



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-057

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer which found that respondent (the district) correctly determined the student was ineligible for special education and related services and denied the parents' request to be reimbursed for their daughter's tuition costs at the Staten Island Academy (SIA) for a portion of the 2017-18 school year, and all of the 2018-19 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

According to the hearing record, the student entered a district elementary school in pre-kindergarten (Tr. p. 122). She remained at the school the following year (2016-17) for kindergarten and it was during this time that the student's mother began to notice "red flags" and express concerns to the student's teacher related to the student's speech development (id.; see Parent Ex. B at p. 1). In response, the district conducted a speech-language screening and determined that the student did not require services (Tr. pp. 65, 66, 125; see Parent Ex. C). The student began first grade (2017-18 school year) as a general education student in an integrated co-teaching (ICT) class (Dist. Ex. 2 at p. 1). During the first two weeks of September 2017, the parents contacted the district and requested that the student be evaluated (Tr. pp. 148-50; see Parent Exs. B at p. 1; C at p. 2). Based on the parents' request, the district conducted a social

history evaluation, a psychoeducational evaluation, a classroom observation, and a speech-language evaluation and solicited input from the student's then-current teachers (Dist. Exs. 2-6). According to the results of the psychoeducational evaluation, the student performed in the average range of cognitive functioning and demonstrated academic strengths in reading comprehension, math problem solving, and oral fluency (Dist. Ex. 4 at pp. 3, 5). Although still in the average range of ability, the student displayed slight delays in spelling, oral discourse comprehension, and pseudo-word decoding (id. at p. 3). The speech-language evaluation indicated that the student demonstrated some speech sound articulation errors, but her speech intelligibility was considered good across all levels of speech production (Dist. Ex. 2 at pp. 3-4). In November 2017, a CSE convened and determined that the student was ineligible for special education services after reviewing the aforementioned evaluations (Parent Ex. I at p. 3).¹ However, the CSE also recommended that the student receive once weekly individual speech-language therapy through the district's speech and language improvement program to address her articulation delays (id.). The district subsequently advised the parents of its decision in a letter dated November 9, 2017, as well as a prior written notice dated November 21, 2017 (Dist. Exs. 1; 7).

On November 28, 2017, the parents requested that the student's IEP be "reopen[ed]" and completed a district "Parent Intake/Referral Form" in which they expressed their ongoing concerns related to the student's speech (Parent Ex. C). The parents also questioned, why, if the student required speech-language services, the district would not create an IEP for the student (id. at p. 2).

On December 18, 2017, the parents sent a letter to the district that provided 10-day notice of their intention to unilaterally place the student at SIA starting January 3, 2018 (Parent Ex. B at p. 2).² The parents asserted that they had been asking the district for two years to evaluate the student for speech-language services but had been "denied" (id. at p. 1). The parents also asserted that the student expressed frustration due to her classmates being unable to understand her (id.). The parents also indicated that they felt "ignored" and "must move on" (id. at p. 2). Lastly, the parents indicated that they hired a parent advocate (id.).

On January 3, 2018, the parent executed an enrollment contract for the student's attendance at SIA for the second semester of the 2017-18 school year, beginning January 3, 2018 (Parent Ex. P). The student attended SIA from January through June 2018 (see Parent Ex. N at p. 1).

¹ The hearing record includes a letter to the parents dated November 9, 2017 indicating that a CSE meeting took place on November 20, 2017, one of which must have been a typographical error (Dist. Ex. 1 at p. 1). However, a review of the entire hearing record does not clarify which day the CSE meeting took place, with the prior written notice indicating the meeting took place on November 9, 2017 and the attendance sheet indicating a November 20, 2017 date (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 1 at p. 2).

² The Commissioner of Education has not approved SIA as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

Subsequent to the student's enrollment in SIA, the parents obtained a private speech-language evaluation which was conducted from April 20, 2018 to May 23, 2018 by the Sensory Studio (Parent Ex. M). The parents also had a private neuropsychological evaluation of the student conducted in July 2018 with the evaluation report dated August 16, 2018 (Parent Ex. N).

On May 23, 2018, the parent executed an enrollment contract for the student's attendance at SIA for a summer 2018 program and the 2018-19 school year (Parent Exs. S; T).

A. Due Process Complaint Notice

By due process complaint notice dated June 19, 2018, the parents through their advocate, requested an impartial hearing (Parent Ex. A at p. 1). The parents asserted that the student's "speech and related disabilities of immediate memory recall and executive functioning skills hamper[ed] her participation and achievement in class" (*id.* at p. 2). The parents further asserted that the student was "twice gifted" and that the district did not provide services for such students (*id.*). According to the parents, they requested an assessment of the student in October 2017 and the district completed a psychoeducational evaluation in November 2017 (*id.*). The parents did not accept the district's evaluation, which they alleged was used to deny the student special education services (*id.*). The parents also asserted that they did not accept the "policy that gifted kids with any kind of disability would not get services" (*id.*). The parents further contended that the speech-language services the district offered outside of an IEP were not sufficient for the student to receive a FAPE (*id.*).

The parents asserted that they obtained "a complete speech and language evaluation" of the student at the Sensory Studio in April and May 2018 (Parent Ex. A at p. 2). The parents alleged that the results of the evaluation indicated the student had below average language skills, which affected the student's executive functioning (*id.* at pp. 2-3). According to the parents, the evaluator recommended two sessions per week of individual speech-language therapy to work on articulation and executive functioning skills (*id.* at p. 3).

The parents next asserted that their unilateral placement of the student at SIA from January 2018 to June 2018 and for the 2018-19 school year was appropriate, providing a summary of SIA and the student's progress there, and asserting that SIA provided the student with "the appropriate learning environment for [her] to thrive" (Parent Ex. A at p. 4). The parents also argued that the Sensory Studio was appropriate because the student received individualized services to support her academic curriculum at SIA (*id.*). As relief, the parents requested tuition reimbursement for the costs of the student's tuition at SIA from January 2018 to June 2018 (in the amount of \$16,200.00), speech-language services provided by the Sensory Studio from January 2018 to June 2018 (in the amount of \$1,905.00) and for the student's lunch (in the amount of \$400.00) (*id.* at p. 1). The parent also requested reimbursement for the 2018 summer camp at SIA (in the amount of \$3,685.00) and speech-language therapy for summer 2018 (in the amount of \$780.00) (*id.*). Additionally, the parents requested direct payment for the student's tuition at SIA for the 2018-19 school year (in the amount of \$30,055.00), speech-language services provided by the Sensory Studio during the 2018-19 school year (in the amount of \$4,680) and the student's lunch for the 2018-19 school year (in the amount of \$1,251.00) (*id.* at p. 2).

B. Impartial Hearing Officer Decision

A prehearing conference was held on July 24, 2018 (Tr. pp. 1-4).³ The impartial hearing took place on August 24, 2018, at the end of which, the parties discussed the submission of post-hearing briefs (Tr. pp. 5-257). On September 6, 2018, the parties participated in a conference and further discussed the submission of post-hearing briefs (Tr. pp. 258-262). The IHO who presided over the hearing up to that point recused herself after the September 6, 2018 conference (see IHO Decision at p. 4). After several recusals by other IHO's, a new IHO was appointed on April 15, 2019; the new IHO held a conference with the parties on April 25, 2019 and issued a final written decision on June 2, 2019 (id. at pp. 3, 10; see Tr. pp. 263-289).

In a decision dated June 2, 2019, the IHO found that the November 2017 CSE's determination that the student was not eligible for special education services was reasonable and well-supported by the information before the CSE (IHO Decision at p. 9). Initially, the IHO noted that the speech-language evaluation reviewed by the November 2017 CSE indicated some misarticulations; however, the student's speech intelligibility was still "deemed to be good" (id. at p. 8). The IHO also reviewed a private speech-language evaluation conducted "well after" the November 2017 CSE meeting, which the IHO found indicated the student had executive functioning limitations and more significant articulation issues, but also reflected average language measures consistent with the student's potential (id.). The IHO concluded that "the totality of clinical information before [him] could potentially support that th[e] student ha[d] a speech disability" (id.). Next, the IHO noted that the psychoeducational evaluation reviewed by the CSE reported consistently average capacity and performance (id.). The IHO also noted that a "more detailed and nuanced neuropsychological assessment" that was not available to the CSE reached similar academic conclusions, but indicated potential diagnoses of anxiety disorder, attention-deficit hyperactivity disorder (ADHD), and speech-sound disorder (id. at p. 9). The IHO concluded that the totality of clinical information before him could potentially support a conclusion that the student had an other-health impairment, or at a substantial stretch, an emotional disability; however, the IHO emphasized that the November 2017 CSE was not aware of the major elements on which any of these diagnoses could be based (id.). The IHO further noted that the conclusion that the student was speech or language impaired because of her misarticulation or other health impaired because of her executive processing, anxiety, and ADHD diagnoses were at most "speculative" (id.). The IHO also found that none of these "potential" diagnoses impeded the student's capacity to benefit from instruction at the time of the November 2017 CSE meeting "even to the present day and surely not at the time of the review" (id.). Furthermore, the IHO found that neither the speech-language nor psychoeducational evaluation, which were before the CSE, noted any diminution of the student's ability to benefit from instruction in general education (id.). Based on the foregoing, the IHO agreed with the November 2017 CSE's determination that the student was not eligible for special education

³ The district did not appear at the pre-hearing conference (Tr. p. 2).

services and ordered the district to provide a copy of his decision to any person participating in the review of the student's placement for the 2018-19 school year (id. at pp. 9-10).⁴

IV. Appeal for State-Level Review

On appeal, the parents assert that the IHO ignored procedural errors and violations of the IDEA and child find and that the IHO erred in denying the parents reimbursement for SIA for a portion of the 2017-18 school year and all of the 2018-19 school year. Initially, the parents assert that the IHO ignored testimony and documentation provided by the parents during the impartial hearing. The parents also assert that the IHO failed to review the transcripts of the hearings conducted by the previous IHO.

The parents assert that while they had requested a complete speech-language evaluation for over a year, the evaluation was never done and the district only conducted a speech screening. The parents also assert that they learned in October 2017 that the district would conduct a complete evaluation; however, they contend that they learned about the assessment from the student, that it was not a complete evaluation, and that they did not receive a prior written notice regarding it. The parents also contend that the district's due process response was blank.

Next, the parents challenge the credibility of the district's witnesses and the documentary evidence submitted by the district. The parents assert that some of the information included in the September 2017 teacher progress report was false and that it was filled out in bad faith to deny the student an IEP. The parents object to the document being relied upon without testimony from the teacher who completed it, asserting that it is hearsay. The parents also argued that the November 2017 speech-language evaluation report was not credible in light of the testimony presented by the parents' witnesses and further asserts the evaluator's conclusions were "a mystery as she did not testify." The parents further contend that the classroom observation and psychoeducational evaluations conducted by the district were not credible because there was no evidence that the evaluators who conducted these evaluations were licensed.

The parents contend that the student "fell apart" in the fall of the 2017-18 school year. The parents allege the student became shy, was afraid to speak in class, was not sleeping at night, and was showing other signs of anxiety at school and at home, which impacted on her academics and interactions with her peers. The parents assert that the November 2017 CSE had decided prior to the meeting that the student would not get an IEP. The parents also assert they requested a new CSE meeting in a letter to the student's teacher on November 28, 2017; however, a new CSE meeting was not scheduled.

Finally, the parents assert that the IHO erred in failing to consider the parents' privately obtained speech-language evaluation and neuropsychological evaluation, which the parents

⁴ The IHO indicated that Section 504 accommodations and/or at-risk services "might" have been appropriate to address some of the issues identified subsequent to the November 2017 CSE meeting that could have a non-academic impact on the student (IHO Decision at p. 10).

allege contradicted the district's evaluations. In addition, the parents contend that the evidence in the hearing record disproved the IHO's finding that the diagnoses contained in the parents' privately obtained evaluations did not impede the student's capacity to benefit from instruction.

In an answer, the district generally responds to the parents' allegations and requests dismissal of the request for review. The district alleges that the parents failed to number the paragraphs in their request for review, as required by the practice regulations. The district also alleges that there is nothing in the hearing record to indicate that the IHO lacked impartiality.

In a reply, the parents reassert the arguments raised in their request for review, respond to the district's assertion that the request for review did not include numbered paragraphs, and raise new factual assertions and arguments, seemingly in response to the factual assertions contained in the district's answer.⁵

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

⁵ The parents are reminded that a reply is restricted by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). The reply should not be used to impermissibly rehash arguments set forth in the request for review or to introduce new claims.

"[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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

Initially, the district asserts that the parents failed to number the paragraphs in their request for review, as required by the practice regulations. Part 279 of the Practice Regulations was amended, effective January 1, 2017, and while the former regulations mandated that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][former 3]), that requirement was not carried through into the regulations as amended (see 8 NYCRR Part 279). The regulations as amended neither require nor preclude the use of numbered paragraphs; however, they now require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.8[c][2][emphasis added]). Contrary to the district's assertion, the request for review does

include numbered paragraphs; however, it does not fully comply with the practice regulation as it does not set forth separately numbered issues or provide a clear and concise statement of the issues presented for review. However, as pro se parents are customarily given a greater degree of latitude and the reasons that the parents believe the IHO erred in finding the November 2017 CSE's eligibility determination can generally be understood from the request for review, I will exercise my discretion and will not dismiss the parents' request for review.

2. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As an initial matter, the parents appear to raise several allegations on appeal that were not raised in their due process complaint notice or during the course of the impartial hearing. In particular, the parents appear to raise a claim related to the district's child-find obligation prior to the parents' referral of the student for an initial evaluation in September 2017 and assert that the district's November 2017 speech-language evaluation was not a "complete" evaluation of the student. Those allegations do not appear in the parents' due process complaint notice (see Parent A). In addition, the parents do not assert, and the hearing record does not support, any basis upon which they may, at this late juncture, expand the scope of their due process complaint notice. Accordingly, I decline to consider these issues raised for the first time on appeal (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012][explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

3. Additional Evidence

Next, the district attaches the following three documents to its answer as additional evidence for consideration on appeal: (1) a March 5, 2019 due process complaint notice filed by the parents; (2) an October 2018 letter to the parents from the district indicating that the October 29, 2018 CSE determined that the student was not eligible for special education services; and (3) an online verification related to the qualification of an educational evaluator (see generally Answer Exs. 1-3). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the March 5, 2019 due process complaint notice is not before me and it is not necessary to render a decision in this case; therefore it will not be considered. Similarly, the October 2018 CSE's ineligibility determination is not at issue before me and the document is not necessary to render a decision in this matter; therefore it will not be considered. Lastly, the online verification pertains to an issue that I declined to consider because the parents raised this issue for the first time on appeal; therefore, this document will not be considered.

4. IHO Bias

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

In the instant matter, the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. Initially, to the extent that the parents disagree with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). Further, overall, the hearing record reveals that both parties were treated fairly, and the IHO was patient and courteous to both parties during the impartial hearing (see Tr. pp. 263-289).

Overall, a review of the IHO's decision does not support the parents' allegation that the IHO ignored testimony and documentation provided by the parents during the impartial hearing and failed to review the transcripts related to the impartial hearings conducted by the previous IHO. Although the IHO did not include citations to the hearing transcripts, he did cite to exhibits submitted by both parties (see IHO Decision at pp. 3, 8-10).⁶ In addition, the IHO articulated the grounds for his determination and an independent review of the hearing record reveals that the IHO rendered a well-reasoned decision, which as discussed further below, properly determined that the November 2017 CSE appropriately found that the student was not eligible for special education programs or related services.⁷

⁶ The IHO's Decision indicates that "Exhibit F at 6 diagnoses this student as having a specific (reading) learning disability" (IHO Decision at p. 8). This appears to have been an error as Exhibit F was not entered into evidence, but was described as being the same social history update as a two-page document entered into evidence as District Exhibit 5 (Tr. p. 24; see Dist. Ex. 5). There is no document included in the hearing record that indicates the student had a diagnosis of a specific learning disability.

⁷ Regarding the time period that elapsed between their filing of the due process complaint notice and the

B. Evaluative Information and Eligibility for Special Education

1. Evaluative Information

In this instance, although the sufficiency and consideration of the evaluative information before the November 2017 CSE was not directly challenged in the parents' due process complaint notice and is therefore not a subject of this proceeding, a summary thereof provides context for the discussion of the remaining issues to be resolved.⁸

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." 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]). Any 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], [B]; 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

issuance of the decision in this matter, the parents also assert that the "delay of eight months severely prejudiced the parents, who acted in good faith that the hearing process would be fair and timely"(Request for Review at p. 7). The IHO also described, in great detail, the numerous recusals that occurred between the date the parents filed the due process complaint notice, June 19, 2018 and the date he was appointed to the matter on April 15, 2019 (IHO Decision at pp 3-6) and, further, attributed the multiple delays that preceded his appointment "to dysfunctional elements of the Impartial Hearing process as it unfolded in this matter" (id. at p. 6). Although I understand the parents' frustration at the largely inexplicable and protracted delay that occurred, I also note that the proceeding was handled expeditiously once it was assigned to the IHO who issued the decision and, because the IHO properly determined that the November 2017 CSE appropriately found that the student was not eligible for special education programs or related services, as discussed in this decision, the parents did not suffer any prejudice by reason of the delay.

⁸ The due process complaint notice includes a statement that "[t]he parents do not accept this evaluation"; however, it is not clear if that statement is referencing the district's eligibility determination or the October 2017 psychoeducational evaluation (see Parent Ex. A at p. 2).

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]; see Application of the Dep't of Educ., Appeal No. 07-018).

In September 2017, the parents contacted the district and requested that the student be evaluated (Tr. pp. 148-50). As part of the initial evaluation of the student, the district conducted an October 2017 social history evaluation, an October 2017 psychoeducational evaluation, an October 2017 classroom observation, and a November 2017 speech-language evaluation (Dist. Exs. 2-5).⁹ A prior written notice, dated November 21, 2017, indicates that the CSE considered the above evaluations in determining the student's eligibility (Dist. Ex. 7). In addition to the above, the school psychologist testified that the CSE also reviewed a teacher "report card," which appears to be the September 2017 teacher progress report (Tr. pp. 35-36; see Dist. Ex. 6).

In September 2017, the student's teacher completed a progress report form that solicited information regarding the student's personal care, academic skills and social skills/behavior (Dist. Ex. 6). With regard to the student's personal care, the form indicated that the student was "independent" in using the toilet, putting on her sweater/coat, tying her shoes, eating snacks/lunch, opening packaging/juice box, maintaining her desk or work area, putting away her possessions, packing her bag for dismissal, navigating her way around the school, and was able to independently follow routines (Tr. p. 47; Dist. Ex. 6 at p. 1).¹⁰ With respect to the student's academic skills, the teachers estimated the student's functional grade level for reading as grade level "3" (Dist. Ex. 6 at p. 1). The teacher indicated that, as measured by the Diagnostic Reading Assessment (DRA), the student read at level "G" (*id.*). For math, the teachers estimated the student's functional grade level as grade level "3," while for writing, they estimated the student's functional grade level as grade level "2" (*id.*). According to the form completed by teachers, the student's preferred learning style or learning modality was "mixed" and compared with peers, the student acquired new information and skills "more quickly" (*id.*). The teachers reported that the student's academic strength was in reading and that she preferred class activities in science, reading, and math (*id.*). At the time they completed the form, the student's teachers had no concerns regarding her academic performance and indicated that there were no known health factors that affected the student's learning (i.e., difficulty standing or walking; difficulty hearing; sensitivity to sound; light; or touch; poor coordination of limbs; vision problems; limited strength/endurance; or chronic illness) (*id.*). In terms of the student's social skills/behavior, the teachers rated as "very positive" the student's relationships with peers and adults, feelings about self, attitude toward school, ability to cope with change, frustration tolerance, and ability to follow school rules (*id.*). The teachers indicated that they did not have any behavioral concerns about the student and in their opinion, there were no social or behavioral concerns negatively affecting the student's learning (*id.*). The teachers indicated that at the time the form was completed, the parents had not relayed to them any concerns about the student's social skills or behavior (*id.*).

⁹ The interview for the social history took place on September 28, 2017; however, the social history evaluation report is dated October 2, 2017 (Dist. Ex. 5).

¹⁰ Testimony by the parent indicated the student did not know how to tie her own shoes at the time the form was filled out or at the time of the impartial hearing (Tr. p. 136).

On September 28, 2017, a district social worker interviewed the student's parents as part of a social history evaluation (Dist. Ex. 5 at p. 1). The resultant report indicated that the student had no medical alerts or history of serious illness or injuries and that her vision and hearing were within normal limits (id.). According to the evaluation report, the student reached all developmental milestones within a typical time frame (id.). English and Hebrew were spoken within the home (id.). With regard to the student's behavior at home, the evaluation report described the student as "loving and caring" (id. at p. 2). The report indicated the student was generally always happy and her mood usually consistent (id.). According to the social history evaluation report, the student's mother indicated that the student was able to appropriately express feelings and thoughts verbally (id.). The student coped with stress by crying, whining and complaining for a few minutes (id.). Her attention span was described as "fair" and the report noted that the student could often get distracted when she was uninterested (id.). In addition, the student needed prompting with multi-step directions because she tended to become distracted (id.). The evaluation report noted that the student demonstrated an age-appropriate awareness of dangers (id.). According to the student's mother, one of the student's strengths was that she was a leader and had many friends (id.). A demonstrated weakness of the student was that when she did not get her way she whined and cried (id.). Educationally, the evaluation report indicated that the student had a two-month preschool experience when she was six months old, attended day care from age one and a half until four years of age, and then, universal prekindergarten (UPK) in a district public school (id.). The social history evaluation report indicated that teachers had not expressed concerns regarding the student's academics or behaviors (id.). With respect to the parents' view of the student's school performance, the evaluation report stated that the student enjoyed going to school (id.). The student's mother also noted the student often gave her a hard time with beginning homework and an adult needed to sit with the student to redirect her (id.). With regard to the student's school performance, the evaluation report indicated that the student enjoyed playing with her dolls, arts and crafts, and dancing (id.). The student engaged well with peers and was able to maintain "either role" in a social setting (id.). According to the evaluation report, the student's mother requested an evaluation because she felt the student's speech was affecting her academics and she wanted an evaluation to determine if the student would be eligible for services which might allow her to function at her highest potential (id.).

On October 12, 2017, the district conducted a psychoeducational evaluation of the student (Dist. Ex. 4 at p. 1). Assessment methods included student interview, administration of the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V), administration of the Wechsler Individual Achievement Test - Third Edition (WIAT-III), administration of the Bender Gestalt II, and administration of the Human Figure Drawing (HFD) Test (id.). The resultant psychoeducational evaluation report indicated that overall, intellectually, the student performed in the average range of cognitive functioning (id. at p. 4). Specifically, the psychoeducational evaluation report indicated that administration of the WISC-V revealed a full-scale IQ of 102, placing the student in the average range of cognitive functioning (id. at p. 3). Inter-test and intra-test scatter suggested relative strengths and weaknesses and higher overall potential (id.). According to the evaluation report, the student's cognitive strengths were found in her verbal comprehension and her mental and non-motor construction (id.). The student's cognitive weaknesses were found in her associative memory, graphomotor speed, replication of part to whole designs, and visual working memory (id.). The psychoeducational evaluation report indicated that based on her performance, the student would be expected to perform at the same

rate as her same-aged peers and on grade level (id.). With respect to academics, administration of the Wechsler Individual Achievement Test - Third Edition (WIAT – III) revealed the student's strengths in reading comprehension, math problem solving, and oral word fluency (Dist. Ex. 4 at p. 3). Although still in the average range of ability, slight delays were noted in the student's spelling, comprehension of oral discourse, and pseudo-word decoding (id.).

The psychoeducational evaluation report indicated that the student's visual motor development was within age expectancy (Dist. Ex. 4 at p. 2). Interview data and observed behaviors revealed that socially/emotionally the student presented as a respectful, cooperative student who appeared to enjoy positive relationships with peers and authority figures (id.). The evaluation report noted that the student's reality testing and thought processes seemed to be intact and the student demonstrated age-appropriate interests and concerns (id.). In addition, the student responded well to individual attention, praise, and support (id. at p. 3).

Additional information regarding the student's academic performance was memorialized in an October 19, 2017 classroom observation report written by a district social worker (Dist. Ex. 3). The social worker observed the student in her classroom during a "turn and talk" activity related to a reading passage presented by the teachers and during a mini lesson about writing an opinion piece (id.). The classroom observation report indicated the student appeared attentive and engaged during the conversational (turn and talk) activity with classmates (id.). To the contrary, the report indicated the student did not appear to be attentive during the mini lesson when the teachers explained how to write a draft opinion piece (id.). However, according to the report "[The student] promptly got up and returned to her desk and began to follow the teachers['] direction" (id.). The student was observed to work on the task and did not appear distracted by another student talking near her (id.). Despite the student's appearance of not being attentive during the mini lesson, the observation report noted that she completed the task the teacher assigned, correctly and independently (id.). The November 2017 speech-language evaluation report indicated that the student had no hearing or vision concerns at the time of the evaluation (Dist. Ex. 2 at p. 1). According to "the student profile," the student's language at home was English (id. at p. 2).¹¹ The speech-language evaluation report indicated that, as reported by one of the student's teachers, the student was on grade level and was doing well academically (id.). She was easily understood by her teachers and peers and had a pleasant disposition in class (id.). The student was reading on level and was able to use critical thinking skills (id.). Expressively, the student effectively communicated her thoughts and responses within the classroom; however, it was reported that at times she might need some extra response time (id.).

The November 2017 speech-language evaluation report also indicated that with respect to the student's behavior/pragmatic language skills, the student presented as a friendly and cooperative child (Dist. Ex. 2 at p. 3). She was described to have separated easily from the classroom with the clinician and greeted the clinician by independently saying, "Hi" (id.). Once in the evaluation room, the student sat down independently to begin testing (id.). She engaged in

¹¹ The October 2, 2017 social history report indicated English and Hebrew were spoken within the home (Dist. Ex. 5 at p. 1). The hearing record does not reflect that articulation or language testing was also conducted in Hebrew.

conversation with the clinician about her interests and shared that she enjoyed watching television shows and movies about princesses (id.). According to the speech-language evaluation report, the student was able to establish and maintain eye contact independently and appropriately during discourse (id.). She demonstrated good attending skills throughout the evaluation and did not require breaks that were offered (id.).

The evaluation report indicated that the structure and function of the student's oral-peripheral mechanism were assessed through observation during the evaluation (Dist. Ex. 2 at p. 3). Although the student presented with a slight pronounced "maxillary pro(n)gnathism" and some spacing between her upper teeth that caused additional air flow when producing certain sounds such as "sh," the structure and function of the student's oral-peripheral mechanism was deemed appropriate for speech and non-speech tasks (id.). According to the evaluation report, the student demonstrated appropriate range of motion for tongue and lip movements for speech purposes (id.).

With respect to the student's speech development and articulation, the student's articulation was assessed at the single word, sentence level, and through conversational speech using the Goldman-Fristoe Test of Articulation – Third Edition (GFTA-3) (Dist. Ex. 2 at p. 3). The student's speech intelligibility was judged to be good at the single word level and connected speech (id.). She presented with distortion of "sh" in all positions of words (id.). When given tactile and verbal cues, the student was able to round her lips and produce "sh" in isolation after given several direct models (id.). The student also demonstrated the error of stopping voiced and voiceless "th" sounds as exhibited by her tendency to say "dat" for "that" and "tum" for "thumb" (id.). The student was able to produce the voiceless "th" (as in thumb) in isolation when given several multi-sensory prompts as well as direct models (id.). The speech-language evaluation report noted that despite these few articulation errors, the student was intelligible, and her speech was judged to be good across all levels of speech (id. at p. 4).

The November 2017 speech-language evaluation also indicated with regard to voice/fluency that the student's pitch, volume, and fluency were deemed appropriate for the student's age and gender, although some mild hyponasality was noted (Dist. Ex. 2 at p. 4). The student also was observed to have a slight open-mouth posture (id.).

With regard to the student's receptive language, the speech-language evaluation report indicated administration of the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-V) yielded an above average range receptive language index score of 115, comprised of the following subtests: sentence completion (average to above average range), word classes (average range), following directions (average range), understanding spoken paragraphs (average to above average range), and linguistic concepts (above average range) (Dist. Ex. 2 at pp. 4-5).

With regard to the student's expressive language as measured by the CELF-V, the speech-language evaluation report indicated the student earned an above average expressive language index Score of 116, comprised of the following subtests: word structure, formulating sentences, and recalling sentences, all with scores in the average to above average range (Dist. Ex. 2 at pp. 6-7).

The November 2017 speech-language report further noted that the Crowley & Balgorri School-age Language Assessment Measure (SLAM) sequencing cards were used with the student to collect and analyze a narrative for clausal density, ability to make inferences and meaningful predictions, and ability to understand the perspective of others (theory of mind) (Dist. Ex. 2 at p. 7).

The speech-language evaluation indicated the student's performance evidenced a well-developed ability to identify and describe the information presented in pictures, as well as to synthesize and organize language and express it through an oral narrative (Dist. Ex. 2 at p. 7). The student's narrative included identified characters, their role in the story, and their perspectives and feelings (*id.*). The student also introduced the setting and problem situation (*id.*). Her narrative demonstrated the ability to tell a story with an introduction, plot, conclusions, and enough detail so that it was easy for the listener to follow and understand even without picture cues (*id.*). Furthermore, the student's responses to questions also demonstrated her ability to make inferences and reasonable predictions (*id.*). According to the speech-language evaluation report, the student's responses further indicated that she was able to use the information provided to her in text and pictures to make inferences and respond to comprehension questions, skills required for classroom activities as well as State exams (*id.*).

The evaluator concluded that clinical judgment, based on results of the assessment, indicated that the student presented with age-appropriate receptive and expressive language skills characterized by well-developed critical thinking skills, the ability to make inferences, as well as the ability to interpret a variety of sentence structures (Dist. Ex. 2 at p. 2). The student demonstrated the ability to respond to and ask a variety of questions, communicating effectively with semantically and grammatically correct sentences, and, create cohesive narratives (*id.*).

2. Eligibility

Turning to the crux of this matter, I will now consider whether the November 2017 CSE properly determined that the student was ineligible to receive special education programs and services. The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]). Although the parents do not assert that the student meets the criteria for a specific disability category, the IHO identified two categories, other health impairment and speech or language impairment, under which the student could possibly meet the criteria for eligibility.¹²

A child with a disability having an other health-impairment, pursuant to federal regulations, means "a child evaluated . . . as having . . . an other health impairment . . . and who,

¹² The IHO also indicated that although "a very substantial stretch," the neuropsychological evaluation report could support a conclusion that the student's anxiety disorder might rise to the level of an emotional disability (IHO Decision at p. 9). However, the neuropsychological evaluation report was completed in August 2018 and was not available to the November 2017 CSE, so the information in the report cannot be used to support or challenge the November 2017 CSE's eligibility determination.

by reason thereof, needs special education and related services" (34 CFR 300.8[a][1]). Other health-impairment, in turn, is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

(34 CFR 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

A student with a disability having a speech or language impairment, pursuant to federal regulations, means "a [student] evaluated . . . as having . . . a speech or language impairment . . . and who, by reason thereof, needs special education and related services" (34 CFR 300.8[a]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [explaining that a student must meet a two-prong test to be considered a student with a disability]). A speech or language impairment, in turn, is defined as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance" (34 CFR 300.8[c][11]; see 8 NYCRR 200.1[zz][11]).

The evaluative information available to the November 2017 CSE indicated that the parents had concerns related to the student's speech-language development (see Dist. Exs. 2; 4; 5). According to the social history evaluation report, the student's mother requested an evaluation of the student because she felt the student's speech was impacting her academics (Dist. Ex. 5 at p. 1). The present levels of performance sent to the parents identified the parents' concerns regarding the student's speech-language development and organization skills, as well as concerns regarding the student becoming easily distracted, crying a lot when she did not get her way, and having poor sleeping habits (Parent Ex. I at pp. 2, 3). Socially, the student was described as being attentive during conversational activities with peers, and as a leader, friendly and cooperative (Parent Ex. I at p. 3; Dist. Exs. 2 at pp. 2-3; 3). The present levels of performance also reiterated some information from the district speech-language evaluation indicating that although the student presented with some misarticulations, her speech intelligibility was "judged to be good across all levels and context of speech" (Parent Ex. I at p. 2).

The parent testified that at the November 2017 CSE meeting, she raised concerns about the student's behavior, specifically that the student was crying all the time, was very frustrated, and did not want to go to school (Tr. p. 157). She also testified that she told the CSE the student told her that "kids don't understand me" (id.).

As noted above, according to the district speech-language evaluation the student presented with some articulation issues (Dist. Ex. 2 at pp. 2-3). Specifically, the evaluation

noted that the student presented with the misarticulations of distortion of the "sh" sound and stopping of the voiced and voiceless "th" sound (*id.* at p. 3). Accordingly, as the student presented with, at least, some impaired articulation, she may have qualified as a student with a speech or language impairment if her impairment adversely affected her educational performance (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).¹³

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (*J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 [2nd Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 11 [1st Cir. 2007]; *J.D.*, 224 F.3d at 66-67; *Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (*R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; *Greenland Sch. Dist. v. Amy N.*, 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (*Corchado v. Bd. of Educ. Rochester City Sch. Dist.*, 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; *Application of the Dep't of Educ.*, Appeal No. 11-152; *Application of a Student Suspected of Having a Disability*, Appeal No. 11-021; *Application of the Bd. of Educ.*, Appeal No. 09-087; *Application of the Dep't of Educ.*, Appeal No. 08-042; *Application of a Student Suspected of Having a Disability*, Appeal No. 08-023; *Application of a Child Suspected of Having a Disability*, Appeal No. 07-086; *Application of a Child Suspected of Having a Disability*, Appeal No. 07-042; see also *C.B. v. Dep't of Educ.*, 2009 WL 928093 [2^d Cir. April 7, 2009]; *Muller v. E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 103-04 [2^d Cir. 1998]; *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; *N.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], *aff'd* 2008 WL 4874535 [2^d Cir. Nov. 12, 2008]; *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]).

With respect to the student's academic performance, the September 2017 teacher progress report indicated that the student's functional grade level for reading was at grade level "3" and

¹³ To the extent the IHO found that the student may have been classified as a student with an other health-impairment, the IHO's analysis was based on information that post-dated the November 2017 CSE meeting and the IHO correctly noted in his decision that the November 2017 CSE was not aware of the major elements on which this classification might have been based. In any event, based on an independent review of the hearing record, the information before the November 2017 CSE did not indicate that the student was eligible for special education services as a student with an other health-impairment. More specifically, the hearing record does not demonstrate that the student exhibited limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, which resulted in limited alertness with respect to the educational environment.

that, as measured by the Diagnostic Reading Assessment (DRA), the student read at level "G" (Dist. Ex. 6 at p. 3). For math, the student's teachers estimated the student's functional grade level as grade level "3," while for writing, they estimated the student's functional grade level as grade level "2" (id.).¹⁴ The student's mother testified that at the time of the November 2017 meeting the student could read, needed assistance to do her math homework, and her writing skills were "low" (Tr. pp. 185-87). Finally, as discussed above, the October 2017 psychoeducational evaluation reported that the student's scores on academic testing, the administration of the WIAT-III, were all in the average range (Dist. Ex. 4 at pp. 2-3). The student's score on the total reading composite was 105 (63rd percentile) and on the math composite was 104 (61st percentile), both in the average range (id. at p. 2).

Given the student's academic success, were the student's grades and test scores to be viewed as the litmus of "educational performance," it would be difficult to find that the student's articulation adversely affected her educational performance. However, the parents contend that the student's articulation problems caused her to not only not perform her best in class, but also led to social problems with the other students in her class. In assessing whether a student's disability affects the student's educational performance, courts have taken a slightly broader approach, taking into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broad as to encompass social/emotional needs that have not necessarily translated to academics (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *11-*13 [S.D.N.Y. Sept. 14, 2016]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255-57 [S.D.N.Y. 2014]; cf. W.A., 2016 WL 6915271, at *23 [in the child find context, distinguishing a narrow view of "academic success" (e.g., grades alone) from a broader view that included "feedback from teachers and standardized test scores as well"]]). This interpretation of "educational performance" is in line with federal guidance from the Office of Special Education Programs (OSEP), discussing the eligibility of students with high cognition and providing an example explaining that a student "with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate" (Letter to Anonymous, 55 IDELR 172 [OSEP 2010]).

With respect to what was discussed during the November 2017 CSE meeting and the student's intelligibility and whether it affected her social interactions with her peers, there appears to be some disagreement between the parents and the district CSE members.

The student's mother reported that she was not provided with the evaluations at the CSE meeting and that the CSE made a decision prior to the parents entering the room and only invited

¹⁴ Although the parents object to some of the information contained in the teacher progress report, their objections are specific to the student's ability to be independent—as an example stating the student could not tie her shoes independently—her organization skills, her ability to acquire new information, and her preferred writing style (Req. for Rev. ¶7; see Tr. pp. 136-38; Dist. Ex. 6 at p. 1). The student's mother also testified that she was worried about the student's writing (Tr. p. 137). However, as the parents did not specifically object to the reporting of the student's grade levels, with respect to math and reading in the teacher progress report, those reports are accepted as being an accurate assessment of the student's performance as of September 2017.

the parents to satisfy protocol (Tr. pp. 138, 158-59; see Tr. pp. 206-07).¹⁵ The parent further reported that she was confused because the CSE agreed that the student demonstrated some weaknesses, but indicated that the student did not need an IEP (Tr. p. 155). According to the parent the CSE justified its decision by explaining that it believed the student's weaknesses were going to go away (Tr. pp. 155-56). She reported that the CSE advised the parents to check with their insurance to see what services it would cover and suggested that they could find someone outside of school to work with the student on speech (Tr. p. 156). The parent recalled that she told the CSE that she was concerned about more than speech; the parents had seen changes in the student's behavior (Tr. pp. 157, 189-90). As mentioned above, the student's mother testified that she informed the CSE that the student was frustrated and did not want to come school and had told her that the "kids don't understand me" (Tr. p. 157).¹⁶ She also testified that she told the CSE that the student did not feel comfortable with the teacher and was scared (Tr. p. 160).

The school psychologist confirmed that she conducted academic testing of the student and found her oral language, reading and math skills to be in the average range (Tr. p. 70). The school psychologist stated that she was not aware of social emotional problems that the student manifested in first grade; however, she recalled that the district received a letter from the parents and further testified that it seemed to be about home issues and the CSE discussed it at the November 2017 meeting (Tr. p. 59-60). The school psychologist also testified that the parents mentioned concern regarding the student's social functioning; however, there seemed to be more issues at home and that school staff were not seeing any social/emotional issues at school (Tr. p. 38). She indicated that the CSE advised the parents that if they had concerns regarding the student's social/emotional functioning to put in a request for at-risk services in counseling, which the district could provide if there was an ongoing issue (Tr. p. 60). The school psychologist testified that regardless of whether there were social/emotional or speech-language issues, the district was not seeing them impact the student's academics as she was performing at and above grade level in class (Tr. p. 60). She confirmed that the district denied the student an IEP but was willing to provide at-risk services (Tr. pp. 60-61). The school psychologist explained that the impact on academic performance was a "big criteria" for classification (Tr. p. 61). She further explained that because the district could address the issues at-risk, it would do so first and if after a certain amount of time the at-risk services did not work the district would put in for a new evaluation and see if at that time the district would recommend services through an IEP (Tr. p. 61).

The speech-language therapist who evaluated the student was not present at the November 2017 CSE meeting; however, her supervisor attended the meeting and was provided

¹⁵ The parent also testified that she saw the September 2017 teacher progress for the first time at the November 2017 CSE meeting (Tr. p. 135).

¹⁶ Although this occurred after the November 2017 CSE and accordingly cannot be a factor in assessing the reasonableness of the November 2017 CSE's determination, the student's teacher at SIA testified that when the student first arrived in her class the student had anxiety and had difficulty interacting with peers because it was difficult for other students to understand what she was saying; however, she also testified that the student did not have a problem making friends, forming relationships with the other students and the teachers (Tr. pp. 105-07).

with all of the documentation prior to the meeting so that she had time to review them and know where the student was in terms of her speech and language development (Tr. pp. 69-70). According to the school psychologist, the speech-language supervisor was in agreement with the CSE's recommendation to provide the student with at-risk services (Tr. p. 35).

The school psychologist acknowledged that the student had some "issues" with articulation but stated that they were not affecting the student's academics and therefore the CSE did not develop an IEP (Tr. pp. 55-56). She testified that the CSE recommended at-risk speech-language therapy so that the articulation issue would not affect the student's academics in the future (*id.*). The school psychologist reported that the district would provide the at-risk speech-language therapy at the school and the district had a provider available to work with the student (Tr. p. 56).¹⁷

Based on the above, the information before the November 2017 CSE supported the CSE's determination that the student did not meet the criteria for classification as a student with either a speech or language impairment or an other health-impairment and that the student was not eligible for special education. Even considering the parent's concerns related to the student's articulation, and how the student's speech was affecting her socially, the information before the CSE indicated that the student was doing well academically, the student's speech was intelligible, and any speech errors she presented with were not affecting her academic performance or social relationships in school (*see* Dist. Exs. 2; 4; 5). Similarly, the school psychologist testified that regardless of any social or speech-language difficulties the student might have had, at the time of the CSE meeting, district staff did not see the effect of those difficulties on the student's performance in school (Tr. pp. 38, 59-60).

As discussed above, and according to the present levels of performance sent to the parent, the district offered the student one session per week of individual speech and language improvement program (SLIP) services (Parent Ex. I at p. 3). In a November 28, 2017 "Parent Intake/Referral Form," the parents questioned why speech-language services were not going to be placed on an IEP considering that the district "evaluated [the student] and agreed that she needs speech" (Parent Ex. C at p. 2). To the parents' credit, the question as to when general education services—such as the SLIP services recommended by the district—provided to a student with a disability amount to a need for special education has proven to be a difficult question to answer. The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students (*see, e.g., L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175-78 [9th Cir. 2016] [finding that a student's receipt of 1:1 assistance, mental health services, behavioral interventions, and accommodations to the general educational environment constituted specially designed instruction despite the school district's assertion that they were general education services]; *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic

¹⁷ The school psychologist testified that the at-risk speech-language services would have been provided two times per week; the present levels of performance provided to the parent indicated that speech-language services would have been provided one time per week to the student (Tr. p. 56; Parent Ex. I at p. 3).

progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at *5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at *10-*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]). For example, State law and regulation in New York also specifically contemplate the provision of academic intervention services (AIS), response to intervention (RtI) support, or "additional general education support services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]).

However, this question only arises if a student meets the initial criteria for one of the disability categories. In addition to meeting criteria for a specific disability category, to be deemed eligible for special education, a student must "need special education and related services" by reason of such disability (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). As the November 2017 CSE determined that the student's speech was not affecting her educational performance, it did not need to determine whether the student was in need of special education (see Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 73 [1st Cir. 2016][eligibility determinations proceed in two steps, with the first determining the existence of a qualifying disability and the second determining whether a student with a qualifying disorder "needs" special education and related services as a result of that disability]).

Additionally, State regulation defines speech or language improvement services as "eligible to students with speech impairments, such as dysfluency, impaired articulation, language disorders, or voice disorders, of a severity that does not adversely affect the student's educational performance, but does present a barrier to communication" (see 8 NYCRR 100.1[p]). Such services are to be provided "to any student determined to be in need of such by the building administrator" (8 NYCRR 100.2[t][1]). Additionally, "[a] student whose speech impairment adversely affects the student's educational performance shall be referred to the committee on special education for further evaluation and review of the need for special services and programs" (8 NYCRR 100.2[t][2]). The district school psychologist testified that even though the student was academically performing well, the November 2017 CSE would provide the student with SLIP services to improve the student's articulation (Tr. p. 61). Consistent with State regulation, the psychologist testified that after a period of several months, if the student did not make progress with the SLIP services a new evaluation could be conducted to determine if the student subsequently qualified for special education (id.).

C. Private Evaluations

The parents had a private speech-language evaluation of the student conducted in April and May 2018 and a neuropsychological evaluation of the student conducted in July 2018 (Parent Exs. M; N). The parents provided the May 2018 speech-language evaluation report to the district in July 2018 (Parent Ex. U). The IHO correctly noted that the November 2017 CSE was not aware of the results of the May 2018 speech-language evaluation report and the August

2018 neuropsychological evaluation report (see IHO Decision at p. 9).¹⁸ As this information was not available to the CSE, it cannot be used to assess the November 2017 CSE's eligibility determination (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013][holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y.][refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]).

In addition to the evaluation reports not being available to the November 2017 CSE, the testimony of the private evaluators does not challenge the accuracy of the district evaluations. The psychologist who conducted the July 2018 neuropsychological evaluation testified based on his evaluation of the student in July 2018 (Tr. pp. 223-24). The psychologist testified that he could not speak to the validity of the district psychoeducational evaluation because he was not present for it (Tr. pp. 219-20). In addition, the speech-language pathologist who conducted the May 2018 speech-language evaluation testified based on how the student presented at SIA and on the results of the evaluation she conducted (see Tr. pp. 87-99). Her testimony did not challenge the accuracy of the district's November 2017 speech-language evaluation report.

Finally, as the parents' due process complaint notice is dated June 19, 2018, and the parents did not provide the district with either evaluation until July 2018, the parents cannot maintain an allegation that the district did not consider the evaluations in deciding on the student's eligibility. Any such allegation should be raised after the district has the opportunity to review the reports and consider them as part of a CSE meeting to reexamine whether the student is eligible for special education. According to the district's answer, such a meeting took place in October 2018 and the CSE determined that the student was not eligible for special education at that time (Answer at p. 5 n. 2). The parents may challenge that determination in a separate proceeding.

¹⁸ The neuropsychological evaluation was conducted in July 2018 and the report was completed in August 2018 (Parent Ex. N at p. 1).

VII. Conclusion

Having determined that the IHO correctly concluded that the evidence in the hearing record supported the November 2017 CSE's determination that the student was not eligible for special education programs or related services, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' placement of the student at SIA or whether equitable considerations preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 9, 2019**

**CAROL H. HAUGE
STATE REVIEW OFFICER**