The University of the State of New York

The State Education Department
State Review Officer
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No. 19-092

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

Appearances:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Jason H. Sterne, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2017-18 and 2018-19 school years were appropriate and denied, in part, the parent's requests for further evaluation of the student. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student attended the Leadership Preparatory Ocean Hill Charter School from kindergarten through fourth grade (Dist. Ex. 4 at pp. 2-3). [1] On April 25, 2017, during the 2016-17 school year (fourth grade), the parent requested the district evaluate her son due to her concerns about his academic skills, frustration with completing homework, and focusing and attention skills (Dist. Exs. 1 at p. 2; 4 at p. 1). In June 2017, the district conducted a social history,

[1] The social history indicated that the student was "held over" in first grade (Dist. Ex. 4 at p. 3).

psychoeducational evaluation, and a speech-language evaluation of the student (see Dist. Exs. 3; 4; 5).

On July 17, 2017, the CSE convened and determined that the student was eligible for special education and related services as a student with a learning disability (Dist. Ex. 2 at p. 17). For the 2017-18 10-month school year, the July 2017 CSE recommended in the resultant IEP that the student receive integrated co-teaching (ICT) services in English language arts (ELA), math, social studies, and science (id. at pp. 13, 16-17).[2]

Due to concerns about difficulty with writing and distractibility, the student was referred for an occupational therapy (OT) evaluation, which the district conducted on July 17, 2017 (Parent Ex. C at p. 3; Dist. Ex. 7).[3] The CSE reconvened on August 7, 2017 to consider the results of the OT evaluation and continued to recommend that the student receive ICT services for math, ELA, social studies, and science (Parent Ex. C at pp. 3, 7, 9; Dist. Ex. 9). Additionally, the CSE recommended that the student receive one 30-minute session per week of OT in a group of two (Parent Ex. C at p. 7).

The student attended fifth grade at the Leadership Prep Ocean Hill Middle Academy (Leadership Prep), a charter school, for the 2017-18 school year (Tr. p. 89; Parent Ex. I; Dist. Ex. 14 at p. 1).

In a letter dated February 1, 2018, the parent informed the district and Leadership Prep that she had met with her advocate and staff at Leadership Prep for a parent-teacher conference on January 18, 2018, at which time she was informed that despite "receiving the services on his IEP" her son was not making progress (Parent Ex. M). Further, the parent indicated that she first learned at the meeting that Leadership Prep did not have ICT services, but instead "pull[ed] students

[2] State regulations define Integrated co-teaching (ICT) services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher, to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]). While both ICT and consultant teacher services are delivered in a general education classroom, the State Education Department has issued a guidance document, which describes the difference between the services (see "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Educ. [Nov. 2013] at pp. 14-15, available at http://www.p12.nysed.gov/ specialed/publications/policy/documents/ continuum-schoolage-revNov13.pdf). The guidance document notes that "[ICT] services means students are intentionally grouped together based on similarity of need," whereas consultant teacher services are intended for an individual student with a disability (id.). In addition, primary instruction is delivered by the special education and regular education teachers in the ICT class, whereas the consultant teacher services aim to adapt "content, methodology, or delivery of instruction" to the student (id.).

[3] The July 2017 OT evaluation report entered into the hearing record is not properly paginated (see Dist. Ex. 7). District exhibit 7 is seven pages long; however, what should have been labeled page "7" of the exhibit is incorrectly labeled as page "8". For the sake of clarity, the pages will be cited to as labeled.

needing [ICT] service[s] to the back of the [class] room for SETSS;" an arrangement the school indicated the parent had "sign[ed] for" at the beginning of the school year (id.).[4] The parent also stated that at the meeting Leadership Prep asserted she had signed consent for SETSS instead of ICT services; however, it did not produce her signed consent and later "sent a form home to sign for consent" (id.).[5] Moreover, the parent relayed that she was informed the student was not being pulled out of the classroom for OT services (id.). Since, according to the parent, "OT services clearly had not been provided to date," she requested that when services did start, they "be doubled to make up the missing time" (id.).

In a letter dated February 14, 2018 addressed to the school psychologist at Leadership Prep, the parent indicated that the results of the student's June 2017 psychoeducational evaluation could have been "skewed" because he did not have his prescription glasses with him during the evaluation (Dist. Ex. 10). The parent requested that the district conduct a new psychoeducational evaluation, which was completed on April 11, 2018 (Dist. Exs. 10; 11).

The CSE convened on May 10, 2018 and recommended that the student receive ICT services in math, ELA, social studies, and science in a general education classroom at a district nonspecialized school (Parent Ex. B at pp. 10, 13, 14, 16; Dist. Ex. 13 at pp. 19, 22, 23, 25-26). Additionally, the CSE recommended one 30-minute session per week of individual OT in a separate location and one 30-minute session per week of individual OT within the general education classroom (Parent Ex. B at p. 10; Dist. Ex. at p. 19). The CSE determined that SETSS were not recommended because the student "needs more support" (Parent Ex. B at p. 14; Dist. Ex. 13 at p. 25).

Due to the parent's dissatisfaction with Leadership Prep, for the 2018-19 school year, the student attended Ocean Hill Collegiate Charter School (Collegiate) where he repeated fifth grade (Tr. pp. 88-89, 100; see Parent Exs. K at p. 3; L at p. 3).

In a letter dated March 8, 2019 addressed to the school psychologist at Collegiate, the parent indicated that she disagreed with the results and the "thoroughness" of the April 2018 psychoeducational evaluation the district conducted (Parent Exs. K at p. 3; L at p. 3).[6] The parent asserted that if the results of the April 2018 psychoeducational evaluation were accurate, then further testing should have been conducted to determine why the student was "unable to complete age-appropriate and grade-appropriate work" (Parent Exs. K at p. 3; L at p. 3). She further requested that the district pay for an independent neuropsychological evaluation due the

[4] The special education coordinator at Leadership Prep testified that "SETSS" represents "special education teacher support services," which the charter school provided in lieu of ICT services (Tr. pp. 30, 32-35).

[5] The parent indicated that she was "sending in the consent form for [the student] but am very disturbed by how Leadership Prep has handled my son's case" (Parent Ex. M).

[6] The facsimile transmission confirmation reports for this letter indicated that it was sent to Collegiate and the CSE on March 29, 2019 (Parent Exs. K at pp. 1-2; L at pp. 1-2).

discrepancies between the student's performance and the results of the psychoeducational evaluation (Parent Ex. K at p. 3; L at p. 3).[7]

A. Due Process Complaint Notice

By due process complaint notice dated March 29, 2019, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (Parent Ex. A at pp. 1, 6).

The parent alleged that the district failed to fully evaluate the student as the student's occupational needs were not evaluated until July 2017 (Parent Ex. A at p. 4). Further, the parent contended that the district failed to comprehensively assess the student's vision, conduct an appropriate evaluation to assess the student's "social and emotional status," and failed to complete a functional behavioral assessment (FBA) or behavioral intervention plan (BIP) (Parent Ex. A at p. 4).[8]

The parent argued that during the 2017-18 school year, the district failed to provide the student with counseling services, which "academically and socially hindered" the student's progress (Parent Ex. A at p. 5). Further, the parent asserted that the district failed to offer the student assistive technology as the district failed to "recommend, or even evaluate" the student's needs in this area (Parent Ex. A at p. 6).

Moreover, the parent alleged that the annual goals created for the 2017-18 and 2018-19 school years were inappropriate, not measurable and did not indicate how the "accuracy" of the goals would be determined (Parent Ex. A at p. 5). The parent argued that the goals did not have a metric for which they could be accurately and consistently measured, and therefore, were "overly-vague" (Parent Ex. A at p. 5).[9]

Finally, the parent asserted that the July 2017 IEP was not implemented as the district failed to provide the student with "an ICT classroom" or OT services (Parent Ex. A at p. 6).

The parent requested that the district be directed to fund an independent neuropsychological evaluation and conduct a comprehensive assistive technology evaluation, a vision evaluation, an evaluation to determine if counseling services are necessary, an FBA, and if warranted, a BIP (Parent Ex. A at pp. 6-7).[10] Further, the parent requested compensatory education

[7] In the letter the parent identified the specific independent evaluator that she wished to conduct the evaluation and the cost of the evaluation (Parent Ex. K at p. 3; L at p. 3).

[8] Additionally, in the due process complaint notice the parent asserted that the district failed to fulfill its child find obligations due to the student's four-year pattern of academic struggles (Parent Ex. A at p. 3).

[9] The parent also contended that the district failed to provide her with periodic progress reports of how the student was performing as she only received two IEP progress reports for both school years at issue (Parent Ex. A at p. 5).

[10] The parent requested that the CSE be directed to reconvene within 10 days of receipt of these evaluations (Parent Ex. A at p. 7).

in the form of OT services, counseling services, and academic tutoring for the district's failure to provide these services.

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 11, 2019 and concluded after a second day on June 24, 2019 (see Tr. pp. 1-132). In a decision dated August 15, 2019, the IHO found that the district offered the student a FAPE for both the 2017-18 and 2018-19 school years (IHO Decision at pp. 5-6).[11] The IHO held that the parent "chose to reject the offer for a District placement" which would have fulfilled the student's IEP recommendation of ICT services (id. at p. 5). The IHO noted that the parent placed the student in a general education class in a charter school and found that the parent was notified by the charter school that it was "unable to meet the ICT mandate on [the student's] IEP" (id.).

The IHO determined that an "analysis of the equities reveals that Parent's action (of rejecting placement in a community school ICT setting in lieu of a charter school placement that could not fulfill [the student's] IEP ICT mandate) contributed to [the] challenges faced by" the student (IHO Decision at p. 5). The IHO held that the parent knew that the charter school could not provide the student with ICT services and found that the parent's testimony was "unpersuasive and lacking in some credibility" (id.). The IHO noted that the parent "[c]ertainly" knew by the second school year that no ICT services would be provided, "yet she continued to send" the student to a charter school (id.). The IHO stated that both district witnesses testified that neither charter school provided ICT services (id. at pp. 5-6). Based on the documentary and testimonial evidence, the IHO held that the district offered the student a FAPE for the 2017-18 and 2018-19 school years and met its burden under the IDEA (IHO Decision at pp. 4-5).

Turning next to the request for a neuropsychological IEE, the IHO noted that the parent submitted her IEE request to the district on the same day she filed her due process complaint notice (IHO Decision at p. 7). The IHO found that this "preemptory timing reflects inequitable behavior in that the action realistically prevents a fair response," noting that the district may alter the course of its actions regarding an IEE after a complaint is filed (id. at p. 7). Moreover, the IHO indicated that "[o]f late, this hearing officer has noticed that Parent's attorneys capitalize on this by strategizing to file [due process complaints] on the same day as IEE requests. I find this to be inequitable behavior" (id.). Consequently, the IHO rejected the parent's request for an IEE at public expense, although she ordered the district to conduct a neuropsychological evaluation of the student "at the District rate by a District provider" in light of the recommendation for further evaluation by the parent's private provider (id.).

Finally, the IHO noted that the parent requested compensatory education, which the student may require "after [the] Parent placed [him] in a setting not recommended on his IEP;" however, the district "met its burden of proof that remediation may not be [the] District's responsibility" (IHO Decision at p. 7).

[11] The IHO's decision was not paginated (see generally, IHO Decision). For ease of reference, citations to the IHO's decision will reflect pages numbered "1" through "9," with the cover page identified as page "1" of the decision.

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO denied her due process rights by commencing the June 11, 2019 hearing without her or her attorney present. According to the parent, the IHO entered exhibits into the record without either present, denying her the opportunity to object to any of those exhibits.[12] By starting the impartial hearing without her or her attorney, the parent claims that the IHO denied her the opportunity to hear the district's opening statement and the start of the first district witness—the student's teacher's—testimony. Finally, the parent asserts that the IHO impermissibly demanded that the parent's attorney make an oral closing statement and denied his request for a five-minute recess.

The parent contends that the hearing record demonstrates that the student did not receive ICT or OT services during the 2017-18 school year. The parent argues that the district had an obligation to provide these services, even though the student was attending a charter school. Therefore, the parent asserts that IHO erred in finding that the district offered the student a FAPE for the 2017-18 school year. The parent also contends the record demonstrates that the student did not receive ICT services during the 2018-19 school year either and that it remained district's obligation to provide these services, even if the student attended a charter school. For the same reasons as the 2017-18 school year, the parent asserts that the IHO also erred in finding that the district offered the student a FAPE for the 2018-19 school year.

With regard to her claim seeking a neuropsychological IEE, the parent contends that the IHO erred by not granting the neuropsychological IEE as she requested. The parent asserts that the April 2018 psychoeducational evaluation was inappropriate, and the district offered no evidence to defend the CSE's evaluation of the student. The parent contends that her private provider testified that the district's failure to evaluate the student's processing speed was a "serious omission." Based on this evidence, the parent alleges that the IHO should have been awarded the neuropsychological IEE she requested at district expense, rather than ordering a district neuropsychological evaluation by a district evaluator. Moreover, the parent asserts that the IHO's reasoning that "it was 'inequitable' for the parent to request the IEE and file a due process complaint notice on the same day has no basis in law or equity." In relation to her claims of inadequate assessment of the student, the parent alleges that the IHO failed to address her requests to order the district to conduct an assistive technology evaluation, a vision evaluation, and an assessment of the student's social emotional status, and an FBA of the student.

As relief, the parent seeks modification of the IHO's order to provide that the neuropsychological IEE be provided by an independent evaluator selected by the parent at a cost not to exceed $5000. The parent further requests that the district be directed to conduct additional evaluations of the student, including a comprehensive assistive technology evaluation, a vision evaluation, an evaluation to determine if counseling services are needed, an FBA, and that a BIP be created if deemed necessary upon completion of the FBA. Additionally, the parent requests 400 hours of 1:1 compensatory education to remedy a denial of FAPE for two school years.

[12] The parent asserts that there are were problems with District Exhibits 21 and 22 as District Exhibit 21 was not disclosed and District Exhibit 22 does not exist. District Exhibit 21 was marked as "OT Attendance Record" and District Exhibit 22 was marked as "SESIS Events" (Tr. pp. 3, 10-11; IHO Decision at p. 9).

In its answer, the district denies the allegations of error made by the parent in the request for review. The district contends that it offered the student a FAPE because it offered IEPs for the student for the 2017-18 and 2018-19 school years were reasonably calculated to enable the student to make academic progress. Further, the district argues that the record does not support a finding that the student should have been evaluated for unaddressed deficiencies.

The district argues that the parent rejected the district's recommendations by enrolling her son at Leadership Prep and Collegiate for the 2017-18 and 2018-19 school years. The district contends that it recommended a community school; however, the parent, for both school years, decided to reject that school placement. The district asserts the parent's decision should be viewed similar to that of a unilateral placement and that the placement the parent chose was not appropriate to meet the student's educational needs. The district argues that "it would be inequitable" to find that it "deprived the Student of a FAPE when it was willing to do so at a public community school." Further, the district notes that the evidence regarding implementation of OT services is "admittedly thin;" however, there is evidence that OT services were provided during the 2017-18 school year.

The district contends that since it offered the student a FAPE for both school years in question, compensatory education is not warranted. Moreover, the district argues that it will conduct a neuropsychological evaluation in accordance with the IHO's decision and there is no evidence to support the parent's request for an independent neuropsychological evaluation.

Finally, the district argues that the parent received due process and there is no evidence that the parent was deprived of any opportunity at the hearing. The district notes that the parent's attorney was present to cross-examine the first witness called by the district and he failed to object during the impartial hearing to the IHO's decision to begin the hearing without him being present.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[13]

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. Implementation of the August 2017 and May 2018 IEPs

At the outset, I note that the relevant facts pertaining to the implementation of the August 2017 and May 2018 IEPs are undisputed and do not significantly differ—rather, it is the legal significance of the facts that is disputed by the parties. Therefore, the parent's claims of implementation failure of the two IEPs for the 2017-18 and 2018-19 school years will be addressed together in this decision. The parent contends that the IHO erred in finding that the district offered a FAPE because the district failed to implement both the August 2017 and May 2018 IEPs as the student did not receive the services recommended (Req. for Rev. at p. 6). The district responds that because the IEPs in question were reasonably calculated to enable to the student to make progress it offered a FAPE; however, any lack of implementation of the IEPs is the parent's fault because the parent "rejected" the district's offer of special education services (Answer at pp. 7-8). The district argues that the parent's continued enrollment of the student in a charter school was a rejection of the community school that "amounts to a unilateral placement" (Answer at p. 8).

In New York, both the public school district of residence—as the local educational agency (LEA) under the IDEA and State law—and the charter school are assigned responsibilities to ensure the provision of a FAPE to a student with a disability who attends a charter school, with

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

the public school having the initial responsibility for creating a student's IEP.[14] Before a charter is approved, the applicant must, when filing an application with a charter entity, provide the "[m]ethods and strategies for serving students with disabilities in compliance with all federal laws and regulations relating thereto" (Educ Law § 2851[s]). Thus, according to the State's charter school office, the "charter school is responsible to implement the IEP as written. The charter school may provide these services directly or arrange to have such services provided by the school district of residence or by contract with another provider" ("Charter Schools and Special Education," at ¶¶ 14, 17-19, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html; see also Educ. Law § 2853[4]).[15] When it comes to the IDEA's procedural safeguards, the public school district is responsible for compliance with the due process procedures, but "[c]harter schools must cooperate with school district personnel and school district attorneys in the conduct of due process proceedings, by making charter school personnel available to testify and providing documentary evidence upon request. ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html). State guidance provides that "[a]s the local educational agency (LEA), the school district of residence is generally responsible for due process procedures relating to the evaluation, identification, educational placement and the provision of a [FAPE] to charter school students" ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html). While charter schools may be considered LEAs for other statutory purposes, it has been made clear that the public school district remains the LEA for purposes of implementing the IDEA ("Charter

[14] The Education Law provides that

> a charter school shall be deemed a nonpublic school in the school district within which the charter school is located. Special education programs and services shall be provided to students with a disability attending a charter school in accordance with the [IEP] recommended by the [CSE] of the student's school district of residence. The charter school may arrange to have such services provided by such school district of residence or by the charter school directly or by contract with another provider. Where the charter school arranges to have the school district of residence provide such special education programs or services, such school district shall provide services in the same manner as it serves students with disabilities in other public schools in the school district, including the provision of supplementary and related services on site to the same extent to which it has a policy or practice of providing such services on the site of such other public schools.

(Educ. Law § 2853[4][a]).

[15] According to guidance issued by the charter school office,

> If the charter school is providing all special education and/or related services either directly or by contract, one of the child's special education providers must serve as the special education teacher member of the CSE. If both the school district and the charter school, directly or by contract, provide special education and/or related services to the child, the school district must designate the most appropriate provider to serve as the special education teacher member of the CSE. Charter schools are expected to cooperate fully with school districts by assuring that charter school teachers and other charter school personnel participate in CSE meetings relating to charter school students.

("Charter Schools and Special Education," at ¶ 4, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html).

Schools as Local Educational Agencies (LEAs)," Office Of School Innovation [July 23, 2012], available at http://www.p12.nysed.gov/psc/documents/CharterSchools-LEAsmemo_1.pdf).

Both the IHO's decision and the district's defense in this proceeding simply ignore the State's Charter School Act and attendant state policies with respect to obligations for FAPE that state law imposes on both charter schools and public schools. The authorities above clearly indicate that the parent had a right to have her son's IEPs implemented as written in the charter school. The IHO erred in laying the blame at the parent's feet and the district's argument supporting the IHO's decision in faulting the parent in this proceeding is equally infirm and is rejected as lacking any basis in law.[16] In this case, Leadership Prep and Collegiate—both charter schools—were expected to arrange the implementation of the student's IEPs as written whether doing so directly, arranging to have such services provided by the school district of residence (in this case the district), or by contract with another provider; however, the evidence in the hearing record demonstrates that both charter schools failed to adhere to their legal obligations to do so. The August 2017 IEP was not implemented as the student did not receive the recommended ICT services, and the district failed to establish that OT services were provided to the student during the 2017-18 school year and the district failed to refute the parent's understanding that OT services were not provided (compare Tr. p. 32 and Parent Exs. B at p. 4; M and Dist. Exs. 12 at pp. 1, 3, 4, 5; 14 at p. 2, with Parent Ex. C at p. 7). The May 2018 IEP was not implemented as the student did not receive all of the ICT services recommended during the 2018-19 school year (compare Tr. p. 19, with Parent Ex. B at p. 10).[17]

"[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP" (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 467 ([S.D.N.Y. 2018]; see Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions under the circumstances of therapist

[16] The district's references to Application of the Bd. of Educ,, Appeal No. 16-004 and French v. New York State Educ. Dep't, 476 Fed. App'x 468 (2d Cir. Nov. 3, 2011) are irrelevant to this case as neither involve children enrolled in charter schools.

[17] The district witness testified that the student received ICT services in ELA from January to May 2019; however, the IEP recommended that the student also receive ICT services in science, social studies, and math (Tr. p. 19).

absence as a result of the therapist's absence was not a significant failure to implement the student's IEP]).

In this case, according to witnesses called by the district, the student received five 45 to 60 minute sessions per week of SETSS in reading and math during the 2017-18 school year as an "alternative" to "co-teaching," and during the 2018-19 school year, "instead of an ICT class," the student received "extra support in ELA and math throughout the day with small group instruction," the failure to implement the services recommended in both the August 2017 and May 2018 IEPs amounted to a substantial and material deviation from those IEPs and denied the student a FAPE for the two school years (Tr. pp. 20, 35, 41-42).[18] When creating the latter IEP, the CSE specifically considered and rejected SETSS services as insufficiently supportive for the student (Parent Ex. B at p. 14; Dist. Ex. 13 at p. 25), and any notion by the district that the student was not denied a FAPE because SETSS was provided to the student is particularly implausible under the circumstances of the case.

Although the charter schools in this case bore the initial responsibility for arranging the implementation the IEPs at the time they were created, the district is nonetheless charged with the responsibility of answering for the failure to provide a FAPE through the due process procedures including the provisions of a FAPE ("Charter Schools and Special Education," at ¶¶ 2; 8, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html). Nothing in the Charter School Act's division of responsibilities of between public and charter schools overrides the IDEA's basic provision which allows the parent to file a due process complaint against the district (that is, the LEA) regarding "any matter relating to the identification, evaluation, or educational placement of the [student], or the provision of a free appropriate public education to such [student]" (20 U.S.C. § 1415[b][6] [emphasis added]). Therefore, even though the parent decided to send the student to a charter school for both the 2017-18 and 2018-19 school years, the district as the LEA is responsible to answer in due process for the charter school's failure to implement the student's IEPs and resultant denial of a FAPE. Because there was substantial and material deviation from both of the student's IEPs in question, the student was denied a FAPE for both the 2017-18 and 2018-19 school years and the IHO's decision must be reversed.

B. Compensatory Education

Turning next to the relief sought by the parent, the parent requests 400 hours of 1:1 compensatory education services for the two year denial of a FAPE. The district contends that compensatory education is not warranted as it provided the student with a FAPE for both years at issue and asserts there is no evidence the student was deprived of educational opportunities and requires make up services (Answer at p. 9).

Case law instructs that compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ.

[18] This is especially true here, as the district witness testified that "the majority of the times . . . probably 80 percent of the times [SETSS] w[ere] pull out services," and the August 2017 IEP indicated that the ICT services were to be implemented in the student's general education classroom (Tr. pp. 41-42; Parent Ex. C at p. 7).

Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, for the reasons discussed above, the student was denied a FAPE for both the 2017-18 and 2018-19 school years. The district's contention that compensatory education is not warranted because the student made progress during the years at issue is belied by the fact that the student had to repeat fifth grade due to his poor academic performance during the 2017-18 school year. (Tr. pp. 88-89, 98).

Despite bearing the burden of production and persuasion at the impartial hearing, the district did not present evidence regarding an appropriate award of compensatory education services for the student in the event that it was determined that the student was denied a FAPE. However, the parent developed the hearing record with sufficient evidence to support the request for 400 hours of 1:1 compensatory education. Specifically, the director of EBL Coaching (director) testified that she had read the student's psychoeducational evaluation reports, two IEPs, and a speech-language evaluation report (Tr. pp. 73, 76-77). She also met and assessed the student, concluding that he had a learning disability characterized by weak processing speed, and below grade level reading, spelling, math, and writing skills (Tr. pp. 76-80). The director opined "very strongly" that the student needed "remediation to build these skills[] [s]pecifically, using the Orton-Gillingham method to develop his decoding and spelling skills and similar research based

multisensory techniques for reading comprehension, writing, and math" (Tr. p. 80). Given the student's "overall profile" the director testified that the student required "an average of five hours per week of one-on-one instruction over a two year school time period," totaling 400 hours of academic remediation (Tr. pp. 80-81). The director testified that EBL Coaching would be able to provide these services to the student at the rate of $125.00 per hour and that the services could be provided by a certified teacher (Tr. p. 83). Based on the district's failure to produce evidence, and the parent's evidence contained in the hearing record before me, the request for 400 hours of 1:1 tutoring services at the rate of $125.00 per hour should be granted. However, since the student was deprived of ICT services for two years, which is defined in part as instruction with a special education teacher, I will direct that the compensatory tutoring services be provided to the student by a New York state certified special education teacher.

I recognize that the denial of a FAPE to the student in this case is not solely attributable to the district in its capacity as the LEA, but the evidence shows that that the charter schools bear responsibility for the student's present circumstances because they failed to adhere to the student's IEPs as written. However, the district cannot assign fault to the parent for enrolling the student in the charter schools because, as described above, the legal obligations are imposed on charter schools and LEAs. I do not have jurisdiction over issues such as whether the district has recourse against the charter schools for any of the consequences flowing from this proceeding. I note that with respect to charter schools whose charter entity is the Board of Trustees of the State University of New York (SUNY) or the Board of Regents, the Charter School Act allows a school district in which a charter school is located "the right to visit, examine into, and inspect the charter school for the purpose of ensuring that the school is in compliance with all applicable laws, regulations and charter provisions. Any evidence of non-compliance may be forwarded by such school district to the board of regents and the charter entity for action" (Educ. Law § 2853[2-a]).[19] Thus, rather than faulting the parent for an IEP implementation failure, the district may have to resort to another complaint process to resolve the concerns with the charter schools' compliance with its special education obligations.[20]

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[19] The Charter School Act includes a three-step complaint process which provides that a

> Any individual or group may bring a complaint to the board of trustees of a charter school alleging a violation of the provisions of this article, the charter, or any other provision of law relating to the management or operation of the charter school. If, after presentation of the complaint to the board of trustees of a charter school, the individual or group determines that such board has not adequately addressed the complaint, they may present that complaint to the charter entity, which shall investigate and respond. If, after presentation of the complaint to the charter entity, the individual or group determines that the charter entity has not adequately addressed the complaint, they may present that complaint to the board of regents, which shall investigate and respond. The charter entity and the board of regents shall have the power and the duty to issue appropriate remedial orders to charter schools under their jurisdiction to effectuate the provisions of this section

(Educ. Law § 2855[4]; see also "Complaints/Grievances Against Charter Schools," Charter School Office, available at http://www.p12.nysed.gov/psc/complaintprocess/complaint.html). The charter entity for the Ocean Hill Leadership Prep and Collegiate charter schools is listed as SUNY (see "New York State Charter Schools 2019-2020," available at http://p1232.nysed.gov/psc/csdirectory/CSLaunchPage.html).

[20] A parent may utilize the due process hearing procedures, use the charter school complaint process, or both.

C. Evaluations

1. Additional District Evaluations

As noted above, the parent alleged in her due process complaint notice that the district failed to adequality evaluate the student (Parent Ex. A at pp. 4-6) and on appeal, the parent alleges that the IHO failed to address these aspects of her requests that the district be directed to complete a comprehensive assistive technology evaluation, an FBA, an evaluation to determine if counseling services are necessary, and a vision evaluation (Req. for Rev. at pp. 7-8). The district argues that there is nothing in the record indicating that the student should have been evaluated for other issues or that there were unaddressed deficiencies. The parent is correct insofar as the IHO briefly recited that the district proffered testimony by the student's general education teacher and the special education coordinator at the charter school did not have any behavioral, emotional, speech or vision concerns (IHO Decision at pp. 5-6), but the IHO did draw any conclusions or otherwise rule on the parents claims in this regard.

a. Assistive Technology

In relation to her request for an assistive technology evaluation, the parent seeks a determination of what, if any, interventions would be appropriate to address the student's identified difficulty with copying from the board and spelling.

The student's then-current teacher testified that there was insufficient indication that the student should be evaluated for assistive technology, because he was able to write complete paragraphs and essays that were "grade level appropriate" in a timely manner with all his letters "properly shaped" (Tr. pp. 18, 21-22). However, teacher progress and evaluation reports included in the hearing record indicate that the student exhibited difficulties with spelling and near and far point copying. For example, a May 2017 progress report stated that the student's spelling significantly distracted the reader from what was written, he often spelled words wrong that were written for him on the paper and he would misspell the same word multiple times in his writing, but each time the word was spelled differently (Parent Ex. J at p. 2). A January 2018 progress report showed that the student was working on an annual goal of copying from both far and near point models using appropriate letter formation, size and alignment, within a given time frame without letter or word omissions (Dist. Ex. 14 at p. 2).

Turning to the evaluative information in the hearing record, the June 2017 psychological evaluation report's "Resourceful Strategies" indicated that "digital interventions" may be helpful in building the student's capacity to exert mental control, ignore distractions, and manipulate information in his mind (Dist. Ex. 5 at p. 10). While a review of the evaluative information available to the August 2017 CSE and the May 2018 CSE does not reveal a direct recommendation for an assistive technology evaluation, the July 2017 OT evaluation report identified the student's ocular motor difficulties and noted that these could contribute to difficulty with reading, writing and far point copying tasks (copying from the board) (Dist. Ex. 7 at pp. 1, 4).

Also, the April 2018 psychoeducational evaluation report concluded that although the student impressed as being capable of "attaining the general education curriculum," the continued reports of his difficulty meeting academic expectations and response to interventions further

indicated the need for part-time remediation (Dist. Ex. 11 at pp. 1, 6). The report further recommended that related services to address visual scanning and visual motor tasks should be implemented as the results of specialized evaluations indicated a need at that time (id.).

Although the district recommended for the student OT services "to work on visual scanning and visual motor tasks to aid in academic performance" and provided an annual goal involving copying from "both far and near point models," there is no evidence the student had made any progress in these skills with those supports in place (Parent Exs. B at pp. 5, 10, 13; C at pp. 3, 6, 7, 9; see Dist. Ex. 14 at p. 2). Indeed, a comparison of the annual goals included in the August 2017 IEP with those included in the May 2018 IEP shows that the evaluative criteria for the annual goal involving copying from far and near point models was changed from 90 percent accuracy within the August 2017 IEP to 80 percent accuracy within the May 2018 IEP, suggesting a decreased expectation for success in this area (compare Parent Ex. B at p. 10, with Parent Ex. C at p. 6).

Therefore, in light of the above, the evidence in the hearing record supports the parent's claim that an assistive technology evaluation was warranted and the district's contention to the contrary is rejected.

b. Functional Behavioral Assessment

Next, the parent argues that the IHO failed to address the request for an FBA and should have directed the district to conduct an FBA and, if warranted, develop a BIP. Here the record supports the district's position that an FBA was not necessary.

The evaluation reports admitted into the hearing record do not include recommendations with respect to the student's in-school behavior or suggest the need to conduct an FBA (see Dist. Exs. 3 at p. 2; 5 at pp. 9-10; 7 at pp. 3, 5-6, 8; 11 at pp. 4, 6; 12 at p. 4). Also, the available progress reports do not reflect concerns that the student engaged in behavior that interfered with his learning in the school environment and to the contrary, a May 2017 progress report indicated that the student socially functioned on a level appropriate for his grade, was well-behaved in the classroom, liked to participate, and was not usually in trouble (see Parent Ex. J at pp. 1-6; see also Dist. Ex. 14 at pp. 1-2).

The parent described the student as someone who was consistently respectful towards adults, yet very easily districted and always on the move (Dist. Ex. 11 at p. 4). The special education coordinator (coordinator)[21] testified that the student's major behavior from the 2017-18 school year was his difficulty focusing and his inability to remain on task independently for a prolonged period of time (Tr. pp. 30, 35-38; see Parent Ex. B at pp. 4-5). The coordinator stated that while it was not something that was "wildly disruptive," when working independently the student would sometimes stop working and start speaking to someone around him or "look around" (Tr. p. 41). She also explained that the student responded well to consistent teacher presence and

[21] The coordinator explained that while she was not a direct teacher of the student, she came into contact with him on a daily basis and that beginning in late fall of the 2017-18 school year she took over as the special education coordinator for a few months (Tr. p. 32). In addition, she stated that she was one of the instructional leaders or "coaches of teachers" at the school and so was aware of the student's behaviors and had spoken to his teachers about his behaviors and academic concerns (Tr. pp. 37-39).

prompts and that she did not think things were "drastically" impacting academics (Tr. pp. 35-36, 38). The coordinator stated that the student required refocusing in class every three minutes or so with a quick redirection (tapping on the desk, checking in on work) and that this was "fairly typical of a 5th grader in our setting" (Tr. p. 40).

The student's teacher during the 2018-19 school year (teacher) testified that she did not observe any social/emotional concerns with the student (Tr. p. 22). The teacher testified that none of the student's behaviors impacted his academics and that with his peers he was a leader and was "always doing the right thing" (id.). She also stated that "[b]ehaviorally," he was a student that she could "shine a spotlight on for others to look at for what they should be doing inside the classroom" (id.). The teacher testified that to her knowledge the student was never pulled out for at-risk counseling and that in her opinion the student did not need counseling (Tr. p. 23). The teacher further stated that the student did not exhibit behaviors which would lead her to believe that the student would benefit from or require an FBA or BIP (Tr. pp. 22-23).

The parent, on the other hand, shared that due to the academic pressures placed on the student by the school, his inability to keep up with his peers academically, and the expressed desire from family members for the student to improve in school, the student was under too much pressure and the parent saw a change in his personality (Dist. Ex. 11 at p. 4). Within the April 2018 psychoeducational evaluation report the parent relayed that the student expressed his frustrations with not meeting expectations and that family members had often informed him that he should be performing better (id.).

The record shows that the family, including the student, were engaged in family counseling with a private therapist since February 2018, stemming from the student's recent increase in his level of frustration and anger about his academic challenges and his inability to meet expectations (Dist. Exs. 11 at p. 1; 12 at pp. 2, 3). According to the parent, the student received homework assistance from his mother, his brother and sometimes his father, but got upset when things did not go his way, his homework was often not neatly done, and he would throw it on the floor when frustrated (Dist. Ex. 4 at p. 2). The parent stated that when assisting the student with his homework, family members expressed their displeasure or disappointment in his inability to understand "what he needed" and that this affected him emotionally (Dist. Exs. 11 at p. 1; 12 at p. 2). The parent shared that the therapy had helped the family understand that speaking in a loud or frustrated tone was not productive and that they were learning together about how to cope in a more effective manner (Dist. Exs. 11 at p. 1, 12 at p. 2).

While I am sympathetic toward the parent's concerns regarding the student's at-home behaviors associated with his difficulties in completing homework, for which he and his family were receiving counseling, the hearing record includes evidence that the student's behavior in the school environment was positive and does not include sufficient evidence to support the parent's position that the student was exhibiting interfering behaviors to the extent that the district was required to conduct an FBA or consider the use of a BIP when developing the August 2017 or May 2018 IEPs.

c. Other Additional Evaluations

Finally, on appeal the parent contends that the IHO should have directed the district to conduct a vision evaluation in light of the student's identified difficulties with ocular motor and visual scanning skills (see Dist. Exs. 7 at pp. 4, 6, 8). The parent also requests "a counseling evaluation," and the hearing record reflects her concerns about the student's frustration level in school (Tr. pp. 87, 91). As explained in more detail below, these concerns will be addressed within the context of an independent neuropsychological evaluation.

Therefore, the parent's request for the district to conduct a comprehensive assistive technology evaluation is granted; however, requests for additional district-conducted evaluations are denied.

2. Neuropsychological IEE

The parent argues that the IHO erred by denying her request for a neuropsychological IEE and, instead, ordering the district to conduct a neuropsychological evaluation of the student. The parent claims that the IHO's reasoning, that it was "inequitable" for the parent to request the IEE and file the due process complaint on the same day, has no basis in law or equity. The district argues that there is no evidence as to why a private neuropsychological evaluation should be awarded as opposed to the IHO's order directing the district to provide the evaluation.

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 2019 WL 3021232, at *3 [3d Cir. July 10, 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).[22] An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]), however recent caselaw clarifies that parents may not demand a comprehensive IEE at public expense while at the same time refusing to consent to the school district's offer to conduct the same assessments (D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 178 [D. Conn. 2019], citing N.D.S. v. Acad. for Sci. & Agric. Charter Sch., 2018 WL 6201725, at *5–*7 [D. Minn. 2018] [explaining that where parents request an IEE to challenge an obsolete evaluation, they are entitled to a due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they

[22] The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year reevaluation period in some cases (see D.S., 357 F. Supp. 3d at 179).

must allow the school district to conduct a current reevaluation and then request an IEE if they disagree]).

By letter dated February 14, 2018, the parent wrote to the school psychologist at Leadership Prep and relayed that the June 2017 psychoeducational evaluation had been conducted without the student having his prescription glasses (Dist. Ex. 10).[23] The parent indicated that she had obtained new prescription glasses for the student and requested that the district conduct a "new" psychoeducational evaluation (id.).

The district conducted a psychoeducational evaluation of the student on April 11, 2018 (Dist. Ex. 11 at pp. 1-6). According to the report, the parent had requested the evaluation due to her concerns about the student's "continued academic difficulties," and the purpose of the evaluation was to assess the student's "overall cognitive development, social-emotional functioning, and academic achievement, using it to determine the progress he has made, and to modify, where needed, his educational program" (id. at p. 1). Cognitive testing yielded a full scale IQ in the low average range; reading, math calculation, written expression and spelling skills "within grade expectancy;" and math reasoning/problem solving and sentence composition skills "below grade expectancy" when compared to same age peers (id. at pp. 4-5).

In a letter dated March 8, 2019, the parent wrote to the "school psychologist" at Collegiate and expressed that she disagreed "with the results" of the April 2018 psychoeducational evaluation and "the thoroughness of the testing completed" and carbon copied the CSE chairperson (Parent Exs. K at pp. 1-3; L at pp. 1-3).[24] She further explained that "the results of the testing do not conform with the concerns expressed by [the student's] teachers" given that the student's academic test scores were in the average range yet his teachers reported that he was "two grade levels behind in reading and math" (Parent Exs. K at p. 3; L at p. 3). The parent also asserted that if the April 2018 test results were accurate, "then further testing should have been completed to determine why [the student was] unable to complete age-appropriate and grade-appropriate work" (Parent Exs. K at p. 3; L at p. 3). She proposed that a specific psychologist or "comparable" licensed psychologist conduct a neuropsychological evaluation of the student, and indicated that the district should either grant her request, or "file a hearing request against me to prove [the district's] evaluation is appropriate" (Parent Exs. K at pp. 3-4; L at pp. 3-4).

Here, the record reveals that the parent stated her disagreement with the results and the thoroughness of the testing completed within the district's April 2018 psychoeducational

[23] The June 2017 psychoeducational evaluation report indicated the evaluation was conducted despite the fact that the student had recently lost his glasses, which he had been wearing since he was five years old (Dist. Ex. 5 at p. 1). At that time, the parent was informed that the student's lack of glasses could impact "test result validity" and the parent elected to continue the assessment using magnifying glasses (id.). However, the examiner concluded that because the student required glasses for all activities and he did not have glasses with him at the time of the assessment, "results may not be considered valid estimates of his true overall cognitive ability" (id. at p. 3). The examiner also reported that "[t]he impact of [the student's] participation in tasks without his prescribed glasses may be of tremendous significance, regardless of the use of magnifier tools," and it was "uncertain" that the tools provided him with "enough support," and that "higher potential is suspected" (id.).

[24] Although dated March 8, 2019, the evidence shows that the letter was sent via facsimile to the school psychologist at Collegiate and the district's CSE on March 29, 2019, which as the IHO noted was the same day that the due process complaint notice was dated (Parent Exs. A at p. 1; K at p. 1; L at p. 1).

evaluation and requested a neuropsychological IEE at district expense (Parent Exs. K at p. 3; L at p. 3). The IHO determined that the parent had sent the request for a neuropsychological IEE on the same date that she filed for a due process hearing, labeling this action "preemptory timing," which reflected inequitable behavior in that the action "realistically prevents a fair response" (IHO Decision at p. 7).

The IHO's provided no authority indicating that a parent is prohibited from seeking an IEE at public expense as well as a due process hearing on the same day. For the reasons described below, the IHO's determination that it was prohibited as "inequitable behavior" must be reversed.

As detailed above the district's response to a request for a publicly funded IEE ordinarily includes two options, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate. The district bears the burden of showing that its evaluation of the student was appropriate in order to prevail in its challenge to the parent's requests for IEEs at public expense.

In this case, the district was not precluded from considering and providing the parent with a response before proceeding to an impartial hearing. Unlike when a district initiates a due process hearing, when a parent initiates a request for an impartial hearing by filing a due process complaint notice the IDEA provides for a resolution process that must be followed before a parentally requested hearing can proceed. More specifically

> (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under § 300.511, the LEA must convene a meeting with the parent and the relevant member or members of the [CSE] who have specific knowledge of the facts identified in the due process complaint that—
>
> > (i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and
> >
> > (ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.
> >
> > (2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(34 CFR 300.510[a]). The parent cannot unilaterally waive the resolution meeting because it requires both parties to waive a resolution meeting (34 CFR 300.510[a][3]). The district was permitted up to 30 days to consider and resolve the parent's complaint, including her request for an IEE, before being required to proceed to an impartial hearing to defend its own evaluation of the student (see 34 CFR 300.510[b]). During that period, the district could have agreed to the parent's request for an IEE or sought further information from the parents. Thus, while the parent's tactic may be characterized as unnecessarily surprising, it was not so unfair to the district as to be prohibited as "inequitable." The district, in these circumstances, could not be faulted for any delay in commencing its own due process hearing as the parent's IEE request was already the subject of

a due process proceeding by virtue of the parent's March 2019 due process complaint notice. Thus, the district could have availed itself of the time allotted under the IDEA's resolution process to consider the parent's request, and the district was required to proceed and defend its own evaluation of the student after the conclusion of the 30-day resolution period if it did not reach a decision to grant the parent's request for a publicly funded IEE by the conclusion of the resolution period.[25]

At the impartial hearing, the district presented no witnesses to support the appropriateness of its April 2018 psychoeducational evaluation (see Tr. pp. 1-132). The parent, on the other hand, called a licensed psychologist as a witness whose testimony detailed the problems with the district's evaluation of the student (see Tr. pp. 58, 66-67). The licensed psychologist testified that she did not believe the April 2018 evaluation was sufficient to understand the student's individual needs and noted the need to look at more measures than were administered during that evaluation (Tr. p. 67). For example, she stated that the April 2018 evaluation did not measure the student's processing speed ability (an area in which the student had performed poorly the previous year without his glasses), which she believed was a "serious omission" that required more assessments "to really understand why this [student] who has average/low-average intelligence is still having so much trouble," still "seems to be struggling," and had repeated both first and fifth grades (Tr. pp. 66-67; see Dist. Ex. 11 at pp. 1-6).

In view of the forgoing, the evidence in the hearing record shows that the district failed to establish the appropriateness of its April 2018 psychoeducational evaluation, therefore, I find that the parent's request for a neuropsychological IEE at district expense must be granted. As discussed above, the parent requested a vision evaluation and an evaluation to determine if counseling services for the student were appropriate. In light of my determination that the student is entitled to an independent neuropsychological evaluation, I will order such evaluation to include assessments of the student's ocular motor skills as they relate to academic abilities, and social/emotional skills to address the parent's concerns in these areas.

Further, after completion of the neuropsychological IEE, the CSE should reconvene to consider the results of the evaluation and make recommendations based on the evaluative information before it. Moreover, if the parent wishes to continue to have her son attend a charter school, the CSE is required to work with the charter school and is reminded that in "formulating the recommendation, the CSE should consider the educational programs and services, and extracurricular and other nonacademic activities, available in the charter school setting and should attempt to tailor the IEP to meet the individual needs of the student in the context of the charter school program" ("Charter Schools and Special Education," at ¶ 5, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/ specialeduc.html). Further:

> If the "nature and severity of the disability of a student enrolled in a charter school is such that the education of the student in the general education classes of the charter school cannot be achieved satisfactorily, the CSE must recommend a special

[25] The district would have been required to proceed at an impartial hearing regardless of the parent's IEE request in order to defend its evaluations against the parents' claim that the student was denied a FAPE because the CSE failed to adequately evaluate the student (Parent Ex. A at p. 4).

class or other appropriate placement whether or not such special class or placement is available at the charter school (id.).

If the CSE believes that appropriate IEP services for this student cannot be delivered with the student enrolled in a charter school, the CSE must make such a determination abundantly clear to the parent on the student's IEP, rather than merely proposing a public school setting on the IEP without consideration of the services that could be implemented in the charter school setting. There is no documentation to that effect in this hearing record and the student's IEPs, in the "Other Options Considered" sections, do not show that charter school services were even considered by the CSE (Dist. Exs. 3 at p. 2 at p. 18; 13 at p. 25).

D. Conduct of the Impartial Hearing

The parent asserts that she was denied her due process rights by the IHO's conduct at the impartial hearing (Req. for Rev. at pp. 5-6). The district contends that the parent received due process and there is no indication that she was deprived of any opportunity at the hearing (Answer at p. 10).

The parent points to two specific instances to support her assertion that she was denied due process. First, the parent asserts that the IHO rescheduled the hearing date knowing that her attorney was unavailable and then began the hearing before her attorney was present (Req. for Rev. at p. 5). According to the parent, the IHO proceeded with the impartial hearing in the absence of the parents' attorney and allowed the district to admit its exhibits into the record, proceeded to hear the district's opening statement, and began hearing the testimony of the first district witness (Req. for Rev. at p. 5). Second, the parent asserts that following the conclusion of testimony, the IHO denied the parent's attorney's request to file a written closing brief, and then denied his request for a five-minute recess to enable him to prepare his closing statement (Req. for Rev. at pp. 5-6).

The parent is correct that the IHO began the June 11, 2019 hearing without the parent's attorney present, and the IHO acknowledged she was beginning the hearing without him (Tr. p. 5). The IHO noted on the record that the parent's attorney had "doubled booked himself" but had informed her that he would attend the hearing (Tr. pp. 5-6). Although the hearing was scheduled to begin at 9:30 a.m., the IHO noted that it was "now 9:55," and she began to enter into the hearing record the district's evidence (Tr. p. 6). After entering the district exhibits into the record, the district's attorney made her opening statement and the first district witness began to testify (Tr. pp. 6-16).[26] The hearing record does not indicate a precise moment when the parent's attorney entered

[26] The parent's attorney correctly notes that there is a discrepancy in the exhibit list from the IHO's decision and that submitted to the SRO. The IHO entered into the record an "OT Attendance Record" as Dist. Ex. 21 (Tr. pp. 10; IHO Decision at p. 9). However, the Dist. Ex. 21 that was submitted to the SRO, is a SESIS Event log, which the IHO entered into the record as Dist. Ex. 22 (see Tr. pp. 10-11; IHO Decision at p. 9). This issue regarding the exhibit discrepancy was never fully clarified as the district asserted the OT Attendance Record was not entered as evidence during the hearing (Answer at p. 10). In a letter dated October 29, 2019 and received by the undersigned on the date of this decision, district clarified that District Exhibit 21 (the OT Attendance Record) was unmarked and Dist. Ex. 22 (the SESIS Log) had been inadvertently mislabeled as District Exhibit 21. Because the parent has not requested compensatory education for the OT services that were allegedly not provided to the student, the failure to submit this evidence earlier will not alter the relief granted by the undersigned. I note that the OT Attendance Record, which appears to have been printed from the district's SESIS computer system

the hearing room, but he was available to cross-examine the witness (Tr. pp. 25-29). Further, the parent's attorney asked a question relating to a question asked during the witness' direct testimony (see Tr. pp. 21, 27-28). Toward the end of the second and final day of the hearing, the IHO informed both parties that there would not be closing briefs, rather, closing statements could be made on the record that day (Tr. p. 111). The parent's attorney requested five minutes to develop his closing and the IHO acknowledged that the parent's attorney was scheduled to appear at another impartial hearing (Tr. p. 112). The IHO permitted the district's attorney to read her closing statement into the hearing record first, after which time the parent's attorney made his closing statement (Tr. pp. 112-13; 113-20).

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]).

Here, the IHO made some effort to delay the start of the impartial hearing to accommodate the parent's missing attorney who had indicated that he would be present for the impartial hearing. While it would have been preferable for the IHO to indicate why she found it necessary to proceed with the hearing in the absence of the parent's attorney, in this case the IHO's conduct of the impartial hearing does not support a finding that the proceeding was so infirm that the parent was denied due process. The record reflects that the parent's attorney was able to cross-examine the district's witness and a review of the hearing transcript and cross-examination indicates that he was present for at least part if not all of the direct examination of the district's first witness. Notably, the parent's attorney did not raise an objection to the documents admitted into evidence or the case proceeding without him on the record when he arrived at the hearing or any time prior to the conclusion of the impartial hearing officer, thus precluding the IHO from considering any remedial measures to mitigate a potential harm. Although the parent's attorney did not hear the district's opening statement, in this case that alone does not support a finding that the parent's due process

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on October 19, 2019 in response to my office's directive to file or clarify the missing exhibit, shows that the student received 17 30-minute OT sessions between October 2018 and January 2019. The district's October 29, 2019 letter indicates that it transmitted the exhibits "exactly as submitted and certified by the [IHO]", however the district is reminded that as the LEA, the district is the custodian of the student's records, not the IHO, and it is responsible when submitting a true and complete copy of the hearing record under Part 279, to show its attempts to resolve any known record discrepancies, including through consultation with the IHO, or parent's representative, or the individual representing the district at the impartial hearing in the process of submitting a hearing record to the SRO. The IHO is required to submit a list of exhibits attached to the IHO's decision, and under Part 279 a district is required to make an index of the exhibits received from the IHO so that a comparison between the two will reveal any discrepancies requiring further investigation and/or clarification.

rights were denied. Further, the IHO's decision to have the parties make oral closing statements does not support such a finding. The parent's attorney was granted an opportunity to gather his thoughts and formulate his statement while the district read its closing statement into the record, and it was within the authority and discretion of the IHO as to whether closing statements should be made orally on the record or in the form of written briefs. Finally, assuming for the sake of argument that the IHO violated the parent's due process hearing rights, I have conducted an independent review of all of the parents claims and her challenges raised on appeal, and in light of my findings in her favor on the issue of FAPE as discussed above, any deprivation of due process would not affect the outcome of the case before me.

VII. Conclusion

In light of the foregoing, the IHO's determinations that the district offered the student a FAPE and that the parent was not entitled to an IEE must be reversed. Some of the parent's requests for additional evaluation by the district were also justified.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 15, 2019 is modified by reversing those portions which found that the student was offered a FAPE for the 2017-18 and 2018-19 school years, found the district's evaluation of the student appropriate and denied the parent's request for a neuropsychological IEE at public expense; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall fund 400 hours of 1:1 compensatory academic tutoring by EBL coaching to be delivered by a New York State certified special education teacher at the rate of $125 per hour; and

IT IS FURTHER ORDERED that the district shall fund the parent's requested neuropsychological IEE to be conducted at the rate of $5,000.00; and

IT IS FURTHER ORDERED that the district shall conduct an assistive technology evaluation of the student within 30 days of the date of this decision.

Dated: **Albany, New York**
October 30, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER