



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-019

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 East Islip School District

Appearances:

Ingerman Smith LLP, attorneys for respondent, by Susan M. Gibson, 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 the decision of an impartial hearing officer (IHO) which denied his request for home instruction for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative proceeding concerning the 2018-19 school year (see Application of a Student with a Disability, Appeal No. 18-143). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

For the 2018-19 school year (third grade), the student received home instruction through pendency until October 2018 (Tr. pp. 16-17). By letter dated November 1, 2018, the parent advised the district that he was opting to "transition [the student] from home instruction to home schooling" to ensure that the student received adequate instruction and academic guidance from a qualified

and experienced teacher (Dist. Ex. 35 at p. 1).¹ The student was homeschooled beginning on November 2, 2018 and continuing for the remainder of the 2018-19 school year (Dist. Exs. 16-17, 35-36). The parents hired the teacher who had been providing the student home instruction to provide homeschooling (Dist. Ex. 35 at p. 2).

In or around February 28, 2019 the district requested consent to reevaluate the student (Dist. Ex. 32 at p. 2; see Tr. p. 36).

By letter to the district dated March 10, 2019, the parent declined consent for the district to reevaluate the student and indicated that due to the student's "sensitive health and related complications" the parents had not yet decided on a course of action for the student's education for the 2019-20 school year (Dist. Ex. 32 at p. 1). The parent further indicated that he was planning on conducting an independent evaluation of the student in the "coming months, when [the student's] health allow[ed]" (id.).

The CSE convened on May 16, 2019 for an annual review for the student's 2019-20 school year (fourth grade) (Dist. Ex. 5 at p. 1). The CSE recommended the student attend an 8:1+1 special class with the support of a 1:1 aide (id. at pp. 8, 10). The CSE also recommended that the student receive related services of one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual psychological counseling services, one 30-minute session per week of group psychological counseling services, and one 30-minute session per week of group occupational therapy (OT) (id.). Further, the CSE recommended supplementary aids and program modifications, which included breaks, clarification of assignments, modified classwork, and non-verbal cues (id. at pp. 9-10). The meeting information summary indicated that the parent was "currently considering" home schooling for the student but had not yet decided whether the student would return to the district (id. at p. 2).

On June 25, 2019 the parent filed a due process complaint notice with the district (Tr. p. 63). On July 31, 2019 the parties met for a resolution meeting (Tr. p. 63). During the meeting the parent advised the district that the student had experienced "a horrible relapse and had been hospitalized" (Tr. p. 131). The parent conveyed his wish for a transition plan and the district advised the parent that it was willing to discuss such a plan, but that updated testing would be necessary (Tr. pp. 63-64). The parent indicated that he did not trust the district to conduct the evaluations (Tr. p. 64). Following the resolution meeting, the district provided the parent with a list of independent neuropsychologists for his review (Tr. p. 64; Dist. Ex. 42). By letter dated July 31, 2019 the district thanked the parent for meeting and noted that he had indicated that he would be "willing to review some independent evaluators in order to provide the district with updated

¹ The hearing record includes references to both "home instruction" and "home school"; it should be clarified that a student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]).

information" as it tried to plan for the student's possible transition from homeschooling to the district (Dist. Ex. 42 at p. 1).

In a letter to the district dated August 16, 2019, the parent indicated that he was writing to follow up on the July 31, 2019 meeting in which the parties discussed educational options for the student for the 2019-20 school year as part of the resolution process (Dist. Ex. 43 at p. 1). The parent indicated that after discussion with other professional elementary school educators and administrators, he opted to register the student in a private school outside of the district for the coming year (*id.*). He further indicated, however, that if the student's health continued to remain unstable, the parents would be forced to move the student to another placement/setting in line with the recommendation of the student's primary care medical doctors (*id.*).

On August 21, 2019, the parent provided the district with a letter from the student's pediatric neurologist which indicated that the student had recently been admitted to the hospital and had several seizures (Dist. Exs. 33, 34). In her August 19, 2019 "To Whom It May Concern" letter, the neurologist reported that she had changed the student's medication and was waiting for the student to stabilize (Dist. Exs. 33 at p. 2; 34 at p. 1). The neurologist suggested that the student "continue with two hours of home instruction from 10 am to 12 noon" and recommended that he continue home instruction for "the next four months" also (Dist. Exs. 33 at p. 2; 34 at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 24, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (*see* Dist. Ex. 1). Initially, the parent argued that the student's May 16, 2019 IEP was not appropriate because it did not contain any testing accommodations or opportunity for the student to participate in alternate assessments (*id.* at p. 2). The parent further argued that the May 16, 2019 CSEs recommendation of an 8:1+1 special class was not appropriate because there was no reasonable and effective transition period or the opportunity for the student to appropriately acclimate to a full-time classroom (*id.* at pp. 1-2).

As relief, the parent requested that effective September 2019, the student shall: (1) immediately commence two hours of home instruction in the morning; (2A) commence the school year with two hours of school-based instruction at the end of the day to allow the student's medication levels to stabilize; or (2B) commence the school year with two and a half hours of school-based instruction, at the end of the day to allow the student's medication levels to stabilize, with all related services, including, one 30-minute session of OT, three 30-minute sessions of speech-language therapy, and two 30-minute sessions with the social worker being provided at school (Dist. Ex. 1 at p. 2). The parent indicated that the proposed schedule would allow the student to eat lunch at home from 11:30 a.m. to 12:30 p.m. and would therefore ensure that he was properly nourished before going to school (*id.*). The parent also requested that effective January 2020, the CSE conduct a joint parent-CSE review of the potential for an extended school day (*id.*). The parent noted that if the student's school day could be extended by one hour, to three and one-half hours, the student's home instruction could be reduced to one hour from 9:30 a.m. to 10:30 a.m. (*id.*). The parent also noted that once the student's classroom instruction could be extended

to four and one-half hours or longer per day, then home instruction would be removed (id.). The parent noted that the aforementioned relief would allow the student to properly adjust to the demands of schoolwork while ensuring that the student's learning and educational progress would not be hampered by a truncated day (id.). The parent further asserted that the relief would permit the student to maintain his nutrition and hydration at proper levels which would ensure the student's health, progress and stability (id.). The parent also requested that the student receive testing accommodations appropriate to his needs (id.).

B. Events Post-Dating the August 2019 Due Process Complaint Notice

Contrary to the parent's August 16, 2019 letter to the district, on September 4, 2019, the parent notified the district that he would be home schooling the student, in an effort to make certain that the student received adequate instruction and academic guidance from a properly qualified and experienced teacher, with the additional goals of making sure that the student's health, safety and welfare were properly addressed (Dist. Ex. 36 at p. 1). The parent cited the August 2019 letter from the student's pediatric neurologist that he had shared with the district and stated that it had "become increasingly obvious" that the specific recommendations from the student's pediatric neurologist would "once again be disregarded" (id.).² The parent also indicated that he would not allow the student's health and academic progress to regress like it did the last time the district provided home instruction for the student (id.). In addition, the parent indicated that the student's home schooling would begin on September 5, 2019 (id.).

In a letter dated September 9, 2019, the district acknowledged the parent's request to homeschool the student for the 2019-20 school year and requested that the parent provide the district with an individualized home instruction plan (IHIP) (Dist. Ex. 37 at p. 1).

Subsequently, on or about September 12, 2019 the parent provided the district with a notice of intent to instruct the student at home (homeschooling) along with the student's IHIP for the 2019-20 school year (Dist. Ex. 38 at pp. 1-3)³. In a letter sent to the district on the same date, the parent indicated that the student would be evaluated and tested independently "commencing this month" (Dist. Ex. 39 at p. 1). The parent provided the district with the names of the evaluators who would be conducting the student's psychological and academic testing (id.). In addition, the parent indicated that once the testing was completed, he would share the final evaluation reports with the district (id.).

² According to the parent, the letter from the pediatric neurologist outlined the "need to place [the student] on home instruction for two hours daily for at least four months" due to the student's "fragile and unstable health" (Dist. Ex. 36 at p. 1). The original letter from the neurologist did not indicate the number of hours per day that the student required home instruction (compare Dist. Ex. 36 at p. 1, with Dist. Exs. 33 at p. 2; 34 at p. 1).

³ The student's neurologist completed the required New York State health examination form on September 11, 2019 (Parent Ex. B at p. 2). In the section labeled "Recommendations for Participation in Physical Education/Sports/Playground/Work" the neurologist checked the box marked "Other Restrictions" and wrote "Homebound Instruction" (Parent Ex. B at p. 2).

In an email dated September 12, 2019, the district advised the parent that it was still waiting for consent so that it could contact the student's treating physician regarding the student's need for "Home Instruction" (Dist. Ex. 40 at p. 1). The district further informed the parent that home instruction was dependent on the district's doctors' approval (id.). The district also indicated that once the parent returned the signed form and home instruction was approved, the district would be responsible for securing related service providers for the student (id.). The executive director testified that the parent filled out a document from a packet of information entitled "Homebound Instruction Guidelines and Procedures" except for the "C[onsent] [for] R[elease] [of] I[nformation]" (Dist. Ex. 41, Tr. p. 74).⁴

A second resolution meeting was held in September 2019 at which the parties discussed a transition plan and also the need for updated testing (Tr. p. 75).

C. Impartial Hearing Officer Decision

An impartial hearing convened on November 19, 2019 and concluded after one day of testimony (Tr. pp. 1-235). In a decision dated January 24, 2020, the IHO found that the district offered the student a FAPE for the 2019-20 school year based on the information before the May 2019 CSE and denied the parent's requested relief (IHO Decision at p. 12). With respect to the parent's argument that without a transition plan, the May 2019 CSEs recommendation of an 8:1+1 special class recommendation was not appropriate, the IHO found no evidence in the hearing record to support the parent's claims that the student was too medically fragile to attend a full day program (id. at p. 11). While the IHO was "sympathetic" to the parent's concerns regarding the health and education of the student, the IHO found that the record did not support the parent's position (id. at p. 10). More specifically, the IHO found that the evidence in the hearing record failed to provide guidance regarding the student's prognosis and was devoid of objective medical findings indicating whether the student's health had progressed or deteriorated or impacted the student's cognitive and academic functioning (id. at p. 11). The IHO noted that this information was required by the CSE to assess the student's needs and whether home instruction provided a FAPE in the student's least restrictive environment (LRE) (id.). Next, the IHO noted that the student was last evaluated in May 2016 and found that the district was denied the student's present levels of academic and functional performance because the parent did not consent to a reevaluation and refused to submit the full neuropsychological evaluation (id.). The IHO also found that the district exhausted all reasonable efforts to get the parent to consent to the reevaluation and that without consent, the district is not required to consider a homeschooled student for special education (id. at p. 12). Next, the IHO noted that the student was being home-schooled by the parent but ordered an IEE for the student at public expense, should the student be placed back in the district during the 2019-20 school year (id. at pp. 12-13) Lastly, the IHO dismissed the parent's amended due process complaint notice with prejudice (id. at p. 13).

⁴ The parties' communications include references to "home instruction," "home schooling" and "Homebound Instruction"; the different ways of delivering instruction to students at home or outside of school as previously noted above (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). The executive director testified with respect to the confusion in the record that the parent went through the process of obtaining home instruction for the student and while the district was awaiting consent, decided to home school the student (see Tr. pp. 73-75).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred by denying his requested relief. Initially, the parent argues that the IHO acted with bias in favor of the school district because she disregarded medical documentation indicating that the student's home instruction was a necessity and that the student's health had deteriorated. The parent further argues that the district attempted to re-hire the student's home-school teacher in order to prevent future testimony in favor of the student and failed to accommodate a previous IHO assigned to this case with respect to conditions that would have allowed the IHO to continue to hear cases in the district. The parent also argues that with respect to obtaining contemporary evaluations of the student, the parent informed the district that he would have the student tested in January 2020 but the student was experiencing seizure activity which would not result in accurate test results. Next, the parent argues that the IHO erred in denying the parent's request for two hours of home instruction because she ignored the recommendations from the student's neurologist and neuropsychologist. As relief, the parent requests reversal of the IHO decision and asks that this office conduct an unbiased analysis in order to provide a proper decision. Next, the parent requests that this office instruct the IHO on the need to remain impartial and unbiased. The parent also requests that the district provide the student with two hours of home instruction in line with the recommendations made by the student's medical professionals. The parent also requests that the district engage in due diligence to identify a properly qualified and thoroughly experienced teacher to conduct the home instruction for the student. The parent also requests an appropriate transition plan so that the student can acclimate to the school setting once medically cleared to attend school. In addition, the parent requests that the district develop an IHIP for the student with guidance from the student's medical advisors. Lastly, the parent requests that the district incorporate testing accommodations into the student's IEP which will provide for more time for the student's cognitive processing and response.⁵

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Initially, the district argues to dismiss the parent's request for review because the parent failed to properly serve the district. The district also argues that the IHO correctly dismissed the parent's amended due process complaint notice with prejudice and found that the district offered the student a FAPE in the LRE. Next, the district argues that the IHO correctly found that it exhausted all reasonable efforts to obtain consent from the parent for a reevaluation and that there is nothing in the hearing record supporting the parent's claims that the student was too medically fragile to attend school full-time.

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

⁵ Although we are not reaching relief in this decision, it appears that the parent requested relief on appeal that he did not request in his due process complaint notice (i.e., request for transition plan, IHIP, etc.) (compare Dist. Ex. 1 at pp. 2-3, with Req. for Rev. at p. 6).

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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).

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters

1. Initiation of Appeal

As a threshold matter, it must be determined whether the request for review should be dismissed for improper service. In particular, the district asserts that the request for review should be dismissed because the parent served the request for review upon a senior clerk in the assistant superintendent's office not authorized to accept service under State regulations. An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]).

In general, the failure to properly serve an initiating pleading may result in the dismissal of the request for review by an SRO (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-015 [dismissing a parent's appeal for failure to effectuate proper personal service of the petition upon the district where the parent served a district employee not authorized to accept service]; see also Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner where the parent served the district's counsel by overnight mail]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]). [19-052] However, SROs may exercise their discretion to accept a request for review in spite of service irregularities, particularly in cases in which a pro se parent has complied with nearly all of the service requirements for the request for review and the sole irregularity is the mistaken service upon a high-ranking district representative or official who is nevertheless unauthorized to accept service of process (Application of a Child with a Disability, Appeal No. 95-66; Application of a Child Suspected of Having a Disability, Appeal No. 93-7).

In the instant case, the district asserts that the parent handed a sealed envelope containing the request for review to a senior clerk in the assistant superintendent's office who was covering the reception desk where visitors must sign in to the district's administrative offices (Answer ¶ 11;

see Parent Aff. of Service). The district further asserts that the parent stated that the envelope was for the superintendent's office and immediately signed out without disclosing its contents (Answer ¶ 11). Although, the district states the request for review should be dismissed because the senior clerk was not authorized to accept service on behalf of the district, the district did not present evidence that the senior clerk informed the parent that she was not authorized to accept the parent's papers on behalf of the district (cf. DeVore v. Osborne, 78 AD 2d 915 [3rd Dept. 1980]). Moreover, the failure of the senior clerk to reasonably inform the parent that she was not authorized to accept papers on behalf of the district affords a reasonable basis for the parent to have concluded that he complied with the provisions of the regulation. Furthermore, the district was not prevented from timely preparing and filing an answer and it has not offered evidence that it has been prejudiced by the improper service. Under the circumstances, I exercise my discretion and decline to reject the parent's request for review.

2. Conduct of Impartial Hearing/IHO Bias

Turning to the parent's allegation that the IHO acted with clear bias in favor of the district and disregarded medical documentation that supported his request for relief, it is well settled that an IHO must be fair, impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097) and render their decision based upon the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealing 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, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). 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, the hearing record reveals that the IHO provided clarification of the hearing process to the parties and the issues in dispute to

assist the parent throughout the impartial hearing (Tr. pp. 105-06, 111-15, 122-30, 146-49). Moreover, my review of the hearing record demonstrates that the parent had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by the IHO (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

Overall, a review of the IHO's decision does not support the parent's allegation that the IHO ignored medical documentation provided by the parent. A review of the IHO's decision reveals that the IHO articulated the grounds for her 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 district offered the student a FAPE for the 2019-20 school year, and denied the parent's requested relief. Accordingly, the parent's claims with respect to IHO bias are dismissed.⁷

B. 2019-20 School Year

1. 8:1+1 Recommendation

On appeal, the parent asserts that the IHO erred in finding that the 8:1+1 special class program without a transition plan was appropriate. The parent argues that the student needed an appropriate transition plan so that the student could acclimate to the school setting once medically cleared to attend school. Upon review, and as more fully described below, the hearing record demonstrates that the 8:1+1 special class placement recommended by the CSE for the student's 2019-20 school year was appropriate based upon the evaluative information available to the CSE and, to the extent the IEP did not include an appropriate transition plan for the student, such lack was wholly attributable to the parent's refusal to consent to evaluations.

Although the gravamen of the parent's claims relates to an alleged lack of transition planning for the student's return to the district for the 2019-20 school year, it is helpful to first review the evaluative information that the May 2019 CSE had before it and the recommendations it memorialized in the resultant May 2019 IEP. According to the May 16, 2019 prior written notice, the May 16, 2019 CSE considered the reports and evaluations listed under the "Evaluations/Reports" section of the IEP and the parent's report on how the student was progressing in homeschooling (Dist. Ex. 6 at p. 1). The evaluations listed in the IEP included a May 2016 classroom observation, a May 2016 educational evaluation, a May 2016 psychoeducational evaluation, a May 2016 speech-language evaluation, a March 2016 physical examination, and a February 2016 social history (see Dist. Exs. 5 at p. 3; 7-11). The evaluations indicated that the student's full-scale IQ was in the average range and that he performed in the average range on a standardized measure of mathematics, reading, and writing (Dist. Exs. 9 at p. 5; 10 at pp. 1-4). The student's oral language skills were below average and the speech-language

⁷ The parent also claims that the district attempted to re-hire the student's home-school teacher in order to prevent future testimony in favor of the student (somewhat akin to a witness tampering claim) and failed to accommodate a previous IHO assigned to this case as to conditions which would have allowed the IHO to continue to hear cases in the district (akin to a forum shopping claim); however, there is no record basis in the hearing record to support these allegations and thus they will not be addressed.

pathologist who evaluated the student reported that the student had difficulty initiating and maintaining conversations, asking and answering questions, and sequencing his thoughts and ideas to tell a story (Dist. Ex. 12 at p 1) According to the evaluations, the student was easily distracted and required frequent redirection (Dist. Ex. 9 at p. 5; 10 at pp. 3-4; 11; 12 at p. 1). The student also worked slowly and required extra time to complete tasks (Dist. Ex. 9 at p. 2; 10 at p. 2; 12 at p. 1). The social history, physical examination, and psychological evaluation noted the student's seizure disorder (Dist. Ex. 7 at p. 2; 8; 9 at p. 1). In addition, the social history indicated that the student was referred for evaluation due to reported misbehavior and distracting behavior in the classroom (id. at p. 3).

Over the course of the 2018-19 school year the parent provided the district with quarterly reports of the student's progress in his homeschool program (Dist. Exs. 44; 45; 46; 47; 48). The executive director of special education for the district (director) testified that, at the time of the May 2016 CSE meeting, the information the district had regarding the student's academic performance came from the quarterly homeschooling reports for November 2018, January 2019, and April 2019 (Tr. p. 83; see Dist. Exs. 44; 45; 46; 47).⁸ The first-quarter homeschooling report (November 26, 2018) indicated that the student continued to make slow but steady progress in his homeschool program (Dist. Ex. 44 at p. 2). The report stated that the student was working on second to third-grade work and displayed a very tactile method of learning, especially with "cutting and drawing academic activities" (id.). According to the homeschooling report, "while the student ha[d] significant attentional and [wa]s highly distractibility [sic], there ha[d] been a reduction in negative seeking behaviors and an increase of on task behaviors" (id.). The report noted that the student progressed "from doing 1-2 pages with significant behavioral and distractibility variability [sic] to consistently doing 10-12 pages of work in one day, including ELA, Math, Science and Social Studies" (id. at pp. 2, 3). The report further noted that the student excelled in math and was doing third-grade math work including adding with regrouping (id. at p. 2). In addition, the student could tell time in half-hour and five-minute intervals and was working toward one-minute intervals (id.). The homeschooling report described the student's understanding of money concepts as "good" and noted that he recognized coins and bills up to ten dollars (id.). The report stated that the student was "adding money together well" and that he was starting to solve area and perimeter problems using "PEMDOS" (id.). With respect to reading, the homeschooling report indicated that the student was making slow but steady progress, knew "most Dolce [sic] 2nd grade words at 80% or higher" and was working on third-grade words and reading assignments (id.). The report stated that reading fluency was a priority for the student and noted that he sometimes got stuck on words and had a tendency to phonetically break down words and spell that way when writing (id.).

According to the November 2018 homeschooling report, the student demonstrated good progress in science and social studies including demonstrating "excellent monitoring skills of his own work" and he often tried to correct the mistakes he made (Dist. Ex. 44 at p. 2). With respect to art and music the homeschooling report indicated that the student drew every day using a variety of art materials and played the piano and violin (id. at p. 3). Moreover, the report indicated that the student was making progress in both of these areas (id.). The report described the student as

⁸ The director testified that the CSE did not have the June 2019 quarterly homeschooling report as it post-dated the CSE meeting (Tr. pp. 83-84; see Dist. Ex. 48).

having high management needs and noted that he required a structured educational environment to address his educational needs (id.).

The November 2018 homeschooling report noted that in spite of an ADHD diagnosis the student was very bright and had a very creative tactile side of solving problems; he often put things together in ways that most students did not see (Dist. Ex. 44 at p. 3). The report suggested that the student displayed early signs of mechanical and building skills (id.). The report also indicated that the student's parents were very supportive of him and worked hard to help him succeed (id.).

In January 2019 the parent submitted a second first-quarter homeschooling report "in the format requested" by the district (Dist. Ex. 45 at p. 1). In an accompanying letter, the parent informed the district that in his original IHIP he had indicated the instructor providing homeschooling would abide by the third grade curriculum as found on www.engageny.org (id.). The second first-quarter homeschooling report included a description of "materials covered and evaluation of each Subject area[] or Grade" (id. at p. 2). More specifically, the homeschooling report indicated that the student was making progress/improving in arithmetic; making slow but steady progress/improving in reading, English language, and writing; tended to spell phonetically but was improving in spelling; making satisfactory progress in geography and U.S. History; and making satisfactory to good progress in science, music, health and safety, physical education, and visual arts (id. at p. 4).⁹ A school calendar included with the progress report indicated that the student did not have any absences during the first quarter of the 2018-19 school year (id. at p. 5).

The second-quarter homeschooling report, dated January 31, 2019, indicated that the student was making progress/improving in arithmetic while making slow but steady progress/improving in reading, English language skills, and writing (Dist. Ex. 46 at pp. 2-3). The report also noted that the student tended to spell phonetically but that his spelling was improving (id. at p. 2). As with the first quarter, the homeschooling report indicated the student was making satisfactory progress in geography and U.S. History, and satisfactory to good progress in science, music, health and safety, physical education, and visual arts (id. at pp. 3-4). The homeschooling

⁹ The second first-quarter homeschooling report indicated that arithmetic instruction included addition and subtraction of double and triple-digit numbers, addition with regrouping, time to 1-5 minute intervals, coins/dollars up to \$10.00, and patterns (Dist. Ex. 45 at p. 2). Reading instruction included learning third-grade vocabulary words, defining and writing new words in sentences, reading second and third-grade fiction and nonfiction works, the student reading to himself and aloud, answering questions to demonstrate understanding, cause and effect, and reading with expression (id.). English language instruction included work on main idea and details, using complete sentences, capitalizations, nouns and verbs (id.). Spelling instruction included working on weekly spelling words, and writing instruction addressed prewriting strategies, writing essays/on topics from reading assignments, and developing creative writing skills (id. at pp. 2-3). According to the quarterly report, geography instruction targeted the ability to reading maps and charts and U.S. History instruction covered reading/writing moving chronologically through events and important people who shaped America (id. at p. 3). Science instruction looked at science investigation using instruments and collecting data; lessons on the nature of matter, physical properties, energy, force and motion; and renewable/nonrenewable energy (id.). The homeschooling report indicated that for music the student received weekly lessons that included playing the piano and reading music (id.). Health and safety instruction addressed home and community safety, nutrition, and hygiene (id.). For physical education instruction the student participated in weekly karate classes and gym/indoor/outdoor physical activities at various locations (id. at p. 4).

report identified new arithmetic skills that were covered in the second quarter including, but not limited to, word problems, introductory multiplication and division, fractions, and estimating (id. at p. 2). In reading, new units related to recounting stories, and describing characters and traits, were added to the student's instruction (id.). With regard to English language, the second-quarter homeschooling report indicated that instruction focused on simple paragraphs, grammar, and speaking and listening skills (id.). Writing included instruction on brainstorming ideas and opinion writing (id. at p. 3). In U.S. History, music, and health and safety new topics were discussed (id.). Physical education reflected the addition of an every-other-week dance class and new materials (clay and playdough) were introduced in visual arts (id. at p. 4).

A third-quarter homeschooling report dated April 12, 2019 described the student's progress in largely the same manner as the two prior homeschooling reports, to wit: the student was making steady progress/improving in arithmetic while making slow but steady progress/improving in reading, English language skills, and writing (Dist. Ex. 47 at pp. 2-3). The report also noted that the student tended to spell phonetically but that his spelling was improving (id. at p. 2). In addition, the homeschooling report indicated the student was making satisfactory progress in geography and U.S. History, and satisfactory to good progress in science, music, health and safety, physical education and visual arts (id. at pp. 3-4).

The third-quarter homeschooling report included an updated list of skills covered by the different educational disciplines (Dist. Ex. 47 at pp. 2-3). New topics covered in arithmetic included place value, reading graphs, measurement, and Roman numerals, (id. at p. 2). In reading, instruction shifted in part to reading fluency with a focus on comprehension and drawing conclusions (id.). English language instruction focused on sentence and paragraph construction, as well as grammar and sentence structure (id.). In addition, the student's writing instruction included poems, his geography instruction included plotting and labeling places on maps, and science included higher order thinking skills (id. at p. 3).

The CSE convened on May 16, 2019 for the student's annual review (Dist. Ex. 5 at p. 1). According to meeting information minutes, the CSE chairperson opened the meeting by advising CSE members that the parent had not consented to the district conducting updated evaluations (Dist. Ex. 5 at p. 1; see Tr. p. 40). She asked the parent if he had obtained any evaluations that he wanted the committee to review (Dist. Ex. 5 at p. 1; see Tr. p. 40). The parent indicated that he had found an evaluator to work with the student but that May was not a good time due to the student's histamine intolerance and difficulty with changes in environmental pressure (Dist. Ex. 5 at p. 1; see Tr. p. 40). According to the meeting information summary, the CSE chairperson asked the parent if he intended to continue to homeschool the student or if the student would be returning to the district (id.). The parent stated that he was "'considering his options and ha[d] not made a decision yet'" (Dist. Ex. 5 at p. 1). The CSE chairperson advised the parent that he would need to notify the district of his intent to homeschool the student by June first for the student to be entitled to receive related services through the district (Dist. Ex. 5 at p. 1; see Tr. p. 40).¹⁰ With respect to the student's academic progress, the meeting information summary indicated that by parent report

¹⁰ According to the meeting information summary, the parent submitted a letter to the CSE indicating that he was "'considering'" homeschooling the student (Dist. Ex. 5 at p. 1).

the student was doing "very well" academically including in reading and math, where he was meeting New York State standards (Dist. Ex. 5 at p. 1). The parent indicated that the student was able to work two hours on task without a break (Dist. Ex. 5 at p. 2; see Tr. p. 41). In addition, the parent indicated that he was pleased with the student's academic and social progress (Dist. Ex. 5 at p. 1).

Although the director testified that the quarterly homeschooling reports served as the CSE's source of information regarding the student's academic performance, the present levels of performance for student's proposed 2019-20 IEP were primarily the same as in his 2018-19 IEP and based largely on reports from the student's home provider from June 2018 (Dist. Ex. 5 at pp. 5-6).¹¹ The IEP indicated that with respect to study skills the student had increased his time on task and was able to use learning strategies provided by his provider (id. at p. 5). The IEP noted that the student required minimal assistance to transition between activities (id.). In reading, the IEP stated that the student was able to use a variety of reading strategies to increase and improve fluency and self-correct (id.). However, the IEP further stated that the student needed to improve his ability to answer questions about key details in content area texts (id.). The IEP noted that in writing the student was making progress in his ability to express his thoughts and ideas during the writing process but needed to improve his use of grammar and punctuation in given writing assignments (id.). The IEP stated that the student excelled in mathematics and used a variety of strategies to complete mathematical problems and assignments (id.). The student needed to improve his ability to add monetary amounts with regrouping (id.).

Turning to the student's social development, the IEP indicated that based on counseling sessions held at school in September and October 2018 the student was polite and respectful to the counselor (Dist. Ex. 5 at p. 5). The IEP noted that the student was easily distracted and required reminders to follow directions but also noted that he was responsive to positive reinforcement for behavior (id.). The IEP stated that the student had been on homeschooling since November 2018 and would require support to adjust back to an educational setting (id.). The IEP further stated that the student would require support to initiate and maintain appropriate peer interactions and would require assistance to verbalize disappointment when he was required to do a nonpreferred activity (id.). In terms of the student's physical development, the IEP indicated that the student enjoyed participating in physical activities such as going to the park and running and playing on swings (id.). The IEP noted that the student was motivated and wanted to please others, his upper extremity strength was functional for tasks, he was able to write/copy letters and words, and he exhibited functional cutting skills (id.). However, the IEP also noted that the student needed to improve his endurance and sensory-motor skills and decrease impulsivity and self-directed behaviors (id. at p. 6). According to the IEP, the student demonstrated significant delays related to core foundation skills and relaxation skills (id.). The student also demonstrated decreased endurance for completing writing assignments past 3-5 minutes and the quality of his writing (spacing, size, line targeting) was inconsistent (id.). The IEP stated that the student needed to improve his fine motor and attending skills (id.).

¹¹ The parent's due process complaint notice did not assert that the present levels of performance in the May 2019 IEP were inaccurate (see Dist. Ex. 1).

The May 2019 IEP highlighted the student's management needs, noting that the student had significant delays and required a program with a small student-to-teacher ratio and minimal distractions in order to progress academically (Dist. Ex. 5 at p. 6). The IEP indicated that the student required a structured environment, as well as teacher redirection and nonverbal cues to stay on task (id.). However, the IEP also stated that the student needed to learn to stay on task without assistance and decrease task avoidant behavior (id.). The IEP further noted that the student required "a great deal of behavior management strategies" (id.).

The May 2019 IEP stated that the student had a significant delay in social skills and attentional skills and displayed aggressive behavior which interfered in his participation in age-appropriate activities (Dist. Ex. 5 at p. 6). With regard to special factors, the IEP stated that the student required strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning, and noted that the student had an FBA and a BIP (id.). The IEP also indicated that the student required a particular device or service to address his communication needs (id.).

With respect to annual goals, the May 2019 IEP included 10 goals that targeted various skills including the student's ability to attend to a task for up to ten minutes, decode words at his reading level related to content area subjects, spell 10 selected words correctly, write fractions correctly and create a visual representation of them, follow multistep directions in order to complete a task, engage in four appropriate verbal exchanges, use problem solving strategies to solve at least three presented problems (speech), transition from one activity to another including from more preferred to less preferred activities, adapt to changes in his environment, and when expressing a negative emotion identify and appropriately use a coping skill to maintain appropriate behavior at school (Dist. Ex. 5 at pp. 7-8).

To address the student's needs the May 2019 CSE recommended that the student attend an 8:1+1 special class and receive related services of one 30-minute session of group speech-language therapy per week, two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group occupational therapy per week, one 30-minute session of group counseling per week, and one 30-minute session of individual counseling per week (Dist. Ex. 5 at p. 8). The CSE also recommended numerous supplementary aids and services and program modifications/accommodations including: breaks as needed throughout the school day, information broken down into smaller parts, clarification of assignments, examples given to increase understanding, extended time for tasks as needed, modified classwork, non-verbal cues, reteaching of materials, use of a graphic organizer, use of a slant board, use of a student carrel, preferential seating, use of graph paper, air conditioned classroom, and a 1:1 aide for assistance in attending to classroom activities (id. at p. 10). The IEP noted that the student's need for a 12-month program or services was deferred pending review (id.). Lastly, the IEP indicated that the student required special transportation accommodations including adult supervision in the form of a group driver assistant and door to door transportation with a group driver assistant (id. at p. 12).

The student required a low student-to-teacher ratio and structured environment and the CSE recommended that the student receive instruction in an 8:1+1 special class (Dist. Ex. 5 at p. 8). The student had difficulty attending and was easily distracted and the CSE recommended that

he be provided with a 1:1 aide, preferential seating, and use of a student carrel (*id.* at p. 10). To address the student's social/emotional difficulties the CSE recommended speech-language therapy and counseling services and developed several goals that focused on his conversational skills, ability to identify emotions, and ability to adapt to changes in the environment (*id.* at pp. 7-10). The student demonstrated fine motor weaknesses and the CSE recommended occupational therapy (*id.* at pp. 6, 8). Accordingly, the CSE attempted, within the best of its ability under the circumstances, to craft an IEP for a student who had not been evaluated since 2016 due to the parent's lack of consent and who had been homeschooled for the previous school year. However, the district was not willing to create a plan to transition the student back into a district placement absent current evaluations. As discussed further below, because the parent did not consent to such evaluations, the district is not liable for any FAPE violation based upon its failure to include a specific transition plan in the May 2019 IEP.

2. Lack of Consent for Evaluations

Turning to the issue of the lack of a specific transition plan in the May 2019 IEP, it is undisputed that the IEP does not contain a specific recommendation for a transition plan for the student for the 2019-20 school year. Rather, the hearing record shows that a transition plan was discussed the previous school year at the student's June 5, 2018 CSE meeting (Dist. Ex. 3 at p. 2). Although the previous school year's IEP (2018-19) is not in dispute, a brief discussion thereof provides context regarding the issue of the student's need for a transition plan for the 2019-20 school year.

The June 5, 2018 CSE meeting information summary indicated that based on information before the CSE and the teacher's report of the student's functioning within the home, the CSE recommended that the student be "transitioned back to the formal school setting" (Dist. Ex. 3 at p. 2). The June 5, 2018 IEP further indicated that the student would require support "adjusting back to an educational setting" (Dist. Ex. 3 at p. 5).

The hearing record shows that the parties discussed how to transition the student back to a school-based program. The June 2018 IEP stated that the student was eligible for a 12-month program and reflected the CSE's recommendation that the student attend a 12:1+1 special class with a 1:1 aide for three hours per day and receive two 30-minute sessions of group speech-language therapy per week during July and August (Dist. Ex. 3 at pp. 2, 11). The corresponding meeting information summary indicated that in order to facilitate a more successful transition to a school-based program the CSE offered to have the student's home instructor consult with the student's summer-school teacher and 1:1 aide (Dist. Ex. 3 at p. 2; Tr. p. 33). The meeting information summary also noted that the district's behavioral consultant would be available throughout the summer to assist with the student's transition (Dist. Ex. 3 at p. 2). According to the meeting information summary, the parents expressed their concerns about transitioning the student to a formal school setting (*id.*). In response the CSE chairperson stated that the three hour summer program was an appropriate setting to begin the student's transition and that a truncated day for the fall could be discussed as the summer progressed and the team had more information and data on the student's performance (*id.*). Although the parent requested that home instruction continue

along with school instruction for the student, the district denied the parent's request and maintained its recommendation of a transition plan through the summer session (id.).

Consistent with the meeting information summary, the district executive director of special education testified that the CSE recommended that the student attend the district's 12-month program with the same teacher who would be his teacher in September 2018 (Tr. p. 33). She explained that the recommendation was made so that the district could start on a transition plan with the student (Tr. p. 33). The director reported that in addition to the teacher, the CSE recommended that the 1:1 aide hired for the student for summer 2018 be the same 1:1 aide working with the student in September 2018 so that the district could "begin that transition" (id.). Ultimately, the student did not attend the recommended 12-month program for summer 2018 (Tr. p. 32). The director reported that the district could not get permission for the student to attend school because a due process complaint notice was filed, and the student was not available (id.). The director further reported that although the student's home instructor reported at the CSE meeting that he would be available to help transition the student to the district's summer program, he was not available (Tr. p. 33). When called, the home instructor indicated that he would be in Florida for the summer (Tr. p. 33). According to the director, the district subsequently learned that the parent had hired the student's home instructor privately to provide summer services (Tr. pp. 33-34).

Turning to the 2019-20 school year, although the student's May 16, 2019 IEP indicated that the student would need support adjusting back to an educational setting, the meeting information summary indicated the parent had not yet made a decision as to whether the student would return to a district school (Dist. Ex. 5 at p. 1). As noted above, the parent stated that he was "considering his options and ha[d] not made a decision yet" (id.).

The director testified that at the time of the May 2019 CSE meeting, the parent was unsure whether or not he would be bringing the student back to school or whether he would continue to homeschool him (Tr. pp. 40-42). Although not reflected in the meeting information summary, the director reported that the CSE discussed that if the parent was going to bring the student back to the district, the CSE would reconvene to discuss how the district would transition the student (Tr. p. 42). She noted that the plan for summer services would be the same as in the prior school year where the student's September teacher would be available in the summer so that "the student could meet the teacher, begin to work with the teacher and the aide so that a transition plan would be in place for September" (id.). When asked if this was indicated on the student's IEP the director explained that the IEP indicated the student's 12-month program was "deferred pending review" (Tr. p. 43). The director stated that if the parent decided to bring the student back to the school district, the CSE would need to reconvene to put a transition plan into place and talk about "what the medical needs would be to keep him safe in school" (Tr. p. 95). In addition, she testified that the CSE had discussed the possibility of reconvening if the parent decided to bring the student back to the school district (Tr. p. 43).

The director testified that the parent originally submitted a due process complaint notice on June 25, 2019 and that on July 31, 2019 a resolution meeting was held (Tr. p. 63; see Dist. Ex. 42). She stated that at the resolution meeting she spoke with the parent about his wishes for a

transition plan (Tr. p. 63). She noted that, at the time of the meeting, the parent had not yet made a decision as to whether or not he was going to homeschool the student and he also indicated that he might be seeking a private school for the student (Tr. pp. 63-64). According to the director, she informed the parent that "[the district] would be willing to sit down and talk about a transition plan but that updated testing would be necessary" (Tr. p. 64). The parent stated that he did not trust the district to do the evaluations; in response the director provided the parent with the names of independent evaluators (Tr. p. 64; Dist. Ex. 42).

The director testified that, in his August 2019 amended due process complaint notice, the parent was looking for a transition plan for the student "to return to school and have a truncated school day, plus home instruction between certain hours of the day, and then effective January 2020 an additional plan" (Tr. p. 72; see Dist. Ex. 1 at p. 3). She indicated that it was the same transition plan that the parent was looking for in the prior impartial hearing (Tr. p. 72). The director testified that a second resolution meeting was held in September 2019 at which the parties discussed "a transition plan for the student if and when he came back to school, that we would put one in place again, but that it was necessary to get some updated testing" (Tr. p. 75).

The director stated that it was difficult to say what the transition plan would be because the student was being homeschooled and the district did not have any updated testing on the student (Tr. p. 75). She explained that the district had not "had eyes" on the student in two and a half years and it was necessary to learn where the student was developmentally in order to have the appropriate safety nets in place for the student when he was ready to transition back into the school (Tr. pp. 75-76). As to whether the district was making the student's return to school contingent upon getting evaluations, the director testified that at the second resolution meeting, the parent indicated that he was going to homeschool the student and the district did not have any indication that the student was coming back (Tr. pp. 75-76).

With respect to the parent's proposed transition plan, the executive director testified that she believed it would be more beneficial for the student to attend school at the beginning of the school day because routines were in place and during the morning the focus of instruction was on academics (Tr. p. 91). With respect to the student starting school at 1:15 p.m., the director explained that she would have to look at the schedule for the recommended classroom but that many times in the afternoon there was a "prep period" where students went to a different subject area so there might be more transition in the afternoon (Tr. p. 92). She opined that this would not be appropriate for the student who had behavioral dysregulation and had been out of school for two years (Tr. pp. 91-92).

The director testified that, contrary to the parent's assertion, she did not contest the student's need for both home and school instruction because it was not at the direction of a doctor; rather, she said that the district needed to bring everyone together and have more evaluations (cognitive and academic), and to speak with the doctor to see what would be appropriate for the student (Tr. pp. 125-26). The director denied telling the parent if he asked for home instruction that the student would "either get worn out of home instruction or would be offered only a truncated day" (Tr. p. 127). She testified that she explained to the parent at the resolution sessions that if "[the student] came back and medically needed to be on home instruction as per New York State, it would be

one hour a day" (Tr. p. 127; see Tr. p. 138). She stated that she further explained that if a student was on home instruction they did not normally get school instruction as well (Tr. p. 127). The director agreed that the student's health and academic success should be taken into consideration when developing a transition plan (Tr. p. 133). The director reported that at the resolution session the district was open to options but needed more information (Tr. pp. 138-39).

The parent testified that in October 2018 the district disregarded advice and gave the student a home instructor in the afternoon, "which set off [the student's] health to the point he required hospitalization within a week" (Tr. p. 170).

The parent testified that in July 2019 the student had "a very serious relapse where not only did his seizure activity, but the severity of the seizures and duration and intensity increased dramatically" (Tr. p. 175). The parent reported that the student was hospitalized and when he returned home, he received homeschooling from their provider (Tr. p. 177).

The parent reported that after the second resolution session in September 2019, the director put him in contact with the district home instruction coordinator who advised him that the student would only receive one hour of home instruction and it would definitely be after school hours (Tr. p. 177). The parent explained that he had concern for the stability of his son's health and feared that he would have an academic relapse and therefore instead of waiting for piecemeal instruction from the school district he would continue to have his son homeschooled because it was safer for his health (Tr. p. 177).

The parent testified that as of November 2019 the student was medically unstable at that time and that the reason for the transition plan was for when the student was medically able to go to school (Tr. pp. 188-90). He commented that he was hoping to have a transition plan in effect that would allow the student "not to regress academically and to take his health concerns into consideration" (Tr. p. 189).

The hearing record contains several documents from the student's physicians that identify his medical needs as they relate to school. Documents from the 2014-15 to 2016-17 school years outlined protocols to follow in the event the student experienced a seizure at school, identified the student's medication regimen, and included recommendations for a 1:1 aide and an air conditioner (Dist. Exs. 20-26). Letters written by the student's physicians during the 2017-18 school year stated that the student had benefitted from and should continue to receive home instruction (Dist. Exs. 28-29).

At the time of the May 2019 CSE meeting, the most recent medical information available to the district was a health appraisal form, stamped as received by the district on June 7, 2018; an October 31, 2018 letter from the student's pediatric neurologist; and a November 2018 letter from the parent (Dist. Exs. 31 at pp. 1-2). The June 2018 health appraisal form indicated that the student was free from contagions and physically qualified for all physical education, sports, playground, work, and school activities, with the exception of swimming (Dist. Ex. 30 at p. 1). The October 2018 letter from the student's neurologist cited the student's headaches and seizures and recommended that the student continue with home instruction from 10 a.m. to 12 noon for the next four months (Dist. Ex. 31 at p. 2). The November 2018 letter from the parent indicated that the

student was experiencing internal bleeding and would continue to undergo medical testing and examination in order to identify the cause and develop a medical plan (Dist. Ex. 31 at p. 1).

Prior to the September 2019 resolution meeting, the parent provided the district with a letter from the student's pediatric neurologist, dated August 19, 2019, in which the neurologist again recommended that the student continue with home instruction for the next four months due to the student's medical needs (Dist. Ex. 33 at pp. 1-2).¹² According to the director, subsequent to receiving the August 2019 letter from the parent, she advised the parent that the district would be responsible for the student's home instruction and that the parent would need to register the student with the district (Tr. p. 69). The director explained to the parent that once he filled out a home instruction packet the home instruction could begin (*id.*). The director indicated that the parent filled out the home instruction packet but did not fill out the consent for the district to speak to the student's doctor (Tr. pp. 69-70, 74). The director explained that everyone in the district who requested home instruction was required to provide consent to the student's doctor (Tr. p. 71).

It is undisputed that the parent did not provide consent for the district to speak with the student's neurologist in order to gain information that would allow it to develop an appropriate IEP or transition plan for the student for the 2019-20 school year. When asked if he had given the district permission to speak with the student's neurologist since 2017, the parent responded that in his opinion "getting six or seven notes that declare the same thing from [the student's neurologist]", "would suffice" (Tr. p. 191; *see* Tr. pp. 196, 207-08). In addition, the parent confirmed that since 2017, he had not given consent for someone from the district, such as a nurse or doctor, to speak with the student's neurologist because the student had not been in school since 2017 and he did not see the need to do that (Tr. pp. 191-92). The parent also testified he was going to give consent for the district to speak with the student's physician until he found out from the home instructor coordinator that the student would only receive one hour of home instruction and it was almost certain that the instruction would take place after school, which would not be appropriate for the student (Tr. pp. 149-50, 192-93). When asked why he refused consent for the student's doctor to speak to the district about the student being "medically fragile," the parent responded that in his experience, the school did not act in "good faith" (Tr. p. 203). He reiterated that when he spoke to the home instructor coordinator, he was told that the student would get only "these" services (one hour of instruction) and that would not be sufficient for the student. (*id.*). The parent further testified that he did not want the student regressing and the last time the student's schedule was moved, the student was hospitalized within one week (Tr. pp. 203-04).

In addition to refusing to provide consent for the district to contact the student's doctor, as noted above, the parent also refused to consent to the district's request to evaluate the student (Dist. Ex. 32 at pp. 1-2). In March 2019 the parent advised the district that the parents were planning to conduct an independent evaluation of the student within the coming months when his health

¹² The director testified that District Exhibit 34 was a faxed version of District Exhibit 33; however, she noted that the fonts were significantly different, the letterhead on the letters was different, and the emblems were in different spots on the letters (Tr. pp. 61-62; *compare* Dist. Ex. 33 at p. 2, *with* Dist. Ex. 34 at p. 1; *see* Tr. pp. 208-212).

allowed (Dist. Ex. 32 at p. 1). However, the director testified that the district had not received private evaluations from the parent (Tr. p. 37). In addition, the parent did not submit the full report of a neuropsychological evaluation that he had obtained in a prior school year, as requested by the district (Tr. p. 37; see Tr. pp. 29-30).¹³

In a letter dated September 12, 2019, the parent indicated that he would be having the student evaluated and tested independently "commencing this month" as had been discussed in prior CSE meetings and meetings with district officials (Dist. Ex. 39 at p. 1). The parent identified the individuals who would be conducting psychological and academic testing of the student and indicated that he would share the final report with school officials (Dist. Ex. 39 at p. 1). The director indicated that she did not know if the testing was taking place and that the district had not received any testing results from the parent (Tr. pp. 38, 140). The director opined that it was vital to get standardized testing on the student, given that he was "medically involved" and had a seizure disorder (Tr. p. 39). She explained that the district had "not set eyes" on the student in two and a half years and had not been able to do "formative" or informal assessment, even within a classroom (Tr. p. 39). She further explained that "at this point" it was necessary to conduct standardized assessments to see if the student's medical condition was affecting his cognitive development and to assess the trajectory of the student's development (Tr. p. 39). According to the director, the last time the district evaluated the student he was six years four months and he was now approaching ten years old (Tr. p. 39). She indicated that the district would like to see with the instruction the student was receiving whether "we are closing the gap, are we maintaining the gap, is the gap becoming bigger" and the district did not have any of that information (Tr. p. 39).

The parent testified that due to increased seizure activity, evaluation of the student had been delayed (Tr. pp. 141-42). He explained that the student's seizure activity had tripled and moved to other locations in his brain (Tr. pp. 142, 185). He reported that he was waiting for the student to be medically stable enough to be evaluated (Tr. pp. 142, 185-86). The parent indicated that he did not want to define a date on which the tests would be done because the student might have a seizure or migraine on a scheduled test day and testing would have to be suspended (see Tr. pp. 143-146). The parent confirmed that the district had made "upward of five to six requests for evaluations [of the student]" (Tr. p. 186). He testified that due to medical restrictions the student has been unable to be evaluated since 2016 (Tr. p. 186).

As explained in one district court case, "[a]lthough a parent always retains the right to withhold consent for further evaluations, after consent is withheld, the school district cannot be held liable for denying a FAPE" (V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). In some circumstances, a district may seek to override a parent's lack of consent to evaluate a student, but such consent override procedures are permissive, not mandatory (see id.). In addition, where a student is homeschooled, a district cannot rely upon the consent override procedures because federal regulations further provide that (i)[i]f a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent

¹³ The director clarified that the full neuropsychological report was submitted to the district in the course of an impartial hearing, but not to the CSE and the CSE did not review it (Tr. pp. 37-38). She stated that the student was unable to be tested during the neuropsychological evaluation (Tr. p. 38).

for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and

(ii) [t]he public agency is not required to consider the child as eligible for services under §§ 300.132 through 300.144.

(34 CFR 300.300[d][4]; see 8 NYCRR 200.5[b][7]).

Here, the hearing record contains abundant and unequivocal evidence that the parent consistently withheld consent for evaluations despite the district's many attempts to obtain consent for the purpose of creating an IEP, including a transition plan for the student's return to the district, that reflected the student's current special education needs, including medical needs. Moreover, throughout the IEP process and the subsequent resolution meetings, the parent indicated to the district that the student might not be returning to the district for the 2019-20 school year or, if he did return, the timing of such return was not clear due to the student's ongoing medical issues. Although the parent has a set notion of what a transition plan for the student would look like – namely two hours of home instruction and two hours of school instruction each day – the district is not obligated to adopt the parent's point of view wholesale without the ability to conduct its own evaluations or to gain access to the student's pertinent medical information. As noted by the IHO, the parent's concerns regarding the health and education of the student are understandable. However, the district cannot be held liable for denying the student of a FAPE where, as here, the parent has withheld consent for current evaluations (V.M., 954 F. Supp. 2d 102 at 118). Moreover, subsequent to the May 2019 IEP, the parent indicated his intention to homeschool the student and the student was homeschooled for the 2019-20 school year (Tr. pp. 14-15; 178-179), rendering the district's obligation to provide special education services to the student during the 2019-20 school year questionable given the parent's failure to provide consent for evaluations ((34 CFR 300.300[d][4]; see 8 NYCRR 200.5[b][7]). Accordingly, the IHO was correct in finding that the district did not deny the student a FAPE for the 2019-20 school year.

VII. Conclusion

In summary, my review of the evidence in the hearing record reveals no error in the IHO's determination that the district did not deny the student a FAPE for the 2019-20 school year. Accordingly, the IHO correctly denied the parent's request for relief.

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 11, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER