The University of the State of New York

The State Education Department
State Review Officer
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No. 20-179

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:
The Law Office of Steven Alizio, PLLC, attorneys for petitioner, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational programs/services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2015-16, 2016-17, 2017-18, and 2018-19 school years were appropriate. The district cross-appeals from that portion of the IHO's decision which denied the district's motion to dismiss the claims related to the 2015-16 and 2016-17 school years based on the statute of limitations. The appeal must be sustained in part. The cross-appeal must be sustained. The matter must be remanded for further administrative proceedings.

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

A CSE convened on November 10, 2015, during the student's kindergarten year, for an initial eligibility meeting (see Dist. Exs. 2; 33).[1] The student was found eligible for special

[1] An October 5, 2015 teacher report was completed in preparation for the CSE meeting (see Dist. Ex. 31). In addition, several exhibits were marked for identification during the impartial hearing that related to the district's initial evaluation of the student in fall 2015 and the CSE's consideration of the student's initial eligibility for special education; however, the exhibits were not ultimately entered into evidence (see Tr. pp. 77-79).

education as a student with a speech or language impairment (Dist. Exs. 2 at p. 1; 33 at p. 1). The CSE recommended related services of one 30-minute session of group counseling per week, one 30-minute session of individual speech-language therapy services per week, and two 30-minute sessions of group speech-language therapy per week (Dist. Ex. 33 at pp. 6-7).

A CSE convened on November 4, 2016 to develop an IEP for the student with an implementation date of November 8, 2016, during the 2016-17 school year (first grade) (see Dist. Exs. 4; 34). The CSE determined that the student remained eligible for special education as a student with a speech or language impairment and recommended related services of one 30-minute session of group counseling per week, one 30-minute session of individual speech-language therapy services per week, one 30-minute session of small group speech-language therapy services in a separate location (therapy room) per week, and one 30-minute session of small group speech-language therapy services in the general education classroom per week (Dist. Ex. 34 at pp. 6-7).

The hearing record includes reports identifying six incidents that occurred between the student and other students at school during the 2016-17 school year (see Parent Exs. B; C; D; E).

In May 2017, the district conducted an occupational therapy (OT) evaluation of the student (Dist. Ex. 7 at p. 1). The OT report indicated that the parent requested the evaluation due to concerns regarding the student's difficulty focusing, completing tasks, and with organization (id.). The report indicated that OT services were recommended to help address the student's difficulty focusing (id. at p. 6).

A CSE convened on June 21, 2017 to develop a program for the student for the 2017-18 school year (second grade) (see Dist. Exs. 8; 9).[2] The student remained eligible for special education as a student with a speech or language impairment and the CSE recommended related services of one 30-minute session of group OT per week, one 30-minute session of individual speech-language therapy services per week, one 30-minute session of group speech-language therapy services in a separate location (speech therapy room) per week, and one 30-minute session of group speech-language therapy services in the general education classroom per week (Dist. Ex. 8 at p. 7). The June 2017 CSE did not continue a recommendation for counseling services for the student (compare Dist. Ex. 8 at p. 7, with Dist. Ex. 34 at p. 6).

The hearing record includes two reports regarding events that occurred at school during the 2017-18 school year; in May 2018 an incident occurred during recess and also in May 2018 an incident occurred when leaving school to board the school bus (see Parent Exs. F; G).

A CSE convened on June 18, 2018 to develop a program for the student for the 2018-19 school year (third grade) (Dist. Exs. 12; 13).[3] The CSE found the student continued to be eligible for special education as a student with a speech or language impairment and recommended related services of one 30-minute session of individual OT services per week, one 30-minute session of

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[2] A teacher's report was completed in preparation for the June 2017 CSE meeting (see Dist. Ex. 5).

[3] An OT "Clinical Guide" was created on June 6, 2018 in preparation for the June 2018 CSE meeting (see Dist. Ex. 11). Further, an email between the district and the parent indicated that the parent provided updated information regarding the student's speech-language needs via a "Parent Intake Form" prior to the June 2018 CSE meeting (see Dist. Ex. 20).

group OT services per week, one 30-minute session of individual speech-language services per week, and one 30-minute session of group speech-language services per week (Dist. Ex. 12 at pp. 1, 7-8). All of the related services were recommended to be provided in a separate location (id. at pp. 7-8).

In a letter dated November 13, 2018, the parent requested an independent educational evaluation (IEE) of the student "in the form of a comprehensive Neuropsychological Assessment" and indicated that she disagreed with the district's most recent evaluation (Parent Ex. H at p. 1).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated November 30, 2018 (Parent Ex. I at p. 1). The parent asserted that the district's most recent evaluation of the student, identified as an October 16, 2015 psychoeducational evaluation, contained "substantial and material deficiencies that invalidate it" (id. at p. 2). The parent asserted she sent the district a letter on November 13, 2018, which indicated that she disagreed with the district's most recent evaluation of the student and had requested the independent neuropsychological evaluation (id.). The parent further asserted that the district did not respond to her letter and therefore, she filed the due process complaint notice seeking the IEE (id.). The parent requested a neuropsychological IEE at public expense to be conducted by a provider of her choosing at the rate of $5,000 (id.).

B. Events Subsequent to the Initial Due Process Complaint Notice

The parties entered into a partial resolution agreement in January 2019, which provided that the district would fund a neuropsychological evaluation by a provider of the parent's choosing at a rate not to exceed $5,000 and that the CSE would reconvene to discuss the findings and recommendations of the neuropsychological evaluation (Dist. Ex. 1).

Subsequent to the resolution agreement, an independent neuropsychological evaluation of the student was conducted in January and February 2019 with the report from the evaluation dated March 4, 2019 (Parent Ex. K at pp. 1, 29).

A CSE convened on March 14, 2019 to review the results of the February 2019 neuropsychological evaluation (Dist. Ex. 23). The CSE found the student eligible for special education as a student with autism and recommended a program consisting of related services, including: one 30-minute session of group counseling services per week, two 30-minute sessions of individual OT services per week, one 30-minute session of individual speech-language services per week, and one 30-minute session of group speech-language services per week (Dist. Ex. 23 at pp. 1, 7-8). The March 2019 CSE also recommended that the parent receive two 45-minute sessions of parent counseling and training per year (id. at p. 8).

In March 2019, the parent requested that the district conduct a functional behavioral assessment (FBA) of the student (Dist. Ex. 16 at p. 1). The district charted the student's behaviors from May 1, 2019 through May 17, 2019 and completed an FBA on June 24, 2019 (Dist. Ex. 17; 18).

In October 2019, the parent had the student assessed by EBL Coaching and the director of EBL Coaching recommended that the student be provided with "400 hours of one-on-one multi-

sensory tutoring using the Orton Gillingham technique as well as specific multi-sensory tools to build his written language, mathematics, reading comprehension, and executive functioning skills" (Parent Ex. L).

C. Amended Due Process Complaint Notice

In an amended due process complaint notice dated November 19, 2019, the parent asserted that the student was denied a free appropriate public education (FAPE) for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. A at p. 1).[4, 5]

Generally, for all of the school years in question, the parent asserted that the district failed to develop procedurally or substantively valid IEPs, provide valid prior written notices, or evaluate the student in all areas of suspected disability (Parent Ex. A at p. 7). Also, the parent asserted that the IEPs did "not fully, adequately, or appropriately reflect or address [the student's] present levels of performance and educational needs" (id.). With respect to the parent's participation in the development of the IEPs, the parent contended that the district predetermined the student's programs, refused to consider input from the parent or the professionals who worked with the student, applied "illegal blanket policies and practices" in creating the student's IEPs, and used an "'IEP program' (i.e., SESIS)" which did not permit the CSE to input supports that the student required (id. at p. 8).[6] Turning to the recommended programs, the parent argued that the student's IEPs did not contain sufficient appropriate, measurable annual goals and short-term objectives to address the student's needs and assess his progress (id.). The parent asserted that none of the IEPs recommended "an appropriate educational program that would enable [the student] to make academic, social, and emotional progress–and avoid regression" (id.). Moreover, the parent alleged that the district failed to recommend an appropriate level of related services (id.). The parent contended the district "failed to consider adequately and rely upon sufficient and appropriate evaluative and documentary material to justify its recommendations, goals, or program" and the "recommended programs and services" were "without sufficient or appropriate justification or sufficient [prior written notice]" (id.).

Regarding the 2015-16 school year, the parent raised allegations related to the student being subjected to bullying on the school bus (Parent Ex. A at p. 3).[7] The parent also contended that, at the November 2015 CSE meeting, the district acknowledged that the student had

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[4] On two occasions, the IHO denied the parent's request for permission to amend the due process complaint notice but, ultimately, in March 2020, the district agreed to accept the parent's amended due process complain notice (see Tr. pp. 7, 61).

[5] The parent obtained an independent speech-language evaluation of the student, which was conducted on January 2, 2020 (see Parent Ex. M).

[6] As to the parent's argument that she was denied meaningful parent participation, she elaborated that the district failed to fully explain all options to her and failed to share copies of all documents used (Parent Ex. A at p. 9). The parent also asserted that the district failed to provide her with any meeting notes following any of the CSE meetings (id. at p. 8).

[7] The parent noted that the student failed his first math test of the 2015-16 school year and, as a result, she obtained a private tutor for the remainder of the 2015-16 school year, which she paid for out-of-pocket (Parent Ex. A at p. 2).

social/emotional needs but did not address those needs (id.). The parent asserted that the student's needs in this area continued to worsen and that he failed to make any meaningful progress (id.).

Regarding the 2016-17 school year, the parent argued that the district failed to address the student's social/emotional needs or provide a safe and supportive environment for the student as he was subjected to bullying on the school bus and at school during that school year (Parent Ex. A at p. 3). Further, the parent contended that district failed to implement the student's mandated counseling services as the counselor often provided 1:1 sessions despite the IEP mandate for group counseling, further noting that counseling was intended to address the student's needs related to socializing (id.). The parent asserted that the student continued to have difficulties with fidgeting, attention span, finishing his work, transitioning, and fine motor and organizational skills, yet the November 2016 CSE failed to provide goals or recommendations to address these areas of need and the student failed to make meaningful progress (id. at p. 4).

For the 2017-18 school year, the parent contended that the CSE again only recommended related services for the student, and again did not provide goals or recommendations to address the student's identified needs, particularly related to the student's social/emotional growth (Parent Ex. A at p. 4). The parent also noted that counseling services were removed from the June 2017 IEP due to the district's failure to implement counseling services the prior year and the lack of success with the counselor (id.). Also, the parent argued that the student was again subjected to bullying during the 2017-18 school year and continued to have "even more social and emotional issues than in the past" (id.). The parent asserted that the student failed to make meaningful progress during the school year (id.).

As to the 2018-19 school year, the parent contended that the June 2018 CSE did not address the student's identified needs, particularly the student's social/emotional needs (Parent Ex. A at p. 5). The parent asserted the student continued to be subjected to bullying and that the student was in an "inappropriate and unsupported environment" that "had a detrimental impact not only on his social and emotional growth, but also in academic areas" (id.). The parent contended that the district's then most recent evaluation, the October 2015 psychoeducational evaluation and the June 2018 Teachers College assessments, contained material and substantial deficiencies that invalidated them (id.). Due to the district's failure to fully evaluate the student, the parent noted that she had previously requested a comprehensive neuropsychological IEE, which the district agreed to fund in a partial resolution agreement (id. at p. 6). The parent contended that the district's agreement to fund the IEE demonstrated that it "seem[ed] to agree" with her assertion that the evaluations were insufficient (id.). However, the parent asserted that the March 2019 CSE, refused to "genuinely consider" the February 2019 neuropsychological evaluation report because the CSE refused to recommend the services that the report found "were necessary for the student to make meaningful progress" (id.). More specifically, the parent alleged that the CSE refused to recommend integrated co-teaching (ICT) services or special education teacher support services (SETSS) (id.). Moreover, according to the parent the district refused to follow the recommendation that an FBA of the student be conducted by a Board Certified Behavior Analyst (BCBA) (id. at p. 7).[8] The parent indicated that the district's June 2019 FBA contained "substantial and material deficiencies that invalidate it," further asserting that the FBA did not "adequately

[8] The parent also alleged that the district did not recommend a smaller bus for the student, despite a number of conflicts between the student and other students on the bus (Parent Ex. A at p. 7).

identify all behavior problems, address all factors that contribute[d] to [the student's] behaviors, and [was] not based on multiple sources as required" by the State regulations (id. at pp. 7, 8). The parent contended that the student failed to make meaningful progress during the 2018-19 school year (id. at p. 7).

For relief, the parent requested a finding that the district denied the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. A at p. 9). The parent also requested a finding that the district failed to thoroughly evaluate the student in all areas of suspected disability (id.). The parent requested that the district be required to fund an independent speech-language evaluation and an independent FBA in conjunction with a behavioral intervention plan (BIP) (id.). Finally, the parent requested compensatory education of 400 hours of 1:1 academic and executive functioning tutoring to be provided by EBL Coaching at their current rate and speech-language therapy to be provide by an independent provider of the parent's choosing at an enhanced rate (id. at p. 10).[9]

D. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on June 10, 2020, which concluded on August 7, 2020, after five days of proceedings (see Tr. pp. 1-623). In a decision dated October 17, 2020, the IHO found that the district offered the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (IHO Decision at pp. 55, 61, 65, 71, 72, 75).

Initially, the IHO indicated that the district was barred from raising the statute of limitations defense as the district accepted the parent's November 2019 amended due process complaint notice in March 2020 after the IHO had rejected the parent's application to amend on two separate occasions (IHO Decision at pp. 6, 8). The IHO denied the defense because "it was the [district] itself that accepted the amended [due process complaint notice]," which alleged a denial of FAPE over four school years (id. at p. 8). The IHO then determined that the district would defend the November 2015 IEP for the 2015-16 school year, the November 2016 IEP for the 2016-17 school year, the June 2017 IEP for the 2017-18 school year, and the June 2018 IEP for the 2018-19 school year (id. at pp. 8-9, 50-51).[10]

As for the 2015-16 school year, the IHO held that a parent member did not participate in the November 10, 2015 CSE meeting (IHO Decision at p. 52). The IHO found that this constituted a procedural violation; however, the IHO noted that it would only amount to a denial of FAPE if it impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process or caused a deprivation of educational benefits (id. at pp. 52-53). The IHO then determined that the parent fully participated in the November 2015 CSE meeting

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[9] The parent also requested costs and fees, including attorney fees, and any additional relief the IHO may determine is appropriate (Parent Ex. A at p. 10).

[10] The IHO held that the district did not have to defend the March 2019 IEP and also noted that he did not find the parent's testimony regarding her request for an FBA credible because the November 2019 amended due process complaint notice "requesting an independent FBA was accepted on or about March 19, 2020 and the Parent concedes receiving the DOE's FBA, three months later in June of 2019" (IHO Decision_at p. 9). This appears to have been a mistake by the IHO as to the timing of the amended due process complaint notice and the FBA (Parent Ex. A; Dist. Exs. 16; 17; see Tr. pp. 73-74).

(id. at p. 53). Next, the IHO found that the evaluative materials relied upon by the November 2015 CSE were all "current and sufficient" (id. at p. 53). The IHO summarized portions of the IEP and noted that the district speech-language pathologist testified that the student had behavior problems during the 2015-16 school year that did not rise to a level that would warrant a behavior plan (id. at pp. 54-55). Based on the foregoing, the IHO determined that the November 2015 IEP offered the student a FAPE (id. at p. 55).

Turning to the 2016-17 school year, the IHO found that the November 2016 CSE was duly composed (IHO Decision at p. 55). The IHO noted that the record demonstrated that the student exhibited academic skills at grade level (id. at p. 56-57).[11] The IHO held that evaluative and assessment materials were "recent, valid and a proper source to assess the student's needs, which had not materially changed from the prior year" (id. at p. 56). Again, the IHO noted that the district conceded that the student had some behavior problems during the beginning of the 2016-17 school year, but that the testimony indicated the student did not require a behavior plan and that an FBA was not yet conducted (id. at p. 58). Overall, the IHO found that the November 2016 IEP "was 'reasonably calculated' to provide the student with educational benefit commensurate with his needs and abilities, and that the [district] did offer the student a FAPE for the" 2016-17 school year (id. at p. 61).

With respect to the claims that the student was bullied, the IHO reviewed eight incidents in the hearing record, which the IHO noted "on occasion were initiated by the student himself or at least participated therein by him," and the IHO found they did not "make it more likely than not that he was the victim of bullying" (IHO Decision at pp. 58-60). The IHO cited to T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d. 289, 316, 318 (EDNY 2011), as the test for whether bullying resulted in a denial of FAPE (see IHO Decision at p. 60). Based on that test, the IHO determined that the student was at times at least partially responsible for the incidents, that the district had notice of the incidents, that the district did not act deliberately indifferent to the occurrences, and that these incidents did not "substantially restrict" the student's educational opportunities (id. at pp. 60-61). Therefore, the IHO found that the student was not denied a FAPE because of bullying (id. at p. 61).

For the 2017-18 school year, the IHO held that the June 2017 CSE was duly composed and the IEP addressed the student's needs and the parent's concerns (IHO Decision at pp. 61, 63-64). Regarding counseling services, the IHO found that the CSE recommended counseling but counseling was removed at the parent's request (id. at p. 64). The IHO noted that the parent testified that the student's father requested the removal of counseling services because he felt the counselor was inappropriate; however, the IHO held that the "generalized testimony was never specified or the alleged 'inappropriateness' identified" (id. at pp. 64-65). Despite the lack of counseling services, the IHO credited the testimony of the district speech-language pathologist regarding the student's behavioral needs and noted that the IEP had a social/emotional/behavioral goal (id. at p. 64). The IHO found that the June 2017 CSE used "recent evaluative and assessment information that assessed the student['s] needs and resulted in an IEP that identified those needs with strategies and recommendation[s] that [we]re reasonably calculated to provide the student

[11] The IHO also acknowledged testimony in the hearing record that indicated the student was not at grade level in math, science, or social studies (IHO Decision at p. 57).

educational benefit" and, therefore, that the district offered the student a FAPE for the 2017-18 school year (id. at p. 65).

Regarding the June 2018 CSE meeting for the 2018-19 school year, the IHO found that the CSE was duly composed (IHO Decision at p. 65). The IHO then quoted from the IEP in determining that the student had made progress "in his speech and social emotionally" (id. at pp. 66-68). The IHO also reviewed testimony by the district speech-language therapist showing that the student was performing on grade level in reading, mathematics, and writing and that the student's behaviors were being addressed in the classroom (id. at pp. 68-69). The IHO again noted that the parent requested the removal of counseling services and that there was no indication the parent would have accepted counseling services for the new school year (id.). Further, the IHO found that the parent's objection to the IEP as not addressing the student's social, emotional, and academic needs did "not make sense" because the parent would not allow counseling services, the IEP had both speech and social/emotional goals, and the student had made progress in those areas (id. at pp. 69-70). The IHO noted that the district was required to recommend a program in the least restrictive environment and that the June 2018 IEP met this requirement (id. at p. 70). The IHO determined that the June 2018 IEP "reflect[ed] the results of the student's recent evaluations and assessments" and was reasonably calculated to allow the student to make progress (id. at p. 71).

Turning next to the testimonial and documentary evidence offered by the parent, the IHO noted that none of the evaluative materials, recommendations, or testimony was available to any of the four CSEs (IHO Decision at pp. 71-72).[12] The IHO held that there was contemporaneous evidence that the parent agreed with the CSEs' recommendations and consented to their implementation, despite her testimony during the hearing to the contrary (id. at p. 72). The IHO found that the testimony and evaluations of the independent evaluators was not evidence that the four IEPs were defective and that "hindsight is not a basis for questioning the appropriateness of an IEP" (id.).

Finally, the IHO addressed the parent's request for IEEs (IHO Decision at pp. 72-75). First, the IHO noted that the parties had entered into a resolution agreement, with the district agreeing to fund the independent neuropsychological evaluation (id. at p. 72). The IHO then found that there was "no contemporaneous, subsequently written or credible evidence in the record that the Parent specifically requested that the student be evaluated, or that she disagreed with any of the [district] evaluations" (id. at p. 74). The IHO held that to "argue that a [due process complaint] seeking IEEs, is itself 'notice' to the [district], runs contrary to the law as contemplated, against the spirit of the regulation, and is fundamentally unfair because it does not afford the agency time to either conduct the 'requested' evaluations, offer IEEs, or defend its position" (id.). The IHO noted State-level administrative decisions finding that a due process complaint notice may be sufficient notice for an IEE; however, he held that these decisions were not binding precedent and that the federal courts had yet to clearly set a precedent on this issue (id.). As such, the IHO held an award of IEEs was not appropriate but indicated he would exercise his discretion and order the district to

[12] More specifically, the IHO referred to the March 2019 neuropsychological evaluation, the testimony of the neuropsychologist, the January 2020 independent speech-language evaluation, the testimony of the speech-language expert, and the testimony of the director of EBL coaching who assessed the student on October 14, 2019 (IHO Decision at p. 71).

"conduct evaluations in all areas of the student's suspected disability, that have not been evaluated within the last two years" (id. at p. 75). Further, the IHO ordered the CSE to reconvene after completion of the student's evaluations and produce a new IEP for the 2020-21 school year (id.). The IHO also ordered the parties to "honor their partial resolution agreement awarding the Parent an independent neuropsychological evaluation at a cost not to exceed $5,000" (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the district offered the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years. First, the parent argues that the IHO failed to address several of her claims, including that the IEPs were predetermined, the March 2019 IEP denied the student a FAPE, and counseling services were not implemented pursuant to the November 2016 IEP.[13] Regarding the March 2019 IEP, the parent asserts that the amended due process complaint notice contained claims regarding its recommendations and that the IHO allowed testimony on that IEP, yet the IHO "inexplicably state[d] that it 'is an IEP that doesn't have to be defended here.'"

The parent also raises a number of allegations regarding bias on the part of the IHO and related to the IHO's conduct of the impartial hearing. Specifically, the parent contends that the IHO failed to develop the hearing record, regularly limited relevant testimony or curtailed cross-examination, and unilaterally extended the compliance date and misrepresented to both parent and district counsel that such extensions were requested. The parent further alleges that the IHO conducted the hearing in a "biased and unprofessional manner resulting in gross prejudice to [the] Parent." The parent asserts that the "IHO evidenced that he predetermined the outcome of the hearing on numerous occasions," completely cut-off the parent's counsel's redirect of the parent's testimony by sustaining objections that were never made, repeatedly expressed "a desire to conclude the hearing quickly above all other concerns," and made "extremely unjudicial comments throughout the hearing process." The parent offered two exhibits as additional evidence to support

[13] The parent also generally indicates that the IHO did not address all of the allegations contained in the amended due process complaint notice and seems to request a comparison be made between the 10-page amended due process complaint notice and the 76-page IHO decision (Req. for Rev. ¶ 22). State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The generic assertion contained in the request for review does not meet the standards of Part 279, particularly in light of the depth of both the amended due process complaint notice and the IHO decision (compare Parent Ex. A, with IHO Decision). It is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]). In addition, while the parent did reference specific paragraph numbers in the amended due process complaint notice in a separate allegation, that allegation only alleged a failure to deem the unopposed or unaddressed factual allegations admitted (Req. for Rev. ¶ 23). I need not address this allegation specifically as a full review of the hearing record, including the parties' allegations, is being conducted.

these allegations and indicates that she could provide additional email correspondence to support these allegations upon request.

The parent also raises a number of allegations regarding the IHO's decision and objections to the IHO's reliance on specific facts and legal standards. The parent asserts that the IHO indicated part of the transcript was not legible, and yet the IHO still relied on this "supposedly incomplete or illegible transcript." Further, the parent alleges the IHO's decision "was vague and failed to include clear legal findings with citations on 'substantive grounds.'" The parent argues that the IHO misapplied and failed to apply governing law as he did not adhere to the standard set forth by the Supreme Court in Endrew F., did not apply the correct standard in addressing the parent's request for an IEE, and applied the wrong standard to the parent's claims related to bullying. Also, the parent contends that the IHO relied upon exhibits that were not entered into evidence during the impartial hearing, specifically the affidavit testimony of district witnesses. The parent contends that the IHO erred in relying on evidence that was not a part of the hearing record. The parent argues that the IHO "made multiple 'findings' unsupported by the record and based on his ruling on incorrect factual finding that are contrary to the record." The parent contends that the IHO ignored testimony that the student was not at grade level and instead improperly relied "on testimony concerning assessments that are not in evidence." Next, the parent asserts that the IHO misinterpreted and disregarded the testimony of the parent's witnesses without basis. She further argues that the IHO improperly dismissed this testimony by calling it hindsight and that, by doing so, he "grossly misinterpret[ed] the testimony." Further, the parent asserts that the IHO misrepresented the testimony of the parent.

The parent asserts that the IHO erred by failing to hold the district to its burden to prove that a FAPE was offered for all school years at issue. Specifically, the parent contends that district witness testimony was "rife with contradictions, misleading statements and evasive answers on cross-examination" and "failed to offer a 'cogent and responsive' basis for the IEPs in question." According to the parent, the testimony relied on by the IHO contradicted the documents in the hearing record and the credible testimony of the parent's witnesses.

The parent argues that the IHO erred by failing to hold the district to its burden to establish it thoroughly assessed the student in all areas of suspected disability. Specifically, the parent asserts that the district failed to defend its 2015 psychoeducational evaluation and the evaluation was struck from the record. Further, the parent notes that witnesses at the impartial hearing testified that the 2015 psychoeducational evaluation was inadequate. The parent contends that the district never conducted a comprehensive speech-language evaluation and relied on a 2015 independent speech-language evaluation that its own witness admitted was not comprehensive. The parent argues that the district failed to defend its FBA and the parent's witnesses established that it was inadequate. The parent contends that the hearing record does not support the IHO's finding that the IEPs were based on adequate evaluative information and that the CSEs' failure to rely on adequate evaluative information "prevented them from creating programs designed to address [the student's] unique needs."

Further, the parent asserts that the IHO failed to hold the district "to its burden to establish that its program recommendations appropriately addressed [the student's] behavior, attention and executive functioning, and social-emotional issues during the" school years at issue. The parent asserts that the district witnesses acknowledged that the student had behavioral needs throughout all four school years, yet the IHO dismissed these concerns about the student's behavior as he

"blindly" accepted the unsupported conclusion that they did not rise to a level that required a BIP. The parent contends that the IHO ignored evidence that the IEPs failed to address the student's behaviors. Moreover, the parent asserts that the IEPs had no mandated supports for the student's attention and executive functioning, which the district witnesses acknowledge the student had, and as such, the parent asserts the student "could have benefitted from another teacher in the room." Regarding the student's social/emotional needs, the parent argues that the IHO failed to address the appropriateness of the recommendations and, instead, held the parent responsible for purportedly refusing to consent to the student receiving counseling services. The parent asserts that the IHO erred in finding that the parent did not explain why counseling services were refused and allege that the hearing record shows counseling services were refused because the parent felt the counselor discussed inappropriate issues and because the district failed to properly implement the service in a group. The parent argues that the IHO's finding essentially "absolves the [district] of its duty to support" the student in this area and ignores the unrebutted testimony of the parent.

The parent contends that the IHO failed to hold the district to its burden to show that its program recommendations appropriately addressed the student's speech-language needs during the school years at issue. The parent argues that the evidence in the hearing record shows that the district never conducted a comprehensive speech-language evaluation of the student and the progress reports only demonstrated "some improvement" or "slight progress." The parent points to testimony from the district speech-language pathologist that the student would have benefitted from additional speech-language therapy services in the June 2018 IEP and testimony from parent witnesses that all IEPs did not recommend the appropriate level of speech services.

Moreover, the parent argues that IHO applied the wrong legal standard regarding bullying claims and erred in his analysis of this issue. The parent contends that the incidents of bullying were uncontroverted and that the evidence in the record "established that bullying contributed to [the student's] social isolation and, consequently his academic progress in school." Moreover, the parent argues that the IHO failed to address her claim that the district refused to discuss bullying at the student's CSE meetings and that the issue of bullying was ignored by the CSEs, which effectively denied the parent meaningful participation in the creation of the IEPs.

Turning next to the IHO's denial of her request for IEEs, the parent asserts that the IHO misapplied the law regarding IEEs. The parent argues that the IHO was "incorrect" in his beliefs that an IEE request made in a due process complaint notice was insufficient notice and that a parent must make an IEE request prior to filing a due process complaint notice. The parent contends that this decision is not supported by recent authority. The parent further argues that the IHO failed to consider an equitable basis for awarding the requested IEEs. The parent asserts that the IHO also erred in finding "without any basis in the record, that Parent did not disagree with the [district] evaluations, and did not request independent evaluations." The parent asserts that it is undisputed that she requested a speech-language evaluation in March 2019 and that she informed the district she disagreed with the FBA prior to filing her amended due process complaint notice.

The parent requests that the IHO's decision be reversed and a finding be made that the student was denied a FAPE for all school years at issue. As for relief, the parent asserts that the student is entitled to 400 hours of compensatory tutoring services and 140 hours of compensatory speech-language therapy. The parent further requests that the district be required to fund an independent FBA, BIP, and speech-language evaluation. In the alternative, the parent requests that the proceeding be remanded to a new IHO to further develop the hearing record.

In an answer and cross-appeal, the district responds to the parent's allegations and argues that the IHO's finding that it offered the student a FAPE for the four school years should be upheld. For a cross-appeal, the district argues that the IHO erred by failing to find that the statute of limitations barred the parent's claims for the 2015-16 and 2016-17 school years. The district contends that the CSE for the 2015-16 school year was held on November 10, 2015 and the prior written notice was dated November 28, 2015 and for the 2015-16 school year, the CSE was held on November 4, 2016 and prior written notice was dated November 16, 2016. Therefore, the district argues that the parent had two years from the date of each prior written notice to file a claim, yet the parent's amended due process complaint notice was not dated until November 19, 2019. The district contends that this filing was more than two years from the date the claims accrued and the parent had not raised any exceptions to the statute of limitation and, therefore, the claims are time barred.

In an answer to the district's cross-appeal, the parent asserts that the district's cross-appeal was untimely and should not be entertained.[14] Next, the parent argues that the statute of limitations does not apply and that the claims for the 2015-16 and 2016-17 school years are not time barred. The parent contends that the statute of limitations does not apply because the district accepted the amended due process complaint notice when it did not have to and did not preserve the defense throughout the hearing. Further, the parent asserts that she only became aware of her claims in March 2019, when the independent neuropsychological evaluation was completed. The parent also contends that the district has the obligation to establish the statute of limitations defense, which it failed to do as it did not demonstrate when the parent knew or should have known of her ability to file for an impartial hearing, since the hearing record does not demonstrate that the parent received the procedural safeguards notice. Moreover, should it be found that the statute of limitations does apply, the parent contends that it should not impact her request for compensatory education.

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]).

[14] The parent's argument about the timeliness of the district's cross-appeal is without merit. The regulations contemplate that a cross-appeal will be set forth in an answer (8 NYCRR 279.4[f]). Therefore, the district's request for a specific extension of time to serve and file an answer was sufficient to encompass a request for an extension to serve and file a cross-appeal. Further, the parent had notice that the district intended to cross-appeal because the district served a notice on intention to cross-appeal and case information statement consistent with State regulation (see 8 NYCRR 279.2[d]-[e]). As for the parent's assertion that the district did not need more time to prepare its answer and cross-appeal, the district's extension request set forth good cause, the undersigned granted the district's request for an extension, and I will not revisit the stated reasons for the district's request in this decision.

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]).[15]

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence & Record Issues

As an initial matter, the parent argues that the IHO erred because he based his decision on exhibits that were not entered into evidence during the impartial hearing, specifically district exhibits 37 and 38. The district asserts that these exhibits were entered into evidence during the impartial hearing.

The transcript demonstrates that district exhibits 37 and 38 were never officially entered into hearing record; however, this is also true for Parent Exhibits N, O, P, U, and V. These exhibits are direct affidavit testimony of the parties' witnesses (see Parent Exs. N; O; P; U; V; Dist. Exs. 37; 38). State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]). There is no requirement in State regulation that the affidavits be admitted into evidence as exhibits, although that practice is an efficient way to manage and organize the hearing record. Here, when each party moved to enter their exhibits into the hearing record, these exhibits were intentionally withheld from being entered into evidence until the witness was made available for cross-examination (Tr. pp. 40-41, 48-49, 79, 83).[16] The parent's attorney also stated that he would stipulate to the admission of district exhibits 37 and 38

[15] 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).

[16] It is noted that district exhibits 25 and 26 (which were also affidavits) were withdrawn by the district (Tr. p. 77).

"so long as those affiants [we]re available for a cross-examination" (Tr. pp. 78-79). When both witnesses appeared at the hearing, the IHO had the witnesses review their affidavit testimony and confirm that they did not want to change anything and that the affidavit was their direct testimony in this proceeding (Tr. pp. 90-94, 292-97). The parent was then able to cross-examine both witnesses (see generally Tr. pp. 110-272, 301-446). Further, the IHO specifically asked both the parent's attorney and the district representative if there was any objection to the content of the affidavits, to which they responded in the negative (Tr. pp. 40, 48, 80, 83). Although, it may have been a cleaner practice for the district to have formally moved to enter the two affidavits into the hearing record when the witnesses testified, there is no prejudice in accepting them as evidence, especially considering the parent's attorney followed the same practice regarding the parent's witnesses testimony (see Tr. pp. 462, 492, 516, 534, 580).[17] Moreover, the parent cited to the district affidavits multiple times in her post-hearing brief, as well as to testimony elicited during cross examination (Parent Ex. W at pp. 9, 14, 15). As it appears to have been an oversight that the exhibits were not formally entered into evidence and considering those exhibits constituted direct testimony, which was avowed by the witnesses as their direct testimony during the hearing prior to cross-examination, the IHO was correct in reviewing and relying on the testimony contained in those exhibits. Both exhibits will be reviewed in rendering this decision as well and for ease of reference they will be referred to as district exhibit 37 and district exhibit 38.

Turning to the multiple exhibits presented by each party as additional evidence on appeal (all of which are identified by the parties as "SRO exhibits"), generally documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the proffered documents were available at the time of the impartial hearing and are not necessary to resolve the issues presented on appeal, and, therefore, I decline to exercise my discretion to consider them as additional evidence.

Specifically, SRO exhibit A, offered as additional evidence with the parent's request for review, is a series of emails and information regarding extension of the compliance date by the IHO.[18] This document is submitted in support of the parent's claim that the IHO unilaterally granted extensions of the compliance date and misrepresented that both parties had requested those extensions. However, as discussed below, even assuming the parent's claim is accurate, it does not support overturning the IHO decision. Accordingly, this document is not necessary to make a determination and it will not be considered on appeal.

[17] Even though, the IHO's decision indicated that the affidavits submitted by the parent were entered into the record, a full review of the transcripts demonstrates that the affidavits were not formally entered into evidence during the impartial hearing.

[18] The final email in this document was dated, October 7, 2020, prior to the issuance of the IHO decision (SRO Ex. A at p. 1). The October 7, 2020 email included data showing the extensions granted to the timeline for the impartial hearing; however, the case follow up sheets from which that information was gathered were already submitted as a part of the hearing record in this matter.

The parent also submits SRO exhibit B, which is a series of emails from May 28, 2020 through June 3, 2020 between the parties and the IHO discussing the issues and witnesses in preparation for the impartial hearing. Similar to SRO exhibit A, SRO exhibit B appears to be provided as support for the parent's allegations regarding the extensions of the compliance date (see Parent Mem. of Law at p. 7).[19] As with SRO exhibit A, SRO exhibit B is not necessary for a determination on that issue and accordingly it is not accepted into the hearing record for this reason.

The remaining documents offered by the parties relate to a request from the undersigned for additional evidence. After a preliminary review of the impartial hearing record in this matter, it was determined that additional evidence was potentially relevant and necessary for a full review of the parties' claims. Thus, in a letter dated December 15, 2020, the undersigned, pursuant to 8 NYCRR 279.10(b), requested a full copy of the October 2015 psychoeducational evaluation. The October 2015 psychoeducational evaluation had been admitted into evidence during the hearing record and is marked as district exhibit 32; however, it was struck from the record when it was determined that the exhibit was missing a page (Tr. pp. 104, 156). The district submitted a full copy of the October 2015 district psychological evaluation with its answer and cross-appeal designated as "SRO Exhibit 1." The parent then submitted two more exhibits with the answer to the cross-appeal identified as SRO exhibits C and D. SRO exhibit C is the parent's copy of the 2015 psychoeducational evaluation and SRO exhibit D is an affidavit from the parent regarding her copy of the evaluation.

Although I had initially requested the submission of the full copy of the October 2015 district psychological evaluation report, upon further review of the hearing record, I find that the report is unnecessary to conduct a full review of the claims before me. Therefore, I decline to consider it. Accordingly, SRO exhibits C and D and SRO exhibit 1 are not accepted as a part of the hearing record in this matter and will not be considered in rendering this decision.

2. Conduct of the Hearing, IHO Bias, and Legal Standard

The parent argues that the IHO demonstrated bias against the parent and parent counsel as he cut off cross-examinations by sustaining objections that were never made and indicated his desire to end the hearing as quickly as possible. Further, the parent asserts that the IHO made prejudicial comments throughout the hearing process. Additionally, the parent contends the IHO inappropriately extended the compliance dates.

In regard to the parent's contention regarding the compliance date, the evidence in the record does not support that the IHO's decision should be disturbed based on improper extensions of the hearing timeline. An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension,

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[19] While SRO exhibit A was referenced in the request for review and a request was made for its addition to the hearing record, the request for review did not reference or request that SRO exhibit B be added to the hearing record.

and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[20] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

In this matter, before the first hearing date, the IHO granted 13 extensions to the timelines purportedly at the request of both parties. According to the IHO's orders of extension, eight of the extensions were due to "Availability of Witnesses" and five were to accommodate "Settlement Discussions." In addition, after the impartial hearing began, three additional extensions were granted purportedly at the request of both parties for "Extensive Testimony/Issues," "Post Hearing Briefs," and "Decision." Notwithstanding the representation that the requests were made by both parties, the hearing record reflects that, during the hearing, parent's counsel objected twice on the record to the IHO granting extensions (Tr. pp. 53-54, 273, 281-82, 621-22).[21] The first objection that is documented in the transcript was made during the July 7, 2020 hearing, which the IHO adjourned because the parent was unable to attend (Tr. pp. 278-84). The other objection was made at the end of the substantive hearing to enable the parties to submit closing statements and obtain transcripts (Tr. p. 621). At the time of the second objection, counsel for the parent indicated that "[t]he Parent [wa]s vehemently opposed to any extensions as we've made clear on the record many times in the past" (Tr. p. 621). In addition to discrepancies with identifying the requesting party, the IHO also did not indicate on the orders of extension whether he considered the cumulative impact of the factors set forth in State regulation (i.e., effect on student's "educational interest or well-being," the parties' opportunity to present their cases, "any adverse financial or other detrimental consequences" to a party, and any delay in the proceeding thus far) (8 NCYRR 200.5[j][5][ii]).

Although the parent is making serious accusations against the conduct of the IHO—i.e., that the IHO misrepresented on documents in the hearing record that both parties requested extensions—the accusation does not provide a basis for what the parent is seeking on appeal, i.e., overturning the IHO's substantive findings. If the evidence in the hearing record supported that the IHO improperly granted extensions to the compliance date, the resulting finding would be that the IHO's decision was not rendered within the applicable timelines. However, courts have found that as long as the student's substantive right to a FAPE is not compromised because of a late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's

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[20] However, State regulation does allow for extensions beyond 30 days but for no more than 60 days during the time that schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis (8 NYCRR 200.5[j][5][i]).

[21] The parent references other communications off the record during which the parent's counsel expressed disagreement with the extensions to the timeline.

emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if. . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alterations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015], [noting that "[t]he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning"], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; M.L. v. New York City Dept. of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014] ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

While the timing of the IHO's decision in this instance does not result in a finding that the student was denied a FAPE, the IHO is nevertheless reminded that a student may be prejudiced by delays in decision issuance and that he must comply with the applicable State regulations for granting extensions and rendering a decision in a timely manner.

While the parent objects to delays during the hearing, the parent also complains that the IHO desired "to conclude the hearing quickly above all other concerns" (Req. for Rev. at p. 9). I next turn to this allegation and the parent's other allegations that the IHO exhibited bias against the parent during the course of the hearing.

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]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR

200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

In the instant matter, the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. Initially, the parent's contention that it was the "IHO's desire to conclude the hearing quickly above all other concerns" is not supported by the hearing record. Though the IHO expressed frustration, as he believed the hearing could be concluded within one day (see Tr. p. 51), the IHO allowed for five days of proceedings. Additionally, the IHO allowed the parent's counsel significant leeway to ask the witnesses the same or very similar questions repeatedly throughout the duration of the impartial hearing (see generally Tr. pp. 115-18, 175, 177-79, 313-319, 327).[22] It was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]). The parent's counsel might not have liked how the IHO attempted to control the hearing; however, this does not demand a finding that the IHO demonstrated bias in favor of the district. The hearing record demonstrates that, overall, the IHO was patient, dignified and courteous with the parties.[23] A review of the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her requests for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, the evidence in the hearing record does not support a finding that the IHO exhibited bias against the parent.

Additionally, the parent argues that the IHO failed to analyze the claims based on the Endrew F. standard, noting that the IHO stated during the impartial hearing that the district does not have to meet a very high standard (Req. for Rev. at ¶ 16; see also Tr. pp. 22, 27). As pointed out by the parent, the standard set forth by the IHO at the commencement of the hearing does not appear to be in line with the standard set forth by the Supreme Court in Endrew F. (see Tr. p. 22). However, in his decision, the IHO correctly cited to the Endrew F. standard multiple times (see

[22] The parent also points to the IHO's decision where he indicated that 160 pages of the transcript were "missing or rendered illegible" and argues that the IHO erred in relying on this portion of the transcript (see Req. for Rev. ¶ 14). In his decision, the IHO stated, because "the parties repeatedly ignored instructions not to talk over each other," the resulting transcript contained "large portions either missing or rendered illegible" (IHO Decision at p. 12). A review of the whole transcript demonstrates that no pages are missing but that portions of the transcript contain a number of notations showing portions of the testimony were omitted due to "interposing" or "indiscernible" statements. As the IHO observed, the transcript is at times difficult to read due the to the parties' failure to follow the IHO's instructions to speak one at a time; however, any information missing does not detract from the information that is included in the transcript and, while the attorney for the parent places the onus on the IHO to correct any errors in the transcripts, the IHO correctly points out that he reminded the parties on multiple occasions not to talk over each other during the hearing (Tr. pp. 95-96, 305, 521; see IHO Decision at p. 12). Under these circumstances, the parent's allegation does not provide a reason for disturbing the IHO's decision.

[23] The parent's counsel objects to the IHO's reference to "Perry Mason"; however, this reference does not support a finding of bias. In both instances the reference was made, the IHO was explaining to counsel that real-life cross-examination was not like a television show and that the witness did not have to answer the question to the parent's counsel's liking, so long as the witness answered the question (Tr. pp. 138, 564).

IHO Decision at pp. 50, 55, 71) and found that all IEPs created for the school years in question were reasonably calculated to enable the student to make progress in light of his circumstances (id. at pp. 55, 61, 65, 71). As such, in rendering his decision, the IHO applied the correct legal standard. Moreover, even if the IHO did apply an incorrect legal standard, this would not be grounds to reverse the decision as I have fully reviewed the IHO's findings and the evidence in the hearing record and apply the legal standard set forth by the Supreme Court.

3. Statute of Limitations

The IHO held that the district waived the defense of statute of limitations for the 2015-16 and 2016-17 school years because the district agreed to accept the parent's amended due process complaint notice (Tr. pp. 21, 33; IHO Decision at p. 8). The district cross-appeals from this finding, arguing that the parent's allegations related to the 2015-16 and 2016-17 school years are barred by the statute of limitations. The district contends that the parent filed her claims regarding these school years in the November 19, 2019 amended due process complaint notice, which was outside the two-year statute of limitations period, and as such they are time barred.

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]). Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.51-1[f]; 8 NYCRR 200.5[j][1][i]).

Here, the district did not waive its defense of statute of limitations by accepting the amended due process complaint notice. State regulations allow for a party to file an amended due process complaint notice if "the other party consents in writing to such amendment" or "the impartial hearing officer grants permission" (8 NYCRR 200.5[h][7]). Nothing in this regulation prevents a district from raising an affirmative defense after accepting an amended due process compliant notice. Moreover, had the district refused to accept the amended due process complaint notice, the parent would have been able to file another due process complaint notice under a different case number raising the same claims that were raised in the November 2019 amended due process complaint notice. If this happened, the district would have been able to raise the statute of limitation defense without question. Therefore, the IHO erred in finding that by

accepting the amended due process complaint notice, the district waived the statute of limitations defense.

The IDEA's statute of limitations is an affirmative defense which only applies if raised at an impartial hearing (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d. 296, 304 [S.D.N.Y. 2014]). The district complied with this requirement as it raised the defense at the first hearing date (Tr. pp. 18-20, 32). The IHO denied the district's request to raise the issue (Tr. p. 33). Further, at the beginning of the next hearing date, the IHO specifically noted that the district had raised statute of limitations and that he had denied the request (Tr. p. 65). The district was not required to raise the issue at each hearing date, once the IHO clearly denied the request. Therefore, the district met its requirement to raise the defense at the impartial hearing and did not fail to preserve the defense.

Turning to the substance of the statute of limitations defense, the initial due process complaint notice in this matter is dated November 30, 2018 and only asserts that the student was not fully evaluated in all areas of suspected disability and requests a neuropsychological IEE (Parent Ex. I at pp. 1-2). The amended due process complaint notice dated November 19, 2019 is the only complaint for this proceeding that includes allegations that the district denied the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. A). The parent's allegations regarding the 2015-16 and 2016-17 school year contained challenges to the district's evaluations of the student, the CSE process, and the recommendations contained in the November 2015 and November 2016 IEPs, as well as claims that the student was subjected to bullying during those school years and that counseling was not implemented as recommended during the 2016-17 school year (id.). There is no question that the claims related to the conduct of the CSE process or the contents of the student's November 2015 and November 2016 IEPs accrued at the time of the CSE meeting or at the latest upon the parent's receipt of the IEPs (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd 2018 WL 3650185 [2d Cir. Aug. 1, 2018]).

The hearing record demonstrates that for the 2015-16 and 2016-17 school years, the CSEs convened and created IEPs dated November 10, 2015 and November 4, 2016 respectively (see Dist. Exs. 33; 34). The hearing record also includes prior written notices for both of these meetings dated November 28, 2015 and November 14, 2016 (see Dist. Exs. 2; 4). According to the parent's testimony she did not recall receiving the prior written notices (Parent Ex. V at p. 8). However, the parent did attend both the November 2015 and November 2016 CSE meetings (Dist. Exs. 33 at p. 12; 34 at p. 11). In addition, the parent testified that she did not agree with the November 2015 IEP because it did not address the student's "educational struggles, which were discussed at length during the IEP meeting and in the IEP" (Parent Ex. V at p. 1). Similarly, for the November 2016 IEP, the parent testified that she did not agree with the CSE's recommendations (id. at p. 3).

Here, based on the evidence in the hearing record, the parent's claims related to the November 2015 IEP and CSE process for the 2015-16 school year accrued, at the latest, as of the November 10, 2015 CSE meeting, and the claims related to the November 2016 IEP and CSE process for the 2016-17 school year accrued at the latest on November 4, 2016, the date of the CSE meeting. The parent had two years from those dates to initiate an impartial hearing, however, as

the November 19, 2019 amended due process complaint notice was well outside of this window, the claims raised for these school years are time barred.[24]

Moreover, the parent's claims regarding bullying during the 2015-16 and 2016-17 school years and the implementation of counseling services during the 2016-17 school year are time barred as the parent was aware of these issues during the respective school years (Tr. pp. 552-56). With respect to counseling, the parent testified that she requested that counseling services be removed from the student's IEP because they were not being implemented; this request was made at the June 2017 CSE meeting (Tr. pp. 429; Parent Ex. V at pp. 3-4; Dist. Ex. 38 at p. 3; see Dist. Ex. 8). Accordingly, the parent's claim accrued at the latest on June 20, 2017, the date of the CSE meeting at which she requested the removal of counseling services. Similarly, the parent was aware of the incidents that she alleges constituted bullying during the school years at issue; her testimony points to specific incidents that occurred during each of the school years and indicates that the parent received notifications of these incidents and/or notified the school district of them (Parent Ex. V at pp. 2-3; see Parent Exs. B-E).[25] Accordingly, the parent had knowledge of these claims during the school years at issue and they accrued at that time, with the 2016-17 school year ending June 30, 2017.[26] For these reasons, to the extent the parent alleged that the alleged bullying incidents contributed to the student's social isolation and academic progress in school during the 2015-16 and 2016-17 school years, those claims are outside the statute of limitations since the amended due process complaint notice raising these claims for the first time was not filed until November 30, 2019; however, to the extent the parent alleges that the CSEs failed to discuss

[24] Notably, even if the date that the parent's first due process compliant notice was filed was used, the claims would still be outside of the two-year window as the initial due process complaint notice was filed on November 30, 2018 (see Parent Ex. I at p. 1).

[25] While the parent asserts that she did not receive a copy of the June 2017 teacher report included in the hearing record (Parent Ex. V at p. 3; Dist. Ex. 5), and she testified that she did not agree with everything in the report or that some additional information should have been included, the parent's testimony does not indicate that there was any information included in the report that she was not aware of in June 2017 (Parent Ex. V at p. 3).

[26] In finding that the district waived the statute of limitations defense, the IHO did not go so far as finding that the November 2019 amended due process complaint notice would be deemed to relate back to the November 2018 due process complaint notice. Nor does the parent at any point argue that the timeliness of her claims should be examined taking into account the date of the original due process complaint notice. Generally, an amended complaint may relate back to an earlier complaint under the relation back doctrine in order for "a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired" (Buran v. Coupal, 661 N.E.2d 978, 981 [N.Y. 1995]). Even assuming that the relation back doctrine applied here, under circumstances such as those presented in this matter, the relevant consideration is whether the original complaint gave the defendant notice of the transactions or occurrences at issue (O'Halloran v. Metro. Transp. Auth., 60 N.Y.S. 3d 128, 131–32 [1st Dept. 2017]). Upon review of the original due process complaint notice in this matter (requesting only an IEE) and the amended due process complaint notice (alleging a denial of FAPE over four school years), the original complaint did not give the defendant notice of the transactions or occurrences at issue in the amended due process complaint notice (Parent Exs. A; I). This is especially so for the allegations in the amended due process complaint notice related to implementation of counseling services and incidents of bullying, as they do not in any way relate back to the district's obligation to evaluate the student. Accordingly, the statute of limitations on the parent's claims related to events that occurred during the 2016-17 school year continued to run until the filing of the November 2019 amended due process complaint notice.

bullying, that claim is live to the extent it is related to each of the CSE meetings that occurred within the actionable timeframe.[27]

Turning to the parent's allegation that she did not know until she received the March 2019 neuropsychological evaluation report of her claims regarding the 2015-16 and 2016-17 school years, this assertion is contrary to the above description of her disagreements with the results of the November 2015 and November 2016 CSE meetings. The parent testified that "[o]nce I digested his report, I realized—for the first time—the extent to which [the student's] previous [district] programs were inadequate and the extent to which he failed to make meaningful progress. I also was able to finally understand his disability as well as his strengths, weaknesses, and educational needs" (Parent Ex. V at p. 6). This is contrary to testimony in which she expressed that she did not agree with the CSE recommendations at the time they were made (id. at pp. 1, 3). More importantly, this argument is inconsistent with the allegations contained in the amended due process complaint notice, in which the parent alleged that the November 2015 and November 2016 CSE's "acknowledged many of [the student's] issues" but did not address them (Parent Ex. A at pp. 3, 4). Thus, the evidence in the hearing record shows that the parent knew about her challenges to the November 2015 and November 2016 IEPs as of the CSE meetings.

In her answer to the cross-appeal, the parent also asserts that the "withholding of information" exception to the statute of limitations should apply.

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent" (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; C.H. v. Nw. Indep. Sch. Dist., 815 F. Supp. 2d 977, 986 [E.D. Tex. 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

[27] Although the June 2017 CSE meeting occurred more than two years prior to the date of the November 2019 amended due process complaint notice, the district has not alleged that the parent's claims related to the June 2017 CSE meeting were outside of the statute of limitations period and therefore, the district has waived the statute of limitations defense regarding the June 2017 CSE meeting.

In this matter, the parent testified that she did not remember receiving the procedural safeguards or the prior written notices from the district; however, this testimony is not compelling in light of the consent for initial services (see Parent Ex. V at p. 8; Dist. Ex. 3). The consent for initial provision of services was signed by the parent on December 1, 2015, which indicated that if the parent did not agree with the recommendation, she had the right to request either mediation or an impartial hearing and provided information on how to contact the impartial hearing office (Dist. Ex. 3). Additionally, the parent has not asserted that her purported failure to receive prior written notices or procedural safeguards notices actually prevented her from filling a due process complaint notice (Parent Ex. V at p. 8). Based on the above information, particularly the signed consent explaining the right to request an impartial hearing, the hearing record does not support a determination that the parent was prevented from filing a due process complaint due to the district failing to provide her with information required by the IDEA and its implementing regulations and thus, does not warrant application of the withholding of information exception to the limitations period.

B. 2017-18 School Year – June 2017 IEP

1. Sufficiency of Evaluative Information

The parent asserts that the IHO erred in finding that the evaluative material relied upon by the June 2017 CSE was current and sufficient. The parent argues that the district failed to assess the student in all areas of suspected disability thereby preventing the CSE from creating a program for the student designed to address his unique needs, including his social/emotional, executive functioning, behavioral, and attentional needs.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The June 2017 CSE convened to determine the student's continued eligibility for special education services and to recommend a program to address the student's individualized educational needs for the 2017-18 school year (Dist. Ex. 8 at p.10). The student's speech-language pathologist, the occupational therapist who conducted the May 2017 OT evaluation of the student, the school psychologist who conducted the October 2015 psychoeducational evaluation of the student, a general education teacher, and the parent attended the June 2017 CSE meeting (id. at p. 12; see Tr. p. 110; Dist. Exs. 7 at p. 1; 37 at p. 3; 38 at pp. 1, 3).[28] The June 2017 CSE considered the May 2017 OT evaluation and a June 2017 teacher and provider report, including results from Teachers College reading assessments administered in June 2017, June 2017 classroom and mathematics assessments, and Teachers College writing units/rubrics administered in May 2017 (Tr. pp. 159-60; Dist. Ex. 8 at pp. 1-2; 9 at p. 1; Dist. Ex. 38 at p. 3; see Dist. Exs. 5; 7).[29] In addition, according to the IEP, the student's present levels in the area of speech-language were derived from "non-standardized assessments, response to therapy, and direct observation both within the classroom in the speech therapy room" (Dist. Ex. 8 at p. 1).[30]

With respect to reading, the present levels of academic performance of the June 2017 IEP indicated that the student was reading at "Level J"—comparable to grade level standards—based on the Teachers College assessment (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 1). The June 2017 IEP indicated that the student had solid decoding, vocabulary, and comprehension skills (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 1). According to the June 2017 IEP, the student's performance on classroom and mathematics assessments indicated that the student achieved a "Level 3" rating which corresponded with grade level standards and, although the student demonstrated difficulty with concentration and nervousness during test taking, he "comprehend[ed] most first grade math concepts" (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 1). The student's writing skills were at "Level 3" as assessed by the Teachers College writing units/rubrics administered in May 2017, which suggested that the student's performance met grade level standards (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 2). Despite the student's strong writing skills, the IEP indicated that the student needed to improve his punctuation and capitalization skills, which were below grade level standards (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 2). With respect to his communication skills, the IEP reported comments from the student's teacher that the student often missed spoken directions and had trouble with fluency when nervous or excited, which was "frequent" (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 2). The IEP also reflected the teacher's report that the student completed assignments and homework "most of the time and sometimes participate[ed] in classroom discussions," but also noted that the student had "some difficulty with focusing" (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 2). The IEP reflected the teacher's suggestion that pairing the student with a calm, confident partner could be helpful (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 3). Also, the IEP indicated that

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[28] The school psychologist served as the district representative at the June 2017 meeting (Dist. Ex. 8 at p. 12).

[29] According to the school psychologist's affidavit, the June 2017 CSE reviewed the May 2017 OT evaluation report (Dist. Ex. 7) and the student's teacher and provider reports regarding his then-current performance (Dist. Ex. 5); however, the affidavit was not specific regarding any other teacher or provider reports that were reviewed (Dist. Ex. 38 at p. 3). The June 9, 2017 teacher's report is reflected in the June 2017 IEP present levels of performance (compare Dist. Ex. 5 at pp. 1-3, with Dist. Ex. 8 at p. 1).

[30] The speech-language pathologist testified that she conducted "informal evaluation[s]" of the student for the purpose of determining the student's present levels of performance and provided the results of such evaluations in the IEPs (Tr. pp. 303-05).

insisting on appropriate communication from the student and providing him with charts on his desk could be helpful when accompanied by frequent reminders (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 3).

Regarding the student's speech-language skills, the June 2017 present levels of performance noted that the student presented with both a fluency and an articulation disorder but that, despite his speech disorder, the student's reading fluency and accuracy were on grade level (Dist. Ex. 8 at p. 1). According to the IEP, although the student had grade level decoding skills, he also had difficulty with respect to answering abstract higher level critical thinking questions based on stories read aloud or independently (id.). As recorded in the IEP, the student could produce five target sounds and corresponding blends on the multisyllabic word level and on the simple practice phrase level but not consistently in spontaneous discourse (id.). The student continued to demonstrate difficulty producing three different target sounds at any level (id.). However, according to the IEP, the student's teacher and speech-language pathologist reported that the student showed articulation improvement when sharing his ideas in the classroom and during speech-language therapy sessions (id.). In addition to his articulation disorder, the June 2017 IEP indicated that the student presented with a speech fluency disorder characterized by initial sound and syllable repetitions, initial word repetitions, initial and middle phrase repetitions, sentence repetitions, interjections, and prolongations during running speech and noted that he became more dysfluent when excited (id.). The June 2017 IEP identified the strategies used with the student to facilitate fluency and noted the student had made "slight progress" using the strategies, although somewhat inconsistently (id. at pp. 1-2). The IEP stated that the student had built the "confidence to continue to say what he need[ed] to share either dysfluent or not" (id. at pp. 1-2). The June 2017 IEP noted the student's continued difficulty following multi-step directions both when read or presented aloud and his tendency to miss critical information/key words (id. at p. 2). The student demonstrated progress following two-step directions although he continued to require repetition (id.).

The June 2017 IEP indicated that the student's mother hoped he would improve his level of concentration during test taking and improve punctuation and capitalization skills during writing (Dist. Ex. 8 at p. 2). The IEP also noted the parent's concern with the student's difficulty paying attention, asking questions, and explaining his thoughts in a cohesive, straight to the point manner (id.).

As to the student's social/emotional needs, consistent with the June 2017 teacher report, the June 2017 IEP indicated that the student continued to struggle with finding appropriate ways of relating to peers and adults, tending to get attention by saying inappropriate things, ignoring directions until he was scolded, or doing things to provoke people (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 5 at p. 2). The IEP reported that the student got frustrated easily and required "a lot" of support to engage in appropriate social and emotional interactions (Dist. Ex. 8 at p. 2; see Dist. Ex. 5 at pp. 2-3). The June 2017 IEP indicated that the student's parent was concerned with his low frustration tolerance and his need to improve his ability to focus and attend to tasks, as well as his ability to initiate and maintain conversations with peers (Dist. Ex. 8 at p. 2).

With respect to physical development and consistent with the May 2017 OT evaluation, the June 2017 IEP indicated the student was independent in performing self-care skills, he was able to cut out pictures with curves accurately, he demonstrated bilateral hand skills, and his handwriting was large but generally legible (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 7 at pp. 3-

4). However, the IEP reported that, during the OT evaluation, the student complained of hand fatigue after performing several pencil activities (Dist. Ex. 8 at p. 2; see Dist. Ex. 7 at pp. 2, 4). The IEP also noted, as reported in the OT evaluation, that the student tended to be distracted by auditory and visual stimuli in his environment (Dist. Ex. 8 at p. 2; see Dist. Ex. 7 at pp. 4-6).

In arguing that the evaluative information before the June 2017 CSE was lacking, the parent points to the sufficiency of the October 2015 psychoeducational evaluation. As noted above, the October 2015 was ultimately stricken from evidence during the impartial hearing because the copy offered by the district appeared to be incomplete (see Tr. pp. 151-52, 156).[31] Although the district provided a complete copy of the document as additional evidence on appeal per a written direction from the undersigned, the "adequacy or thoroughness of th[is] evaluation" is not determinative of this matter (Parent Mem. of Law at p. 25).[32] First, the parent's main issue with the October 2015 evaluation is that it failed to offer a diagnosis of the student; however, generally, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have placed considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir. 1997]).

Further, review of the hearing record shows that the June 2017 CSE considered more current assessment information with respect to the student's academic, communication, social/emotional, and physical abilities, which allowed it to ascertain the student's educational needs (Dist. Ex. 8 at p. 1). The present levels of performance of the June 2017 IEP included

[31] In addition, a July 2015 speech-language evaluation, a September 2015 social history, and a September 2015 classroom observation were marked for identification purposes during the impartial hearing but were not entered into evidence (see Tr. pp. 58, 77-79).

[32] There is, however, no merit to the parent's argument that the district's agreement to fund a neuropsychological IEE requested by the parent amounted to an implicit acknowledgement of the insufficiency of the October 2015 psychoeducational evaluation. Although the procedure for a parent to obtain an IEE requires disagreement with a district evaluation, there is no requirement that the district evaluation indeed be lacking in order for a district to agree to fund an IEE (see 34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). To find otherwise would disincentivize districts from agreeing to fund IEEs for fear of inadvertently acknowledging the insufficiency of their own evaluations.

information from the May 2017 OT evaluation and June 2017 teacher report that detailed the student's then-current strengths and weaknesses (compare Dist. Ex. 5 and Dist. Ex. 11, with Dist. Ex. 8 at pp. 1-2). Further, although the CSE did not have a formal speech-language evaluation report before it, the June 2017 IEP included information from the student's speech-language pathologist who attended the meeting (Dist. Ex. 8 at pp. 1-2, 12).

Ultimately, even assuming that the district failed to meet it burden of proving that the June 2017 CSE had sufficient evaluation information (given that the evaluations from 2015 were not entered into evidence and the hearing record, therefore, did not address the adequacy of this formal evaluation of the student), this alone would not rise to the level of a denial of a FAPE unless it was determined that the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). Here, it is not necessary to opine on this question since for the reasons set forth below, I find that the district failed to offer the student a FAPE due to the CSE's failure to sufficiently address the student's social/emotional needs.

Before turning to the substantive review of the June 2017 IEP, I will briefly address the parent's other procedural claims relating to the June 2017 CSE meeting. The parent alleges that she was denied the right to meaningfully participate in the decision-making process and that the June 2017 CSE's recommendations were predetermined. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of

Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The parent's allegation is without merit as the hearing record is devoid of any evidence that the parent was unable to express her concerns regarding the recommended program and services or participate at the June 2017 CSE meeting (Parent Ex. V at pp. 4, 5). The parent attended the meeting and the June 2017 IEP documented several parent concerns (Dist. Ex. 8 at pp. 2, 12). Further, the hearing record demonstrates that the June 2017 CSE considered other placement options for the student (see Dist. Exs. 8 at p. 11; 9 at pp. 1-2; 38 at p. 3). Overall, the hearing record supports a finding that the district provided the parent an opportunity to participate in the development of the June 2017 IEP and maintained the requisite open mind regarding the content of the student's IEP.

2. General Education Placement with Related Services

Next, the parent alleges that the IHO erred in finding that the June 2017 IEP was appropriate. The parent argues that the CSE's recommendations failed to address the student's academic, behavior, attention, executive functioning, and social/emotional needs and failed to include the appropriate amount of speech-language therapy services for the 2017-18 school year. The parent asserts that the IHO erred in relying on the parent's purported request that counseling be removed from the student's IEP to find that the June 2017 IEP adequately addressed the student's social/emotional needs.

Regarding the student's academic needs, the parent argues that the general education program was inadequate to meet the student's needs and that the IHO erred in finding that the student was performing at or near grade level. Specifically, the parent asserts that the student was not performing at grade level in mathematics and some areas of reading and writing but cites to the opinions of experts that were derived based on information acquired after the June 2017 CSE meeting (Req. for Rev. at p. 2, citing Parent Exs. N at pp. 1-2; U at p. 3; V at p. 6). In reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress]). The testimony of the neuropsychologist and the director of EBL coaching regarding the student's academic skills are specific to the experts' views of the student's needs after they evaluated the student in October 2019 and January/February 2019, respectively (Parent Ex. N at pp. 1-2; U at pp. 2-3). The only exception is the neuropsychologist's views regarding the sufficiency of the October 2015 psychoeducational evaluation (see Parent Ex. U at p. 2), but, as set forth above, the June 2017 CSE had before it other

sources of information regarding the student's needs, including reports from the student's then-current teacher, and the sufficiency of the October 2015 psychoeducational evaluation, alone, does not render inaccurate the June 2017 IEP's recitation of the student's present levels of performance (see Dist. Exs. 5;8). As summarized above, the current information available to the CSE reflected that the student demonstrated academic skills comparable to grade level standards (Dist. Ex. 8 at p. 1).[33] And the evidence in the hearing record does not otherwise reflect that the student's needs related to academics alone warranted more supports than the related services and management strategies recommended by the CSE. However, the degree to which the CSE's recommendations met the student's other areas of need remains to be addressed.

As previously noted, the June 2017 present levels of performance detailed the student's various areas of need, including that the student exhibited difficulty with focusing and needed frequent reminders (Dist. Ex. 8 at p. 1). The June 2017 IEP also indicated that the student struggled with finding appropriate ways to relate to peers and adults, used inappropriate means of gaining attention, ignored directions, and provoked people (id. at p. 2). According to the IEP the student got frustrated easily and rather than correcting a mistake he said things like "'I'm never coming to school again'" or threw his work in the garbage (id.). The student required "'a lot of support with appropriate social and emotional interaction'" (id.). The IEP described the student's needs related to a fluency and articulation disorder (id. at pp. 1-2). The June 2017 IEP also included the parent's concerns regarding the student's social/emotional skills noting she wanted him to improve his concentration during test taking, attending ability, and ability to ask questions and explain his thoughts in a cohesive and to the point manner (id. at p. 2). The parent also expressed concerns regarding the student's low frustration tolerance and his ability to initiate and maintain conversations with peers (id.). The IEP also noted the student's occupational therapist's concerns regarding his level of distractibility from visual and auditory stimuli in the environment, which interfered with the student's ability to complete classroom tasks in a timely manner (id.).

The parent testified about the student's social/emotional difficulties during the school years leading up to the June 2017 CSE meeting, noting that the student had difficulty controlling his emotions, and experienced conflicts with peers (see Parent Ex. V at pp. 2-4; see also Parent Exs. B-D). The district school psychologist also testified that during the school years leading up to the June 2017 CSE meeting, the student lacked social skills, had difficulty relating to his peers, and exhibited behaviors that impacted his relationships with other children and his schoolwork (Tr. pp. (Tr. pp. 120-22, 143, 149, 180-81). To address the student's aforementioned needs, the June 2017 CSE recommended related services including OT (one group session per week) and speech-language therapy (one individual session per week, one group session per week in the therapy

[33] The parent also cites an October 2015 teacher report and a November 2015 IEP to support the statement that the student consistently performed below grade level (Req. for Rev. at p. 2, citing Dist. Exs. 31 at p. 1; 34 at p. 1). Review of those documents does not support this statement. The October 2015 teacher report stated that, although the student performed at the "lower end of [the] class" on the Go Math Inventory, she did not "believe math [wa]s the problem," instead attributing the performance to the student's "inability to follow directions [and] focus" (Dist. Ex. 31 at p. 1). The report further stated that the student's "academic skills appear[ed] to be at grade level" (id. at p. 3). The November 2016 IEP reflected results from Teachers College reading assessment and reading/writing rubrics and Go Math assessments showing that the student was meeting or approaching grade level standards (Dist. Ex. 34 at p. 1). Regarding math, the IEP indicated that the student had scored "below grade level" on Go Math chapter tests but that his performance on "class tests, activities, and . . . classwork" showed an increasing "understanding [of] the concepts taught" (id.).

room, and one group session per week in the classroom) but did not include counseling services in the IEP (Dist. Ex. 8 at p. 7). The June 2017 CSE also identified several management strategies necessary to support the student in the classroom including frequent redirecting and refocusing and movement breaks (id. at p. 2). The IEP also noted that the student required directions repeated; preferential seating to minimize distractions; and "wait time" to answer questions and share his thoughts in order to increase ease and decrease frustration and fear (id.). In addition, the IEP indicated that it was beneficial to alert the student that a series of directions would be given aloud to complete a given task, as it supported his ability to attend to the information (id.).

Regarding the June 2017 CSE's decision not to recommend counseling services for the student, the district speech-language pathologist testified that, at an unspecified time during the 2016-17 school year, the parent requested that counseling be removed from the student's IEP (Tr. pp. 441-44). In her affidavit, the student's mother confirmed that it was she and the student's father who requested that the counseling services be discontinued due to the district's improper implementation of the service (providing the student with individual instead of group therapy) and the therapist having addressed what the parent described as inappropriate topics with the student that were unrelated to the goals on his IEP (Tr. pp. 552-57; Parent Ex. V at pp. 3- 4).

The school psychologist testified that, although the parents requested that the student no longer receive counseling services, the teachers and providers discussed that they felt he would benefit from the continuation of counseling and they would have liked the student to continue the service (Tr. p. 186; Dist. Ex. 38 at p. 3). According to the school psychologist's affidavit testimony, the teachers and providers reported that the student got nervous and sometimes had difficulty with concentration (Dist. Ex. 38 at p. 3). In addition, the student demonstrated difficulty interacting socially with adults and peers (id.). The school psychologist opined that the June 2017 CSE's recommendations met the student's academic needs but clarified that the addition of counseling would have been a benefit as well (id.). Although the student's counseling services were discontinued, the school psychologist testified that the management strategies such as redirection, prompting, use of verbal and visual cues, repeating directions, providing the student with movement breaks, and arranging for preferential seating to minimize distraction, were put in place to support the student's social/emotional health (Tr. pp. 183-86).[34]

The student's speech-language pathologist testified that in addition to the management strategies that targeted focusing skills, one of the student's goals addressed the student's social functioning and two of the student's goals addressed his executive functioning needs (Tr. pp. 373-75, 378-80). Specifically, the student's speech-language pathologist testified that the student's goal to initiate and add information to a conversation with peers and add closure to the conversation supported the student's social needs because it targeted the student's ability to initiate conversation and speak with his peers (Tr. pp. 373-74; Dist. Ex. 8 at p. 5). She also testified that the student's goal related to following three to four step directions with varied linguistic concepts such as temporal, spatial, qualitative, quantitative, sequential, and conditional supported his executive functioning needs (Tr. pp. 378-79; Dist. Ex. 8 at p. 5). Lastly, the speech-language pathologist stated that the student's goal related to using taught strategies to help increase attention and

[34] A comparison of the June 2017 IEP to the student's IEP for the 2016-17 school year shows that the same supports for the student's management needs were carried over (compare Dist. Ex. 8 at p.2, with Dist. Ex. 34 at p. 2).

participation level during independent class activities also addressed the student's executive functioning needs (Tr. pp. 379-80; Dist. Ex. 8 at p. 6).

Overall, the student's constellation of needs, and in particular the student's social/emotional needs, as exacerbated by his delays related to fluency and articulation, warranted more support than the IEP offered.[35] It may be that, but for the parent's expressed preference that counseling be discontinued, the June 2017 CSE would have recommended the service for the student; however, the parent's stated preference did not relieve the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (see Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]). Here, the parent declined the counseling services that the CSE felt would benefit the student due to his difficulty with focus/attention, distractibility, and communication with peers and adults. Although, the CSE knew the parent was unlikely to accept counseling services, it still had an affirmative duty to recommended all necessary services to address the student's needs in the IEP. Accordingly, the evidence in the hearing record does not support a finding that the June 2017 IEP offered the student an educational program reasonably calculated to enable him to make appropriate progress in light of his circumstances.

C. 2018-19 School Year

1. June 2018 IEP

a. Sufficiency of Evaluative Information

As with the previous school year, parent alleges that the district failed to assess the student in all areas of suspected disability thereby preventing the June 2018 CSE from creating a program for the student designed to address his unique needs.

Attendees at the June 2018 CSE included the student's speech-language pathologist who participated via telephone, the student's general education teacher, a special education teacher, and the parent (Dist. Exs. 12 at p. 13; 37 at pp. 5-6).[36] The evidence in hearing record indicates that the June 2018 CSE considered the May 2017 OT evaluation, a June 2018 Teachers College reading assessment, a June 2018 Teachers College writing units/rubrics, and a June 2018 classroom and mathematics assessment (Tr. pp. 391-93; Dist. Exs. 12 at p. 1; 31 at p. 1; see Dist. Ex. 7). In addition, according to the IEP, the students' present levels of performance in the area of speech-language were again derived from "non-standardized assessment[s], response to therapy, and

[35] The district speech-language pathologist testified as to her belief that the student's fluency did not impact his socialization as he had developed confidence and spoke through his moments of dysfluency, noting that the student spoke with everybody (Tr. pp. 381-82).

[36] The speech-language pathologist served as the district representative at the June 2018 meeting (Dist. Ex. 12 at p. 13).

direct observations both within the classroom and in the speech therapy room" and also includes information provided by the parent in a June 2018 email exchange with the district speech-language pathologist (Dist. Exs. 12 at p. 1; 20; see Tr. p. 391). The IEP reflects updated information about the student's performance in OT but does not identify the source of the information (Dist. Ex. 12 at p. 3).[37] Further, although a teacher report was not included in the documentary evidence, the report of the student's academic performance on the June 2018 IEP is ascribed to the student's teacher (Dist. Ex. 12 at p. 1). The district speech-language pathologist testified that at the June 2018 CSE meeting the student's teacher discussed the student's reading with respect to inferencing, answering questions, making predictions, and decoding, stating it was a review of "all the subreading areas" (Tr. p. 392).

The June 2018 IEP indicated the student achieved a "Level N" on the June 2018 Teachers College reading assessment, which was "comparable to meeting above grade level standards" and a "Level 3" on the June 2018 Teachers College writing units/rubrics, which reflected skills "comparable to meeting grade level standards" (Dist. Ex. 12 at p. 1). In addition, based on classroom and mathematic assessments administered in June 2018, the IEP indicated that the student achieved a "Level 3" and that his skills were meeting grade level standards (id.). According to the June 2018 IEP, the student's teacher indicated that the student showed progress in all academic subjects and he was raising his hand to answer questions and participate during large group class instruction (id.). His teacher also noted that the student continued to struggle and have difficulty interacting and participating in small group discussions and projects showing a preference to work independently (id.).[38] She indicated the student demonstrated the ability to follow directions to complete a task when he was focused and attentive, but those skills were inconsistent throughout the day (id.). The IEP noted that, due to the student's inconsistent attention, he continued to need repetition of directions and prompting to stay on task through to its completion (id.). According to the IEP, both the teacher and speech-language pathologist reported that the student demonstrated difficulty transitioning back to school after weekend breaks (id.). The June 2018 IEP indicated the student benefited from clear expectations, directional prompts, and motivational rewards for achieving expectations and to support smoother transitions (id.). According to the IEP, the parent expressed concern about, among other things, the student's ability to understand and complete math problems containing multistep questions (id. at p. 11).

Regarding the student's speech-language skills, the June 2018 IEP reported that the student continued to present with a moderate fluency disorder coupled with pragmatic language difficulty and a mild articulation delay (Dist. Ex. 12 at p. 1). The student's dysfluencies were characterized by initial sound and syllable repetitions, initial word repetitions, initial and middle phrase repetitions, sentence repetitions, interjections, increased loudness, and prolongations during conversational speech becoming more dysfluent when the student was excited, nervous, redirected

[37] The hearing record includes a June 2018 OT clinical guide, which reflected information from the student's occupational therapist (see Dist. Ex. 11); however, it is unclear whether the June 2018 CSE considered this document.

[38] The speech-language pathologist testified that the teacher had a behavior chart for the student during the 2017-18 school year but could not recall if the June 2018 CSE discussed it at the meeting (Tr. pp. 394-97). However, she pointed to that portion of the academic present levels of performance set forth in the IEP which stated that the student struggled and had difficulty interacting and participating in small group discussion and projects to support her statement that the CSE discussed the student's behavior (Tr. p. 399).

and when he shared an event whether it was positive or negative (id.). The student's articulation difficulty was related to two target sounds (sh and ch) in all word positions on the conversational level (id.). The student's pragmatic struggles were centered around his difficulty deciphering and understanding non-verbal and abstract cues, as well as interacting appropriately and providing relevant responses and/or interactions during group conversations (id.). The June 2018 IEP indicated that the student's fluency and pragmatic language delays negatively impacted his interactions, participation, and access to the academic curriculum, sharing of information, and his ability to develop friendships (id.). According to the June 2018 IEP, the student demonstrated progress with respect to answering "wh" questions and higher-level critical thinking questions (predictive and inferential) with evidence (id.). The student was also engaging in conversations and activities more frequently in small group speech-language therapy sessions with modeling, prompting, and role playing (id.). When focused and attentive, the student was reported to be able to follow 2-3 step directions orally presented (id. at pp. 1-2). The June 2018 IEP noted that the student had shown increased interest in topics for reading and writing (id. at p. 2).

The IEP also noted that the student showed progress implementing strategies modeled and taught to help him speak more fluently during conversational exchanges and he was speaking with more confidence during moments of dysfluencies (Dist. Ex. 12 at p. 2). However, it was noted that these strategies were not generalized or carried over independently and there was a lack of self-monitoring (id.). The June 2018 IEP described the student's increased confidence when speaking and his increase in large group/class participation with respect to responding to questions and sharing opinions and thoughts about a subject or idea (id.). Although the June 2018 IEP described the student as being able to produce target sounds in all word positions on the sentence level during practice, carry over to conversational speech independently had not been observed (id.). With respect to pragmatic skills, the June 2018 IEP indicated the student wanted to develop friends, engage in group activities, and socialize but he had difficulty interacting, often reacting negatively due to difficulty verbally expressing himself appropriately and deciphering both social messages and situational cues given by peers (id.). The June 2018 IEP noted concerns regarding the student's pragmatic skills as he needed to be able to work in groups and develop appropriate social language skills to make friends and be involved in activities of interest (id.).

With respect to the student's social/emotional development, the June 2018 IEP indicated that the student continued to struggle with finding appropriate ways to relate to peers and adults (Dist. Ex. 12 at p. 2). The IEP described the parent's concern regarding the student's ability to express his feelings regarding events and her observation that he could shut down, get very upset, become more dysfluent, and speak loudly (id.; see Dist. Ex. 20 at pp. 1-2). Further, the June 2018 IEP reported that the student said inappropriate things to get attention or to provoke a reaction from peers or adults (Dist. Ex. 12 at p. 2). According to the June 2018 IEP, the student got frustrated easily, did not like to be corrected, would rip up his paper or throw it away rather than to try to correct a mistake, but at times said, "ok fine" and would attempt to comply with fixing the mistake (id.). The parent indicated that at home the student demonstrated flexibility to change and interacted appropriately, but she was concerned regarding his social interactions at school during recess and gym (id.; see Dist. Ex. 20 at p. 2). She acknowledged the student was initiating conversations with peers but noted that he would shut down or become frustrated when his initiation was not accepted by other students (id.; see Dist. Ex. 20 at p. 2).

The June 2018 IEP indicated that, with respect to the student's physical development, he had legible handwriting, but he needed to improve the consistency of his letter size, needed cuing

to follow margins and space words appropriately, and tended to rush when doing paper and pencil takes, which impacted the organization of the student's work (Dist. Ex. 12 at p. 3). According to the June 2018 IEP, the student needed reminders and incentive to maintain his books and folders in his desk, noting he was doing well "tidying up" before his OT session knowing it would be monitored (id. at p. 3). Further, the IEP indicated that the student was at times unfocused and had issues transitioning between tasks, noting that the student benefited from movement breaks, a written class schedule, and a preview of the flow of the day to alert him of potential schedule changes (id.). It was recommended that the student could benefit from the use of a timer to help him meet deadlines (id.). Regarding his needs, the June 2018 IEP indicated that the parent expressed that the student required assistance with organization (id. at p. 2; see Dist. Ex. 20 at p. 3).

As presented in the aforementioned discussion, the evidence in the hearing record shows that the June 2018 considered current information by way of the Teachers College assessment for reading and writing, class assessments for mathematics, and progress updates with respect to speech-language and OT performance (Dist. Ex. 12 at pp. 1-3). The information included in the IEP reflects an updated view of the student's needs upon which the CSE could rely to develop an appropriate program. However, as with the evaluative information available to the June 2017 CSE, even assuming that the district failed to meet its burden of proving that the June 2018 CSE had sufficient evaluation information, it is unnecessary to determine whether such a procedural violation would have contributed to a finding of a denial of a FAPE since, as set forth below, the June 2018 CSE failed to sufficiently address the student's speech-language and social/emotional needs.

Regarding the parent's assertion that she was denied meaningful participation in the June 2018 CSE, the record demonstrates that this allegation is without merit. The parent did not allege that she was unable to express her concerns during the June 2018 CSE meeting, the June 2018 IEP states several of the parent's concerns, and the district witness testified the parent was able to express her concerns (Tr. pp. 419-20; Dist. Ex. 12 at p. 2). Further, as summarized below, the June 2018 CSE considered but rejected other placement options for the student belying the parent's claim that the CSE predetermined its recommendations (see Dist. Ex. 13 at pp. 1-2).

b. General Education Placement with Related Services

As with the previous year, the parent contends that the June 2018 CSE's recommendations did not adequately support the student's academic, behavior, attention, executive functioning, and social/emotional needs during the 2018-19 school year and that the district failed to offer sufficient speech-language therapy services.

As with the 2017-18 school year, the student's academic skills were not his primary area of need and the parent's allegations suggesting that the IHO erroneously found that the student demonstrated grade-level skills is without merit. The parent relies on opinions of the neuropsychologist and the director of EBL coaching, which in turn were formed based on assessments of the student's needs conducted after the June 2018 CSE meeting and, therefore, may not be relied upon to evaluate the appropriateness of the June 2018 IEP (Req. for Rev. at p. 2, citing Parent Exs. N at pp. 1-2; U at p. 3; V at p. 6; see C.L.K., 2013 WL 6818376, at *13). Further, the evidence in the hearing record shows that the June 2018 CSE considered the option of recommending special education teacher support services (SETSS) for the student but determined

that the student did "not need such intensive specialized instruction to address his educational needs" (Dist. Exs. 12 at p. 11; 13 at pp. 1-2). The evidence in the hearing record generally supports the CSE's conclusion; however, once again, the CSE failed to recommend enough support to address the student's other areas of need.

As set forth above, the June 2018 IEP set forth information from the student's teacher, speech-language pathologist, occupational therapist, and parent that highlighted the student's attention, speech-language, and social/emotional needs (Dist. Ex. 12 at pp. 1-3). The June 2018 IEP noted the student's struggle to participate in small group discussions and projects, the impact of his lack of focus and attention on following directions, and the need for the student to have repetition of directions and prompting to remain on task (id. at p. 1). The student's speech-language pathologist noted the student's difficulty deciphering and understanding non-verbal and abstract cues, his difficulty responding and interacting appropriately with relevant responses or interactions in groups, his tendency to react negatively when there is a lack of shared interest with peers, and his difficulty verbally expressing himself appropriately (id. at pp. 1-2). The June 2018 IEP reported the student's inclination to shut down or get upset articulating his feelings about events, his inappropriate means of gaining attentions and provocation of others, as well as his low frustration tolerance (id. at p. 2). The speech-language pathologist also testified that the student was very friendly and helpful but was at times resistant and noncompliant (Dist. Ex. 37 at p. 5). The parent indicated to the June 2018 CSE that the student had difficulty in the school setting, interacting during recess and in gym, and she expressed her concern regarding the student's frustration and tendency toward shutting down when his attempts to initiate conversations with peers was not accepted (Dist. Ex. 12 at p. 2). The June 2018 IEP also included the student's need for reminders and incentives regarding organizational skills, his need for focus when transitioning between tasks, movement breaks, a written class schedule, preview of the flow of the day, and use of a timer to help the student meet deadlines (id. at p. 3).

The June 2018 CSE recommended related services including one individual and one group OT session per week and one individual and one group speech-language therapy session per week (Dist. Ex. 12 at pp. 7-8). The related services recommendations for the 2018-19 school year reflect an increase in OT, adding one individual session per week, and a decrease in speech-language therapy, removing one group session per week (compare Dist. Ex. 8 at p. 7, with Dist. Ex. 12 at pp. 7-8).[39] The CSE removed the speech-language therapy session provided in the classroom (compare Dist. Ex. 8 at p. 7, with Dist. Ex. 12 at pp. 7-8). The speech-language pathologist testified that the classroom-based speech-language therapy session was not recommended because the student was "making progress and on grade level," adding that providing the service in the therapy room would promote the student's confidence (Tr. pp. 404-06; Dist. Ex. 37 at p. 6). The speech-language pathologist stated that the student " was making very nice progress" but that if he demonstrated that he needed more therapy the CSE would have added it (Tr. p. 405). However, according to the speech-language pathologist's testimony, the student could have benefitted from an additional session of push-in therapy for the 2018-19 school year (Tr. pp. 422-23).

[39] According to the June 2018 OT clinical guide the student's mandate was modified from one (group of two) 30-minute session per week to one individual 30-minute session per week and one (group of two) 30-minute session per week to provide more support to the student so that he could fully function and participate in the classroom (Dist. Ex. 11 at p. 1).

Despite the student's reported progress in speech-language therapy, the June 2018 IEP identified the student's continued needs with respect to fluency, articulation, and pragmatic language skills (Dist. Ex. 12 at pp. 1-2). Of particular concern is the reduction of push-in speech-language therapy in light of the student's lack of independent carryover and generalization of fluency strategies to the classroom environment and the lack of carryover of articulation skills into conversational speech independently (id. at p. 2). Of equal concern is that this reduction occurred at a time when the student demonstrated difficulty interacting with peers, he presented with negative reactions to peers when they did not engage in his interests, and he displayed difficulty expressing himself appropriately and understanding his peer's social messages and situational cues (id.). The June 2018 IEP explicitly noted that the student's "social pragmatic language skills [we]re an area of concern as he need[ed] to be able to work in groups in many subject areas and need[ed] to develop appropriate social language skills to make the friends he want[ed] to and to be involved with activities he [wa]s interested in" (id.).

Although the hearing record does not indicate that the June 2018 CSE considered counseling services to address the student's social/emotional needs, the student's speech-language pathologist testified that the student's fluency goal and a goal related to initiating and adding to conversations with peers, in addition to being speech-language goals also addressed the student's social needs (Tr. pp. 402-03, 409-10; see Dist. Ex. 12 at pp. 6-7). She also pointed to IEP goals that stated the student would "keep his desk organized by filing loose papers in designated folders and stacking books and notebooks in neat piles" and his goal to "utilize taught strategies to help increase his attention and participation level during independent writing activities in order to meet deadlines and teacher's expectations" combined with the student's fluency goal, also targeted specific areas of the student's executive functioning needs (Tr. pp. 411-12; see Dist. Ex. 12 at p. 5). However, according to the speech-language pathologist's testimony, she confirmed that these goals did not meet all of the student's executive functioning needs (Tr. p. 412).

In addition to the identified goals that were reported to support the student's social/emotional needs, the June 2018 IEP included management strategies that were also intended to address the student's needs (Dist. Ex. 12 at p. 3). To help the student with focus, attention, and completion of classroom activities/tasks during instruction the June 2018 IEP included frequent redirection, refocusing, and movement breaks (id.). The IEP also included repetition of directions, preferential seating to minimize distraction, and "wait time" for the student to answer questions and share his thoughts to increase his ease and decrease both his frustration and fear (id.). The June 2018 IEP also recommended alerting the student when a series of directions will be given aloud so that he is prompted to attend to the directions and recommended the use of visual charts (as well as monitoring via a sticker chart which would also serve as motivation) specific to classroom tasks such as organizing his personal and school materials (id.). The visual chart was also noted to reinforce independence and responsibility (id.). The June 2018 IEP added testing accommodations including testing in a separate location in a group of 12 or less in a quiet location with limited visual distractions and on-task focusing prompts (verbal and visual cues to remain on task) during testing (id. at p. 9).

The hearing record supports the notion that the June 2018 CSE discussed the student's social/emotional difficulties such as his lack of focus and attention, his noncompliant behavior, his difficulty communicating with peers and understanding nonverbal cues, his difficulty with task completion and organization, frustration, provocation of others and inappropriate means of gaining attention, but the CSE did not recommend counseling services to address the student's needs with

respect to these social/emotional issues and the hearing record is silent with respect to any discussion at the CSE meeting regarding counseling or the sufficiency of the recommended supports to address these needs (Dist. Ex. 12 at pp. 1-3). Although, the June 2018 CSE may have presumed that the parent was unlikely to accept counseling services based on the prior request to discontinue counseling, again, this does not relieve the CSE of its responsibility to recommend all the necessary services to meet the student's individual needs.[40] Neither the management strategies nor cited goals sufficiently addressed the student's significant issues with respect to his social/emotional skills and cannot be considered a substitute for counseling services. Additionally, the removal of the student's group push-in speech language therapy session was inappropriate in light of the student's needs regarding fluency, articulation, pragmatic language, and the need to carryover communication skills into the classroom environment.

Based on the above, the June 2018 CSE's absence of a recommendation for counseling services and in conjunction with the reduction of speech-language therapy when the student demonstrated significant and continuing needs in both areas, resulted in an IEP that was not reasonably calculated to enable the student to make progress in light of his circumstances. Therefore, the evidence in the hearing record supports a finding that the student was denied a FAPE for the period that the June 2018 IEP was in effect during the 2018-19 school year.[41]

2. March 2019 IEP

The parent objects to the IHO's finding that the March 2019 IEP was outside of the scope of the impartial hearing (IHO Decision at p. 9). The parent contends that she clearly raised the appropriateness of the recommendations made by the March 2019 CSE in the amended due process complaint notice and that IHO erred by not making a finding as to whether the March 2019 CSE offered the student a FAPE for a portion of the 2018-19 school year. In response, the district acknowledges that the IHO did not directly address the March 2019 CSE's recommendations but contends that they were reasonably calculated to provide the student with a FAPE for the remainder of the 2018-19 school year.

Upon review of the amended due process complaint notice, the parent raised specific objections to the March 2019 CSE process and the March 2019 IEP; in particular, the parent

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[40] The speech-language pathologist suggested that, since the parent did not request the reinstatement of counseling services, the CSE could presume that the parent was unlikely to accept a recommendation for counseling (Tr. pp. 429-30). However, the speech-language pathologist was incorrect in this assumption for the reason previously stated.

[41] Under the circumstances of this matter, the parent's claim regarding bullying is intertwined with the discussion above regarding the extent to which the June 2017 and June 2018 IEPs failed to address the student's social/emotional issues. Accordingly, having determined that the June 2017 and June 2018 CSEs did not recommend a sufficient program, I need not delve further into the parent's allegation that "bullying contributed to [the student's] social isolation, and consequently, his academic progress in school." Nevertheless, upon review of the teacher report and the incident reports reviewed by the IHO in determining that the student was not the subject of bullying, but was a provocateur, I agree with the finding that the student was not a victim of substantial bullying but disagree with the IHO's finding that the student "initiated" or "at least participated" in the bullying of other students (Dist. Ex. 5; Parent Exs. B-G; see IHO Decision at pp. 58-61). Additionally, I remind the parties of the collaborative process envisioned by Congress as "the core of the [IDEA]" and encourage a discussion of the parent's concerns regarding bullying at the student's next CSE meeting (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

alleged that the March 2019 CSE did not adequately consider the February 2019 neuropsychological IEE, did not offer the parent a meaningful opportunity to participate in the CSE process, and refused to recommend the program and related services recommended in the February 2019 neuropsychological evaluation report (Parent Ex. A at pp. 6-7).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO limited testimony regarding the March 2019 CSE to how it pertained to the parent's requested FBA (Tr. pp. 67, 202-05, 208-09). As such, the hearing record does not have sufficient evidence to reach a conclusion regarding all of the claims raised by the parent in association with the March 2019 CSE and the resultant IEP.

As such, the appropriate remedy is to remand this matter for further administrative proceedings to address these issues. The parties should be provided the opportunity to present evidence regarding the March 2019 CSE. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

D. Compensatory Education

The parent asserts that the remedy for the district's denial of FAPE is compensatory education of 400 hours of academic tutoring and 140 hours of speech-language therapy. In addition, the parent argues that even if the statute of limitations was applied the requested compensatory education should not be reduced.

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 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. 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] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also 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 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"]).

Initially, it is noted that, although there is evidence in the hearing record supporting the parent's request for compensatory speech-language therapy, the hearing record is less clear regarding the request for academic tutoring services.

In her closing brief, the parent requested 140 hours of compensatory speech-language therapy (Parent Ex. W at pp. 4, 31). The parent obtained an independent speech-language evaluation of the student in January 2020 that is relevant to the parent's request for compensatory speech-language therapy services (Parent Ex. M). The January 2020 speech-language evaluation report identified weaknesses in the areas of pragmatic language and fluency and indicated difficulties in social situations, including the student's misperceptions of how his peers interact with him (id. at pp.4-12). The evaluation report included a recommendation for a minimum speech-language mandate of one 45-minute session of individual speech-language therapy and two 45-minute sessions of speech-language therapy in a small group per week (id. at p. 13). In addition, the speech-language pathologist who conducted the evaluation testified that it "is impossible to determine the exact amount of compensatory speech-language therapy hours that would get [the student] to the point that he would otherwise have been" if he had been receiving the recommended three 45-minute sessions of speech-language therapy per week for the four school years at issue in this proceeding (Parent Ex. O at p. 3). Nevertheless, the speech-language pathologist indicated that it would take more than one hour to compensate "[f]or each hour missed" (id.). According to the speech-language pathologist's testimony, the student should have received 90 hours of speech-language therapy services per school year; however, she did not make a specific recommendation as to what would be an appropriate compensatory award as he did not identify what services were missed (id. at p. 4). The neuropsychologist who conducted the February 2019 neuropsychological evaluation testified that he agreed with the speech-language pathologist's recommendation for speech-language therapy services and assessment that the student should receive compensatory speech-language therapy (Parent Ex. U at p. 4). In his report, the neuropsychologist had recommended two 30-minute sessions per week of individual speech-language therapy services for the student (Parent Ex. K at p. 27).

The amended due process complaint notice and the parent's closing brief both requested a minimum of 400 hours of 1:1 tutoring (Parent Exs. A at p. 10; W at pp. 4, 31). This request appears to be based on the October 2019 letter from EBL Coaching which indicated that 400 hours of 1:1 multi-sensory tutoring was needed to develop the student's reading and spelling skills and "build his written language, mathematics, and reading comprehension, and executive functioning skills" (Parent Ex. L). The private neuropsychologist testified that the student "require[d] a substantial amount of one-on-one multi-sensory tutoring to help get him to the academic and executive functioning levels he would otherwise have" reached had the district offered the student a FAPE (Parent Ex. U at p. 4). However, neither the October 2019 letter nor the testimony of the director of EBL explain how the requested tutoring is connected to a denial of FAPE for the school years at issue (see Parent Exs L; N). The director of EBL further testified that the recommended 400 hours of tutoring was recommended to get the student to grade level (Tr. pp. 467-68, 479-80, 487). Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Here, as the hearing record is not fully developed as to compensatory relief and as this matter is being remanded to address the parent's claims regarding the March 2019 IEP, upon remand, the parties may present additional evidence on the issue of compensatory education, and the IHO shall make a determination in the first instance as to the parent's requested compensatory relief to remedy the district's failure to offer the student a FAPE for the 2018-19 and at least that portion of the 2019-20 school year when the June 2018 IEP was in effect.

E. Independent Educational Evaluations

The parent objects to the IHO's determination that the parent was not entitled to an independent FBA and speech-language evaluation because the parent first requested an IEE in her due process complaint notice. The parent asserts that the IHO was wrong legally, and that the parent first requested a speech-language IEE at the March 2019 CSE meeting. The parent also alleges that the IHO should have considered an equitable basis for awarding the requested FBA and speech-language evaluations.

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

determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). 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 not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). 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]).

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In a November 13, 2018 letter addressed to the principal of the student's school and the CSE chairperson, the parent requested a neuropsychological IEE and indicated that she disagreed with the most recent evaluation of the student because it was insufficient to assess his educational needs (Parent Ex. H at p. 1). The letter identified the district's most recent evaluation as an October 2015 psychoeducational evaluation (id.).

In the parent's November 2018 due process complaint notice, the parent specifically requested a neuropsychological IEE as a remedy for the district's failure to conduct an appropriate evaluation of the student (Parent Ex. I at p. 2). In a "partial settlement" of the November 2018 due process complaint notice, the district agreed to fund a neuropsychological IEE at the rate requested by the parent and to reconvene the CSE to discuss the results of the evaluation (Parent Ex. J). A neuropsychological evaluation of the student was conducted in January and February 2019 (Parent Exs. K at p. 1; U at p. 2). The report for the neuropsychological IEE was completed on March 4, 2019 (Parent Ex. K at p. 29).

According to the parent's testimony, she requested an independent speech-language evaluation and an independent FBA at the March 2019 CSE meeting (Parent Ex. V at p. 7). In a March 21, 2019 e-mail, the parent referenced her earlier request and formally requested that the

district conduct an FBA of the student (Dist. Ex. 16). The district conducted an FBA in June 2019 (Dist. Ex. 17).

In the parent's November 2019 amended due process complaint notice, the parent repeated the allegation that she had objected to the district's evaluation and had requested a comprehensive neuropsychological assessment; however, as relief the parent added requests for an independent speech-language evaluation and an independent FBA (Parent Ex. A at pp. 6, 9). The parent asserted that the request for a speech-language evaluation was based on the parent's disagreement with a July 2015 speech-language evaluation and the CSE's failure to conduct a new speech-language evaluation after the completion of the neuropsychological IEE (id. at p. 6 n. 2). According to the parent's testimony, she requested an independent speech-language evaluation because the district failed to respond to the request, she made during the March 2019 CSE meeting and the student's speech-language abilities had not been evaluated since before kindergarten (Parent Ex. V at p. 7). The request for an FBA in the due process complaint notice appeared to be based on the recommendations contained in the neuropsychological IEE (Parent Ex. A at p. 7). The parent wanted an FBA conducted by a BCBA; in the due process complaint notice the parent indicated that she disagreed with the June 2019 FBA because it contained "substantial and material deficiencies that invalidate it" (id. at p. 7. n. 3). According to the parent's testimony, she requested an FBA because she disagreed with the district's June 24, 2019 FBA and she wanted a BIP (Parent Ex. V at pp. 7-8).

During the hearing, the representative for the district conceded that the district received the parent's November 13, 2018 request for an IEE; however, the district argued that the request was only for a neuropsychological IEE and that the November 2018 due process complaint notice was settled by the district when it agreed to fund the parent's requested neuropsychological IEE (Tr. pp. 8-10).[42] The IHO then inquired as to whether the parent requested an independent FBA and speech-language evaluation prior to filing the amended due process complaint notice, which resulted in counsel for the parent arguing both that the due process complaint notice itself could be considered sufficient notice and that the parent made a request prior to filing the amended due process complaint notice (Tr. pp. 12-16).

Turning first to the IHO's finding that the parent could not raise a request for an IEE for the first time in a due process complaint notice, in order for an IEE to be provided at public expense, State and federal regulations only require that "the parent disagrees with an evaluation obtained by the public agency"; the regulations do not speak to how a parent must manifest this disagreement to the district (34 CFR 300.502[b][1];8 NYCRR 200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"]). However, to the extent that State and federal regulations require a district to respond to a parent request for an IEE at public expense "without unnecessary delay" by either ensuring that an IEE is provided at public expense or in initiating an impartial hearing (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv); federal guidance suggests that the term "unnecessary delay" permits "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for,

[42] Counsel for the district indicated that the only open issue from the November 2018 due process complaint notice involved legal fees (Tr. pp. 9-10).

and arrangements for, an IEE" (Letter to Anonymous, 56 IDELR 175 [OSEP 2010]). However, guidance also indicates that a district "may not require that a parent provide notification of the parent's intent to obtain an IEE at public expense as a precondition for public payment for an IEE" and that "a parent may obtain an IEE without providing prior notice to the public agency" (Letter to Saperstone, 21 IDELR 1127 [OSEP 1994]).

In addition, contrary to the IHO's finding that a claim for an IEE cannot be raised for the first time in a due process complaint notice, a parent may file a due process complaint notice with respect to "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]). Absent any requirement that the parent express her disagreement with the results of a district evaluation in a specific format, there is no reason why a due process complaint notice may not serve the function of expressing the parent's disagreement to the district.

Relevant to the substance of the parents' requests for IEEs, recently, the Second Circuit discussed the idea of a comprehensive evaluation or re-evaluation of a student forming the basis of an IEE request, as opposed to a single assessment (i.e., an FBA) (see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 162-68 (2d Cir. 2020); see also T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, 1291 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). The Court held that parents may base a request for an IEE on the last full evaluation conducted by the district (D.S., 975 F.3d at 169-70 ["Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated."]). The parent's request for an independent FBA is similar to the situation in D.S. where the FBA was not conducted as part of a student's initial evaluation or reevaluation and therefore could not be the subject of a request for an IEE. Accordingly, there is insufficient basis to grant the parent's request for an independent FBA at this juncture. When the district next conducts a re-evaluation of the student, the parent may wish to revisit her request for an independent FBA at such time.

As for the speech-language IEE, even assuming that the November 2018 letter in which the parent stated her disagreement with the district's evaluation of the student in 2015 and requested an IEE to be funded by the district (which the district acceded to in agreeing to fund the neuropsychological IEE) could not be deemed to encompass a request for an independent speech-language evaluation and/or the request in the parent's November 2019 amended due process complaint notice was improperly asserted (see Parent Exs. I; J; K; see also Parent Exs. A at p. 6 n. 2; I at p. 1), I would still find that parent is entitled to district funding of the January 2020 speech-language evaluation. That is the January 2020 speech-language evaluation provides information relevant to determining an award of compensatory speech-language therapy services (see Parent Exs. M; O at pp. 2-4). As such, there is an equitable basis for awarding the parent reimbursement for the cost of the speech-language evaluation (see Application of a Student with a Disability, Appeal No. 15-057).

VII. Conclusion

Contrary to the IHO's decision, the evidence in the hearing record supports a finding that the statute of limitations bars the parent's claims for the 2015-16 and 2016-17 school years. With respect to the June 2017 and June 2018 IEPs, the hearing record supports a finding that the CSEs failed to recommend appropriate related services to address the student's needs and accordingly, the district failed to offer the student a FAPE for the 2017-18 and the 2018-19 school year up to the March 2019 CSE meeting, with the parent's allegation regarding the March 2019 CSE and the remainder of the 2018-19 school year being remanded. In addition, consideration of a compensatory education award is remanded so that an IHO may craft an award in the first instance to remedy the district's failure to offer the student a FAPE. Finally, the district shall reimburse the parent for the costs of the independent speech-language evaluation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated October 17, 2020, is modified to reverse that portion which found that the district waived the ability to assert the defense of statute of limitations and to reflect that the parent's claims regarding the 2015-16 and 2016-17 school years are barred by the statute of limitation;

IT IS FURTHER ORDERED that the IHO decision, dated October 17, 2020, is modified to reverse that portion which found that the district offered the student a FAPE for the 2017-18 school year and the 2018-19 school year up to the March 2019 CSE meeting;

IT IS FURTHER ORDERED that the IHO decision, dated October 17, 2020, is modified to reverse that portion which denied the parent's request for reimbursement for a speech-language IEE and to reflect that the district should reimburse the parent for the costs of the January 2, 2020 independent speech-language evaluation;

IT IS FURTHER ORDERED that that this matter is remanded to the same IHO who presided over the impartial hearing to determine whether the district offered the student a FAPE for the remainder of the 2018-19 school year per the recommendations of the March 14, 2019 CSE based upon the issues raised in the parent's amended due process complaint notice, and what relief, if any, the student may be entitled to remedy the district's failure to offer the student a FAPE for the 2017-18 school year and at least that portion of the 2018-19 school year up to the March 2019 CSE meeting; and

IT IS FURTHER ORDERED that, if the IHO who presided over the impartial hearing is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State Regulations.

Dated: **Albany, New York**
January 19, 2021

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SARAH L. HARRINGTON
STATE REVIEW OFFICER