The University of the State of New York

The State Education Department
State Review Officer
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No. 21-113

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Sarah Pourhosseini, Esq.

Law Office of Elisa Hyman, PC, attorneys for respondent, by Erin O'Connor, 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 district) appeals from a decision of an impartial hearing officer (IHO) which awarded 400 hours of compensatory educational services and which ordered the district to modify the student's IEP to include particular programs and services and to fund a neuropsychological reevaluation of the student. Respondent (the parent) cross-appeals from those portions of the IHO's decision which found that the special education programs and related services recommended by the Committee on Special Education (CSE) for the 2017-18 and 2018-19 school years were appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

According to the evidence in the hearing record, the student in this case attended a charter school for kindergarten and first grade (see Parent Ex. Q at p. 2; Dist. Ex. 6 at p. 7).[1] For second

[1] As reported by the parent, during first grade at the charter school the student experienced "inconsistent instruction" due to teacher turnover, bullying, a physical assault, and racial insults (Dist. Ex. 6 at p. 7). The parent indicated that she wanted the student to receive therapy due to these experiences, but "had trouble finding a

grade (2015-16 school year), the student began attending a district public school (see Parent Ex. Q at p. 2; Dist. Ex. 6 at p. 7).[2]

For third grade (2016-17 school year), the student continued to attend the same district public school in a general education classroom (see Dist. Ex. 25 at p. 1).[3] On February 28, 2017, the parent provided the district with comments regarding the student's February 2017 progress report (see Parent Ex. J). At that time, the parent expressed concern with the student's "level of achievement," noting that the student was "aware of her academic progress and underst[ood] there [was] room for improvement and growth" (id.). In addition, the parent asked the district to provide "guidance, support, and intervention in order to aid the student in her educational growth" (id.).

In a letter to the district dated June 14, 2017, near the conclusion of third grade, the parent referred the student for an initial evaluation (see Dist. Ex. 1). According to the parent's letter, she was concerned that the student was "not doing well in school and believe[d] [the student] m[ight] need special services in order to learn" (id.). The parent also indicated in the June 2017 letter that

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therapist" and the student's maternal grandfather "was opposed to it" so the student "only went for a little while" (id.). In addition, as part of a July 2019 neuropsychological evaluation, the parent reported that the student demonstrated "difficulties recognizing letters and words without teacher support" and "articulation weaknesses" and that, as a result, the parent privately obtained speech-language therapy services for the student, which occurred during kindergarten through first grade and which eventually ended due to "scheduling conflicts" (see Parent Ex. Q at p. 2; Dist. Ex. 6 at p. 6).

[2] As reported by the parent in the October 2017 social history, the student was "barely on grade level, and had a hard time catching up" after she transferred from the charter school to the district public school for second grade (Dist. Ex. 6 at p. 7). The parent also reported that, at that time, she placed the student in a "tutoring program" (2:1 small group) that helped her with homework (id.). According to the parent, she began to notice—in or around the "time of parent teacher conferences in November of that year"—that the student had "trouble focusing" and she spoke with the student's teacher (id.). The parent then privately obtained an evaluation of the student, which included an administration of the "WISC" (Wechsler Intelligence Scale for Children), as well as assessments for "attention problems," "decoding," and "writing" (demonstrating that the student "would switch the order of some letters") (id.). At that time, the parent was told that the student spoke at a "higher level than she [was] able to process information," the student performed "below average with processing" in one area and "above average (2 standard deviations apart)" in another area (id.). In addition, the student had "difficulty focusing" (id. at pp. 7-8). After the privately obtained evaluation, the student began "therapy" with a psychologist from "March/April, to the end of the [second] grade school year" (id. at p. 8). According to the parent, the student "made progress by the end of the school year" (id.). The hearing record does not include a copy of the report from the parent's privately obtained evaluation of the student, nor does the hearing record contain any evidence that the parent shared a copy of this evaluation report with the district—other than what was described during the social history completed in October 2017—and notwithstanding that the district provided the parent with a "Request for Release of Records" form, which asked the parent for "copies of your evaluations as indicated below" to prevent duplicative testing (Dist. Ex. 4 at p. 2; see generally Tr. pp. 1-421; Parent Exs. A-U; Dist. Exs. 1-26; IHO Exs. I-II).

[3] According to the October 2017 social history, the parent indicated that she "discussed the idea of an evaluation with [the student's] teacher at the beginning of [third] grade," but the student's teacher was "not initially concerned" (Dist. Ex. 6 at p. 8). The parent also indicated that, at a November parent teacher conference, she told the teacher about "her concerns regarding [the student's] focus" and further indicated that, by March, the student was "having difficulty across the board"—noting in particular that the student was "distracted, having difficulty focusing, and not completing classwork" (id.). In addition, the parent reported that the student's grades declined during third grade from "3s" to "2s," and the student "scored a low 2 in math, and [a] low 3 in ELA" (English language arts) on the State examinations (id.).

she understood that the district required "written permission" to conduct the student's evaluation, but noted that prior to the evaluation, she had "some question about the process" that needed answers and, thereafter, listed some questions (id.).

For the 2017-18 school year, the student resumed her attendance at the same district public school in a general education classroom for fourth grade (see Dist. Ex. 25 at p. 2).[4] Shortly thereafter, the district sent the parent a letter dated September 26, 2017, notifying her of an appointment scheduled for October 3, 2017, to "review [her] due process rights, discuss the evaluation process, and to conduct a social history interview/update" (Dist. Ex. 2; see Tr. p. 223; Dist. Exs. 22 at p. 7; 25 at p. 1). After rescheduling this appointment, the parent met with district staff on October 13, 2017; on the same date, the parent executed a consent form allowing the district to proceed with the evaluation process and completed the social history (see Dist. Exs. 3-4; see also Dist. Exs. 6 at pp. 6-8; 22 at pp. 6-7). Over three days in November and December 2017, the district conducted a psychoeducational evaluation of the student, the results of which were set forth in a report dated December 6, 2017 (see generally Dist. Ex. 8). On November 28, 2017, the district completed a classroom observation of the student (see generally Dist. Ex. 7).

On December 7, 2017, a CSE convened to conduct the student's initial eligibility meeting (see Dist. Ex. 10 at p. 13). Finding the student eligible for special education as a student with an emotional disturbance, the December 2017 CSE recommended that the student receive four periods per week of special education teacher support services (SETSS) in a group for English language arts (ELA), one 30-minute session per week of individual counseling services, and one 30-minute session per week of counseling services in a group (id. at pp. 1, 9; see Dist. Ex. 11 [consisting of an "Emotional Disability Justification" form]). In addition, the December 2017 CSE created annual goals targeting the student's social skills, social/emotional and attention skills, reading skills (i.e., accuracy, fluency, and comprehension), and writing skills (with the use of graphic organizer) (see Dist. Ex. 10 at pp. 5-8). The December 2017 CSE also recommended the following as testing accommodations: extended time (1.5) on all exams, separate location for all exams (in a small group / with minimal distractions), and the provision of on-task focusing prompts on all exams (as needed) (id. at p. 10). Finally, the December 2017 IEP included the following as strategies to address the student's management needs: on-task focusing prompts, breaking tasks into small portions, and preferential seating (id. at p. 3).[5]

A CSE reconvened on May 17, 2018 to "discuss [the student's] services for 5th grade" and "changing [the student's] services from SETSS to ICT [integrated co-teaching]" services (Dist. Exs. 15 at p. 1; 17 at p. 19; 24 at p. 2; 25 at p. 3).[6] The May 2018 CSE made modifications to the

[4] The evidence in the hearing record reflects that the student had the same regular education teacher during third grade (2016-17 school year) and fourth grade (2017-18 school year) (see Dist. Ex. 25 at pp. 1-2).

[5] On December 19, 2017, the parent executed a consent form, dated December 12, 2017, allowing the initial provision of special education services to the student (see Dist. Ex. 12). It appears that the parent returned the form via facsimile to the district on December 21, 2017 (id.). According to the December 2017 IEP, it was anticipated that the student would begin receiving the recommended services on or about December 18, 2017 (see Dist. Ex. 10 at pp. 1, 9).

[6] The IEP incorrectly carried over the December 7, 2017 date from the prior IEP on several pages of the document

student's IEP, including annual goals, and changed the programming recommendations to ICT services for ELA, mathematics, and social studies instead of SETSS for ELA with an anticipated implementation date for the ICT services of September 6, 2018 (compare Dist. Ex. 17 at pp. 5-10, 12, with Dist. Ex. 10 at pp. 5-9; see Tr. pp. 181, 185-87; Dist. Exs. 24 at pp. 2-3; 25 at p. 3).

Consistent with the May 2018 IEP, the student attended a general education classroom with ICT services for fifth grade during the 2018-19 school year (see Dist. Ex. 6 at p. 1). By letters dated October 4, 2018, the parent informed the district that she "disagree[d] with the most recent evaluations" of the student and requested the following as independent educational evaluations (IEEs): assistive technology, speech-language, central auditory processing, occupational therapy (OT), neuropsychological, and any other testing recommended (Parent Exs. C at p. 1; D at p. 1).

On December 11, 2018, a CSE convened to conduct the student's annual review and to develop an IEP with a projected implementation date of December 12, 2018 (see Dist. Exs. 19 at p. 1; 20 at pp. 1, 13; 21 at p. 1). Finding that the student remained eligible for special education as a student with an emotional disturbance, the December 2018 CSE recommended that the student attend a general education class placement with ICT services in ELA, mathematics, and social studies and receive related services consisting of one 30-minute session per week of counseling in a group and one 30-minute session per week of individual counseling (see Dist. Ex. 20 at pp. 1, 9). In addition, the December 2018 IEP included annual goals targeting the student's needs in writing, reading, counseling, and mathematics (id. at pp. 5-8). The December 2018 CSE also recommended testing accommodations and strategies to address the student's management needs, including the use of graphic organizers, splitting tasks into small portions, preferential seating, and self-monitoring scaffolds such as checklists (id. at pp. 3, 10).

A. Due Process Complaint Notice

By due process complaint notice dated December 4, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. B at pp. 1-2).[7] Shortly thereafter, the parent filed an amended due process complaint notice, dated January 24, 2019, adding allegations related to the December 2018 IEP developed subsequent to the initial due process complaint notice, but which otherwise reiterated the same allegations and requested the same relief concerning the 2016-17, 2017-18, and 2018-19 school years as set forth in the initial due process complaint notice (compare Parent Ex. A, with Parent Ex. B). Relevant to this appeal, the parent alleged that the district committed a child find violation, which denied the student a FAPE for the entire 2016-17 school year; the district evaluations conducted in November and December 2017 were "deficient" and failed to "adequately evaluate" the student in all areas of disability; the district failed to conduct

(see Tr. pp. 185-89; Dist. Ex. 17 at pp. 1, 16-17, 19). At the impartial hearing, the district special education teacher who attended the May 2018 CSE meeting explained that the May meeting was not really a "reconvene" but instead was treated an "amendment" so that the student's annual review date in December would not change (Tr. p. 186).

[7] On December 18, 2018, the parent privately obtained an evaluation of the student with "EBL Coaching," an organization that "specialize[d] in providing one-on-one tutorial support to special education students" (Parent Ex. T at pp. 1-2).

a neuropsychological evaluation of the student; the December 2017 IEP was untimely; the student's eligibility category of emotional disturbance was improper; the December 2017 IEP failed to include sufficient services and annual goals to address the student's executive functioning delays; and the SETSS provided to the student were "not helpful" (Parent Ex. A at pp. 2-5). With respect to the 2018-19 school year, the parent contended that the recommendations in the May 2018 IEP were "deficient," noting the failure to adequately evaluate the student and the failure to recommend annual goals and services to address the student's executive functioning delays, and alleging the recommendations were not individualized to the student's needs (id. at pp. 5-6). With regard to the December 2018 IEP, the parent asserted that the IEP failed to include supports or services to address the student's attention needs (id. at pp. 7-8). As relief, the parent requested findings that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years and relief in the form of IEEs and compensatory educational services (id. at pp. 9-11).

B. Impartial Hearing Officer Decision

On April 5, 2019, the parties proceeded to an impartial hearing, which concluded on July 27, 2020, after 17 days of proceedings (see Tr. pp. 1-421).[8, 9] In a decision dated April 9, 2021, the IHO concluded that, with respect to the 2016-17 school year, the district committed a child find violation on or about March 1, 2017, which extended until a CSE found the student eligible for special education and related services at the December 11, 2017 CSE meeting—for a period of approximately eight months (see IHO Decision at pp. 9-16, 32-33). With regard to the December 2017 IEP, the May 2018 IEP, and the December 2018 IEP, the IHO concluded that the recommended special education programs and related services offered the student a FAPE in the least restrictive environment (LRE) (id. at pp. 16-29).

As relief for the child find violation and resultant denial of a FAPE for the time period from March 2017 through December 2017, the IHO ordered the district to provide the student with a bank of 400 hours of individual instruction in reading, writing, and mathematics by a parent-selected provider and delivered either after school or as a push-in service at school; assistive technology supports and services; transportation or funding for transportation to access the services awarded; and for the district to fund the compensatory educational services via direct payment to the providers or as reimbursement to the parent (see IHO Decision at p. 33). In addition, the IHO ordered the district to modify the student's IEP to include a 12-month school

[8] At the impartial hearing held on April 5, 2019, the IHO explained that he had been "appointed following the recusal of another hearing officer and that [was] becoming a pattern lately" (Tr. pp. 1-3). And while the impartial hearing took place over 17 total days, the IHO held prehearing or status conferences on eight of those dates, therefore, no testimony occurred on those dates (see Tr. pp. 1-64, 120-23). At the impartial hearing held on April 16, 2019, the parent moved for an interim order directing the district to fund an IEE of the student (neuropsychological evaluation), which the IHO ordered in an interim decision dated May 24, 2019 (see Tr. pp. 12, 15; Interim IHO Decision at p. 2). In so moving, the parent also reserved her right to continue to seek IEEs in the areas of speech-language, OT, PT, and assistive technology, as requested in the due process complaint notices (see Parent Exs. A at pp. 9-10; B at p. 8). The neuropsychological evaluation was conducted over the course of three days in July 2019 (July 2019 neuropsychological evaluation), subsequent to the student completing fifth grade during the 2018-19 school year (see Parent Ex. Q at p. 1).

[9] During the impartial hearing on May 20, 2020, the EBL director re-evaluated the student (see Parent Ex. T at p. 2).

year program and to change the student's eligibility category from emotional disturbance to other health-impairment (id.). Finally, the IHO ordered the district to fund a neuropsychological reevaluation of the student, an assistive technology evaluation of the student as an IEE, and "further testing if recommended because of these assessments" (id.).

IV. Appeal for State-Level Review

The district appeals. Initially, the district affirmatively asserts that it does not challenge the IHO's determination that the district committed a child find violation or the IHO's related finding that this violation resulted in the district's failure to offer the student a FAPE from March 2017 through December 2017. Rather, the district argues that the IHO erred by awarding the student 400 hours of compensatory educational services to remedy the child find violation and lack of FAPE for those portions of the 2016-17 and 2017-18 school years. In addition, the district asserts that the IHO erred by ordering the district to modify the student's IEP to include a 12-month school year program and to fund a neuropsychological reevaluation of the student.[10, 11]

In an answer, the parent generally argues to uphold those portions of the IHO's decision now appealed by the district. As a cross-appeal, the parent contends that the IHO erred by finding that the district's child find violation consisted of eight months, arguing that the IHO should have found that the child find violation occurred in or around September 2016—but no later than November 2016—and continued until the CSE meeting held in December 2017.[12] The parent also

[10] The district attaches additional documentary evidence for consideration on appeal (see generally Req. for Rev. Ex. 1). The document consists of an IEP, dated February 2021, which the district submits to reflect that a CSE modified the student's eligibility category from emotional disturbance to other health-impairment, as ordered by the IHO (id. at p. 1; see IHO Decision at p. 33). 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]). Although the parent objects to the consideration of the February 2021 IEP, I will exercise my discretion to consider the document for the limited purpose of establishing that, consistent with the IHO's decision and order, the district modified the student's IEP to change the student's eligibility category from emotional disturbance to other health-impairment (see Req. for Rev. Ex. 1 at p. 1). As such, the IHO's order requiring this change, will not be further discussed in this appeal.

[11] To the extent that the district does not appeal or challenge that portion of the IHO's decision ordering the district to fund an assistive technology IEE of the student, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[12] In this case, the parent's January 2019 amended due process complaint notice contained numerous allegations, which the IHO's decision did not fully address, but which the parent does not now argue as alternative bases upon which to conclude that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (compare Parent Ex. A, with IHO Decision, and Answer & Cr. App.). 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

argues that the district failed to timely develop an IEP for the 2017-18 school year, noting the parent's initial referral of the student for an evaluation by letter dated June 14, 2017. As a result, the parent contends that the district failed to offer the student a FAPE for the entire 2017-18 school year. With regard to the December 2017 IEP, the parent asserts that the district failed to thoroughly and to sufficiently evaluate the student and points specifically to the district's failure to assess the student for an ADHD or to conduct a neuropsychological evaluation to "analyze the reason for her processing speed." Relatedly, the parent contends that the failure to sufficiently evaluate the student led to the December 2017 CSE's erroneous decision to find the student eligible for special education as a student with an emotional disturbance. Consequently, the parent argues that the IHO erred by finding that the December 2017 IEP offered the student a FAPE. In addition, the parent argues that the IHO erred by finding that the December 2017 IEP offered the student a FAPE because the recommendation of SETSS for "ELA only," together with counseling services, did not address the student's academic needs across all domains and the IEP did not include any goals or services or supports to address the student's "impulsivity and inattention." The parent also contends that the district committed multiple procedural violations, which cumulatively resulted in a failure to offer the student a FAPE for the 2017-18 school year.

With respect to the 2018-19 school year, the parent initially argues that the IHO should have only considered the May 2018 IEP to determine whether the district offered the student a FAPE for this school year, rather than relying on the December 2018 IEP. The parent asserts however that neither the May 2018 IEP, nor the December 2018 IEP, was substantively appropriate, as both IEPs identified the student's eligibility category as emotional disturbance and both IEPs failed to address the student's identified lack of focus, distractibility, and poor attention skills. In addition, the parent contends that the May 2018 IEP and the December 2018 IEP both failed to address the student's academic and processing delays through either individual tutoring or remediation services, and both IEPs failed to include any supports for the student's executive functioning. Moreover, the parent contends that the annual goals in the May 2018 IEP were vague, insufficient, and were repeated from the December 2017 IEP. If considered by the SRO, the parent asserts that the annual goals in the December 2018 IEP were also insufficient and "'watered down' to socially promote" the student, and thus, resulted in a failure to offer the student a FAPE. For these reasons, the parent argues that the IHO erred by finding that the district offered the student a FAPE for the 2018-19 school year. As relief, the parent seeks to uphold the IHO's award of compensatory educational services and seeks additional findings that the district failed to offer the student a FAPE for the entire 2016-17, 2017-18, and 2018-19 school years.[13]

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]). Consequently, consistent with State regulation, any issues from the parent's due process complaint notices not addressed by the IHO and/or not now raised as issues in the cross-appeal as bases upon which to conclude that the district failed to offer the student a FAPE for the three school years at issue are hereby deemed abandoned and will not be reviewed.

[13] The parent also argues that the IHO failed to make any determination with respect to the parent's section 504 claims. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education

In an answer to the parent's cross-appeal, the district generally argues to uphold the IHO's findings concerning the length of the child find violation and that the December 2017, May 2018, and December 2018 IEPs offered the student a FAPE.

V. Applicable Standards

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

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

Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

§ 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]).[14]

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).

[14] 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).

VI. Discussion

A. Child Find

Turning first to the parent's cross-appeal, the parent contends that the IHO should have found the district in violation of its child find obligation as of September 2016—or at least no later than November 2016—and therefore, the IHO should have found that the district's child find violation denied the student a FAPE for the entire 2016-17 school year. The district, while not appealing the IHO's conclusion that the district committed a child find violation from March 2017 through December 2017, appeals the 400 hours of compensatory educational services awarded as a remedy for this violation, which will be addressed below.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop

"effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). Upon receipt of a written request of a referral, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1]-[3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). State regulations do not prescribe the form that a referral by a parent must take but do require that it be in writing (8 NYCRR 200.4[a]). It has been held "that general expressions of concern" cannot be deemed to "constitute a 'parental request for evaluation' under the plain terms of the statute" (D.K., 696 F.3d at 247 n. 5 [emphasis in the original], citing 20 U.S.C. § 1415[d][1][A][i]).

In support of the contention that the district violated its child find obligations prior to March 1, 2017, the parent argues that the district had notice of the student's difficulties in school "early on in the 2016-2017" school year—either in writing in September 2016 or no later than November 2016—and that the district failed to timely evaluate the student in response to the June 2017 referral letter (Answer & Cr. App. ¶¶ 13-16).

As reflected in the evidence in the hearing record, the student's third grade regular education teacher described her as a "bright student" who became "distracted" in class and who also had "difficulty maintaining relationships with her peers" (Dist. Ex. 25 at p. 1). According to the third grade teacher, "these struggles affected [the student's] classroom performance" (id.). He also testified that he first noticed the student becoming distracted in class approximately 1.5 months into the school year, when the classroom shifted its focus from "community building" within the school to "getting deeper into academics" (Tr. pp. 224-25). He met with the parent at the November 2016 and March 2017 family conferences held at the school (see Tr. p. 225). At the March 2017 family conference, the third grade teacher informed the parent that the student had "difficulties with attention and focus," and the parent expressed similar concerns about the student at that time to him (Tr. pp. 226-27; see Dist. Ex. 25 at p. 1). He also confirmed in his testimony that the March 2017 conference was the first time the parent expressed such concerns to him about the student (see Tr. p. 227). The third grade teacher's testimony also reflected that, as of March 2017, the student was "slightly behind grade level in reading," and that he and the parent "discussed the IEP process" at that conference (Dist. Ex. 25 at p. 1). According to the teacher, although the parent agreed that the student "should be evaluated" at that time, the parent indicated an unwillingness to initiate that process due to concerns that the student's grandfather "would not agree to this course of action" and, therefore, indicated that she "did not wish to proceed at that time and would speak with the family" (id.; see Tr. pp. 228, 236).

When asked why the March 2017 conference was the "first time" the third grade teacher brought up the student's attention and focus difficulties with the parent, he testified that the November 2016 conference "would have been early on in the school year" (Tr. p. 229). He explained that, at the start of the school year, the school engaged in "a lot of community building," and that with a new group of students who all had different learning styles, it was a time to try different things with the students and it was "not entirely unusual for a kid not to be focused on academics" (Tr. p. 229). The teacher also explained that, within the classroom, he had "American READS tutors and student teachers" who worked with different students, including this student in particular, but that "when it became apparent that those things weren't as effective as [he] would [have] like[d] them to be, that's when [he] had a conversation" with the parent (Tr. pp. 229-30; see Dist. Ex. 25 at p. 2). The teacher also "implemented small group instruction, prompting and the breaking down of information in the classroom"—and that all of "[t]hese additional supports helped [the student] for the remainder" of the 2016-17 school year (Dist. Ex. 25 at p. 2).

When the IHO asked the third grade teacher whether he implemented any response to intervention (RtI) strategies with the student, the teacher testified that "it would have been informally," by providing the student with work that was "scaffolded for her," by breaking down tasks into "smaller steps," having the student work on one piece of a writing assignment at a time, and talking the student through "how [she] would work through that process" (Tr. pp. 230-33). The teacher also noted that although he understood that he could "initiate the IEP process" himself, he also understood that he could "not initiate that process without parent consent" (Tr. pp. 234-35). According to the teacher, the parent did provide consent to evaluate the student in March 2017, but after the parent referred the student in June 2017, she agreed that the student would be "evaluated at the start of the 2017-2018 school year" (Dist. Ex. 25 at p. 2; see Tr. pp. 236, 239-40).

According to the parent, when the student transferred into the district public school in second grade (2015-16 school year), she informed the teacher about the student's "history of difficulty focusing and spacing out" and "asked whether [the student] should be evaluated" (Parent Ex. U at pp. 1-2). According to the parent, the teacher advised that she "should wait to see how [the student] adjusted to the new school setting" (id. at p. 2). The parent also testified that, by March 2016, the student's teacher "agreed" that the student had "difficulty focusing" (id.).

With respect to third grade during the 2016-17 school year, the parent testified that, "[a]t the beginning of third grade"—in September 2016—she "submitted a written statement" about the student's difficulties to the district, including "her issues with attention as well as reading and asked whether she should be evaluated" (Parent Ex. U at p. 2). During cross-examination, the parent acknowledged, however, that she could not locate a copy of the September 2016 letter to corroborate this assertion, nor had such a letter been entered into the hearing record as evidence (see Tr. pp. 206-07). The parent disputed, however, that she "refused" an evaluation of the student in or around March 2017, as suggested by the teacher's testimony, due to potential concerns from the grandparent (Parent Ex. U at p. 2). According to the parent, she submitted another request to evaluate the student in June 2017 (id.; see Dist. Ex. 1).[15] The June 2017 letter does not reference

[15] The parent sent the June 2017 letter directly to the student's then-current third grade regular education teacher (see Dist. Ex. 1).

or otherwise mention any previous requests to evaluate the student or question why the district had not yet undertaken the initial evaluation process the parent allegedly requested in writing in September 2016 (see Dist. Ex. 1).

In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652). In his decision, the IHO carefully examined the evidence presented by both parties with respect to the alleged child find violation to determine if, and when, the district's child find violation was triggered. For example, the IHO weighed the evidence demonstrating that, while the student's third grade teacher acknowledged that the student's difficulties emerged in fall 2016, he judged November 2016—or the time of the first family/parent-teacher conference—as too early in the school year to refer the student for an evaluation (see IHO Decision at pp. 9-11). The IHO also weighed evidence demonstrating that the third grade teacher implemented several strategies, such as small group instruction, prompting, breaking down of information, and providing the student with additional adult support in the classroom (i.e., tutors and teaching assistants) (id. at p. 11). According to the IHO, when these efforts failed, the third grade teacher spoke to the parent about his concerns—at the March 2017 conference—and found that the parent shared his concerns (id.).

In addition, the IHO examined the parent's evidence, weighing her testimony that she had shared information concerning the student's "history of difficulty in school"; that she wrote to the district in September 2016 to ask whether the student should be evaluated but also noting that this letter was not produced at the impartial hearing; and that the parent expressed concerns with the student's "'level of achievement'" in February 2017, and asked for "'guidance, support, and intervention'" to assist the student (IHO Decision at p. 12). The IHO further noted that, despite reporting the "'family's hardships'" as part of the social history, the parent disputed this as a factor causing the student's difficulties at school (id. at pp. 12-13).

Overall, the IHO found that, based upon the evidence, the student "exhibited academic delays" during the 2016-17 school year, which coalesced for the parent and the student's third grade regular education teacher in or around the time of the March 2017 conference and which, at that time, persuaded the third grade teacher to speak to the parent about evaluating the student (IHO Decision at pp. 13-14). While the IHO was unable to fully resolve the factual question surrounding the parent's allegedly delayed "'consent to evaluate,'" the IHO concluded that the district's child find obligations existed absent a parent's request to evaluate the student and that the district had "'reason to suspect a disability and reason to suspect that special education services may [have] be[en] needed to address that disability,'" as of March 1, 2017 (id. at pp. 14-16). In addition, the IHO found that the child find violation continued through the "implementation date" of the December 2017 IEP, on December 18, 2017—for "nearly 8 months of school" (id. at p. 16).

Based upon a review of the evidence in the hearing record, the parent's arguments do not warrant disturbing the IHO's conclusion that the child find violation occurred beginning on or around March 1, 2017. This is especially true where, as here, the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully

marshaled and weighed the evidence in support of his conclusions. Consequently, the parent's arguments must be dismissed.[16]

B. Relief—Compensatory Educational Services

Before addressing the parent's cross-appeal of the IHO's determinations that the December 2017, March 2018, and December 2018 IEPs offered the student a FAPE, I will address the district's appeal of the IHO's award of 400 hours of compensatory education to remedy the eight month child find violation. The district contends that the IHO's award of 400 hours of compensatory educational services to remedy the district's admitted eight-month child-find violation was excessive.

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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [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 E. Lyme, 790 F.3d at 456; Reid, 401 F.3d at 524 [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

[16] Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial individual evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]). In this case, the district obtained the parent's consent to evaluate the student on October 13, 2017—four months after receipt the parent's June 2017 referral letter (see Dist. Exs. 1; 4). Even assuming for the sake of argument that, as argued by the parent, the district failed to timely evaluate the student within 60 days of the June 2017 referral letter, that the December 2017 IEP was untimely, and relatedly, that the district failed to have an IEP in place for the start of the 2017-18 school year, the parent would not be entitled to any additional relief for these procedural violations because the IHO's child find violation extended through the same period of time—i.e., September 2017 through December 2017, and the IHO awarded compensatory educational services as relief for that same period of time (see IHO Decision at p. 33). To the extent that the parent argues that the district's failure to have an IEP in place at the start of the 2017-18 school year denied the student a FAPE for the entire 2017-18 school year, this argument holds no merit. This is because, as discussed herein, the evidence in the hearing record supports the IHO's finding that the December 2017 IEP—which provided special education services to the student for the remainder of the 2017-18 school year, or December 2017 through June 2018—offered the student a FAPE for that period of time, and thus, the December 2017 IEP served as a point that cut off any failure to offer the student a FAPE for the remaining portion of the 2017-18 school year and terminated the parent's right to compensatory relief for that portion of the 2017-18 school year.

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"]; L.M., 478 F.3d at 316 [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"]).

As part of the December 2018 EBL Coaching evaluation (administered when the student was in fifth grade), the director of EBL administered the Wide Range Achievement Test (WRAT) (assessing decoding, spelling, and math computation skills), the Test of Written Language, and the Qualitative Reading Inventory to the student (Parent Ex. T at pp. 1-2). According to the EBL director's affidavit testimony, the student performed "at a low fourth grade level for both spelling and decoding, and a mid-fourth grade level for mathematics" (id. at p. 2). In the area of written language, the student performed at "a low fourth grade level and a fourth grade level for reading comprehension" (id.). At the time of EBL's reevaluation of the student in May 2020, the student would have been nearing the conclusion of sixth grade (see Parent Exs. Q at p. 17; T at p. 2). Although the re-evaluation was conducted "virtually," the EBL director attested that the student was "attentive to each task" and the testing results were an "accurate portrayal of her academic levels" (Parent Ex. T at p. 2). Based upon the re-evaluation results, the EBL director reported that the student "tested at a low fourth grade level for spelling, an upper fourth grade level for decoding, a low fifth grade level for mathematics, a low fourth grade level for writing, and a fourth grade level for reading comprehension," which the director characterized as "representing only minimal progress in some areas and no progress in others" (id. at pp. 2-3). Based on results indicating that the student was "functioning below grade level across the board," as well as a review of other evaluations of the student and IEPs, the EBL director recommended that the student "receive 400 hours of one-on-one instruction, based on an average of five hours per week over a two-year school time span" (id. at p. 3). The EBL director recommended the student receive multi-sensory tutoring using Orton-Gillingham methodology to address "her reading and spelling skills" and "similar instructional tools to build her written language and reading comprehension skills" (Parent Ex. R). The director further testified that the student had the potential "to come close to or achieve grade level academically" (Tr. p. 386).

The neuropsychologist who conducted the July 2019 neuropsychological IEE of the student also indicated in affidavit testimony that, with appropriate supports, the student had the ability to perform at grade level (Parent Ex. S at p. 16). The neuropsychologist averred that he reviewed the recommendations of the EBL director and "strongly agree[d] with her assessment that [the student] require[d] 400 hours of tutoring in order to compensate for her current delays" (id.).

The district argues that, after the December 2017 CSE meeting, the district provided the student with sufficient services to make up for the eight-month delay in services and that, as a result, approximately one year after the period of time for which the IHO found a child find violation, i.e., by the December 2018 CSE meeting (during the student's fifth grade year), the student was reported to be performing on grade level. The student's special education teacher for the 2018-19 school year attended the December 2018 CSE meeting (see Dist. Ex. 2 at p. 1). According to the district special education teacher's testimony, the student was "performing on grade level in math and reading" at that time (id. at p. 2). The December 2018 CSE noted in the IEP that the student performed at the "mid-fifth grade level," which was a "reading level T" on Fountas and Pinnell (Dist. Ex. 20 at p. 1). Similarly, the December 2018 CSE noted in the IEP that, in mathematics, the student performed in the early-to-mid-fifth grade level in the areas of math concepts, problem solving, and math calculations, based upon a "Slosson Math Diagnostic Screener" administered to the student in December 2018 (id.).[17]

In crafting the compensatory educational services award, the IHO credited the neuropsychologist's testimony, as well as the EBL director's testimony, "regarding the [s]tudent's disabilities and potential to achieve grade level if given the right program and support" (IHO Decision at p. 32). In addition, the IHO noted that, in the neuropsychologist's affidavit testimony, he "agreed" with the EBL director's recommendation for 400 hours of tutoring (id. at p. 30).

As to the district's argument pertaining to the student's progress subsequent to the child find violation, the district is correct that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Smith v. Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018] [noting that "a child must have 'lost progress' or a need for education 'restor[ation],' or else the child may be deemed 'whole' and no educational services may be necessary] [internal citation omitted] [alterations in the original], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). However, here, the IHO acknowledged evidence of the student's scores on the Fountas and Pinnell but quoted the testimony of the EBL director that the Fountas and Pinnell was an informal reading assessment and that the standardized assessments administered by EBL "outweigh[ed]" such measures (IHO Decision at p. 31, quoting Tr. p. 382).

Here, where the IHO weighed the relevant evidence both supporting the parent's requested relief and the district's position as to the student's progress, the district has not pointed to a

[17] For purposes of comparison and to demonstrate the student's functioning during the time that corresponds to the end of child find violation (i.e., in December 2017 during the student's fourth grade year), the district points to grade equivalents (3.1 for reading and 3.0 for math fluency) reported in the December 2017 psychoeducational evaluation for the student's scores resulting from administration of Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV ACH), as well as scores from a December 2017 administration of the Fountas and Pinnell assessment reported in the IEP which indicated the student was performing at an early third grade reading level at that time (level "N") (see Dist. Exs. 8 at pp. 4-5; 10 at 1). In addition, the May 2018 IEP noted that a classroom reading assessment demonstrated that the student achieved a "Fountas and Pinnell Independent Reading Level R, Mid Fourth Grade Benchmark, as of May 2018" (Dist. Ex. 17 at p. 1).

sufficient basis in the hearing record to modify the IHO's discretionary award. While the 400 hours of compensatory education for an eight-month child find violation may appear at first glance to be a relatively large award if viewed on an hour-to-hour basis for a period of eight months, the IHO's calculation was nevertheless appropriate as it was based on the IHO's view of the evidence of the student's needs (see IHO Decision at p. 32; see also L.M., 478 F.3d at 316 [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"]; Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). Accordingly, I decline to disturb the IHO's award of 400 hours of compensatory education.

As a final matter, the district argues that any award of compensatory education in this case must be limited to a rate not to exceed $125.00 per hour and the services must be provided by a certified special education teacher (Req. for Rev. ¶ 11). With regard to the rate cap, the district specifically contends it should be limited to $125.00 per hour because it is the only evidence on this issue in the hearing record and the parent should not be allowed to exceed it (Answer to Cr. App. ¶ 2). The district also contends that the IHO's award of transportation to access the compensatory education should be vacated, as the parent found a provider—EBL Coaching—that did not charge additional fees for traveling to a student's home (see Req. for Rev. ¶ 11). The parent argues that the district waived any argument concerning the rate of the compensatory services because the district failed to raise this issue at the impartial hearing or in its closing brief to the IHO (Answer & Cr. App. ¶ 9).

The EBL director indicated that EBL charges $125.00 per hour for the type of one-on-one tutoring the agency recommended for the student but no additional charges for travel time (Parent Ex. T at p. 3; see Tr. pp. 388-39). During cross-examination, the EBL director acknowledged that not all of the instructors at EBL Coaching were licensed special education teachers, but approximately 60 percent were certified in special education by the State (Tr. p. 385). The EBL director further testified that although an instructor had not yet been selected for the student, the student would receive all of the one-on-one tutoring from one instructor (Tr. pp. 385-86).

Overall, a review of the hearing record reveals no other evidence concerning either the rate charged by EBL Coaching, any other rate charged within the market for the type of one-on-one tutoring recommended by the EBL director, or, for that matter, that the rate charged by EBL Coaching has remained unchanged since the impartial hearing concluded in July 2020 (see generally Tr. pp. 1-421; Parent Exs. A-U; Dist. Exs. 1-26; IHO Exs. I-II). However, the IHO did not require the parent to obtain the awarded compensatory education from EBL Coaching in particular. And, as the parent notes, although the district argued during the impartial hearing that the compensatory education sought by the parent was excessive, it did not dispute that it would be appropriate for the parent to select a private provider to deliver a compensatory award (as opposed to it being the district's responsibility to implement the award) or that any particular rate should apply (see IHO Ex. II at pp. 16-20). Indeed, if the district wished to argue that a particular rate should apply to the compensatory award, it was incumbent on the district to develop the hearing record as to a market rate. The district had ample opportunity to present alternative arguments on these points as the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017

WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Based on the foregoing, I decline to modify the IHO's order with respect to assigning a rate cap to the award of compensatory education.

C. December 2017, May 2018, and December 2018 CSEs and IEPs

Having found that the evidence in the hearing record supports the IHO's award of compensatory education, there is little to be gained from addressing the parent's cross-appeal of the IHO's findings that the December 2017, May 2018, and December 2018 IEPs offered the student a FAPE. That is, even if I were to find that the IHO erred in his findings on these issues, the parent does not seek any additional relief relating thereto.

In any event, a review of the evidence in the hearing record supports a finding that the IHO correctly determined that the December 2017, May 2018, and December 2018 IEPs offered the student a FAPE. The IHO addressed the specific factual and legal claims raised by the parent and set forth and applied the proper legal standards to the evidence developed in the hearing record as to the parent's claims related to the sufficiency of the evaluative information before the December 2017 CSE, the appropriateness of the emotional disturbance eligibility category, the December 2017 CSE's recommendation for SETSS and counseling, the appropriateness of the May 2018 and December 2018 CSEs' recommendation for ICT services and counseling, and the appropriateness of the annual goals contained in the December 2018 IEP (IHO Decision at pp. 16-29). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO other than as set forth below (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with respect to the above issues are hereby adopted; however, I will further address the parent's arguments about the sufficiency of the evaluative information available to the December 2017 CSE, as well as the appropriateness of the emotional disturbance disability category, as these issues appear to form the crux of the parent's arguments on appeal and underlie several of her other arguments (i.e., that because the district failed to diagnose the student's ADHD or fully evaluate her processing speed, the IEP recommendations failed to address the student's needs related to impulsivity and inattention).

The parent argues in the cross-appeal that the district failed to rely on sufficient evaluative information in developing the December 2017 IEP, and as a result, the IHO erred in finding that the December 2017 IEP offered the student a FAPE. Specifically, the parent argues that, notwithstanding the student's "well documented" "poor attention, lack of focus, slow processing speed, distractibility and delayed reading comprehension," the district did not assess the student for an ADHD or conduct a neuropsychological evaluation of the student to "analyze the reason for her processing speed." In addition, the parent contends that the district's failure to comprehensively evaluate the student led the December 2017 CSE to erroneously identify the student's eligibility category as emotional disturbance.

In response, the district argues that, consistent with State regulations pertaining to an initial evaluation, the district conducted a social history, a psychoeducational evaluation, and a classroom observation. The district also argues that the December 2017 CSE relied upon the evaluative information to identify the student's academic levels, strengths, and weaknesses. With respect to the eligibility category selected for the student, the district contends that it was proper, noting that the student had not been diagnosed as having an attention deficit disorder (ADD) or an ADHD when the parent had the student privately evaluated in second grade. Nevertheless, the district argues that the student's difficulties with attention did not go unaddressed.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related 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).

Relevant to disputes regarding a student's particular disability category or classification, 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 given considerably less weight to 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, 480 F. Supp. 2d at 1342; 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]).

Accordingly, the IDEA requires that CSEs do not merely rely upon the disability category of a student to determine the needs, goals, accommodations, and special education services in his or her IEP, but instead utilize the information gleaned from the evaluation process. To wit, as noted above, the 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 (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP derived from the relevant evaluations and assessments becomes the operative focus with respect to the student's needs and not the "label" that is used when a student meets the criteria for one or more of the disability categories. Moreover, where neither the student's eligibility for special education nor the student's needs are in dispute, the significance of the disability category label is more relevant to the local education agency (LEA) and State reporting requirements than it is to determine an appropriate IEP for the individual student.[18]

The evidence in the hearing record reflects that the district completed a social history, a psychoeducational evaluation, and a classroom observation upon receipt of the parent's consent to evaluate the student (see generally Dist. Exs. 4; 6-8). According to the classroom observation, the student "often did not appear to be focused on the teacher, but did participate, and responded appropriately to questions" (Dist. Ex. 7 at p. 2). The observer also noted that the student's "body was frequently in motion," and when given an independent writing task, the student had "difficulty focusing, and appeared to accomplish little if any writing" (id.). The student appeared "distracted by materials" and "was talkative, though [she] appeared to be talking to herself" (id.).

As reported in the psychoeducational evaluation report, the parent described the student as having "difficulty with academics, poor attention, and peer relationships" and "lacking foundational skills" (Dist. Ex. 8 at p. 1). The district school psychologist administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV ACH), and the Behavior Assessment System for Children, Second Edition (BASC-2) to the student over the course of three days (id.). During the testing sessions, the student was "easily distracted by noise from the hallway, but was easily redirected to the task at hand" (id.). Results from the WISC-V, which assessed "five areas of cognitive ability," revealed the following standard scores: an overall, full-scale IQ, 97 (average range); verbal comprehension skills, 113 (high average range); visual spatial skills, 100 (average range); fluid reasoning skills, 91 (average range); working memory tasks (assessing concentration and mental control), 110 (high average range); and processing speed, 80 (low average range) (id. at p. 5). The evaluator noted that the student's processing speed was "one of her weakest performance areas" (id.). With respect to academic skills assessed with the WJ-IV ACH, the student's scores all fell within the average range, although she "did demonstrate some weaknesses in complete proficiency

[18] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of [t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who fall in over a dozen other subcategories (20 U.S.C. § 1418[a]; 34 CFR 300.641).

in reading comprehension, reading fluency, spelling and math fact fluency" (id. at pp. 4-6). In addition, the evaluator indicated that the student "struggle[d] most consistently on timed tasks as she tend[ed] to process information at a slower pace" when compared to her same age peers (id. at p. 6). And finally, the evaluator noted that the results of the BASC-2 revealed "specific elevations requiring clinical/counseling intervention" (id.).

To address the student's "relative weakness" in her processing speed, the evaluator explained that while some students "simply work[ed] at a slow pace," other students were "slowed down by perfectionism, problems with visual processing, inattention, or fine-motor coordination difficulties" and it was "important to identify the factors contributing" to the student's weakness in her processing speed (Dist. Ex. 8 at p. 6). Therefore, "[i]in addition to interventions aimed at these underlying areas, processing speed skills m[ight] be improved through practice," and specific to this student, "[i]nterventions c[ould] focus on building [her] speed on simple timed tasks" (id.). The evaluator further noted that "speeded flash card drills," which required the student to "quickly solve simple math problems," could improve fluency in her academic skills (id.). In addition, the evaluator explained that "[d]eveloping automaticity with academic concepts c[ould] free up cognitive resources in the service of more complex academic tasks" (id.).

At the impartial hearing, the district school psychologist who conducted the psychoeducational evaluation testified that, overall, the student "did not present with significant cognitive weakness" or "with significant academic learning deficits" (Dist. Ex. 23 at pp. 1-2). She further testified that, based upon the BASC-2 results, the student functioned in the "'at-risk' range in the areas of hyperactivity and conduct problems (the tendency to engage in rule breaking behavior)," and within the "[c]linically significant" range for "attention problems, learning problems and atypicality" (id. at p. 2). According to the district school psychologist, the December 2017 CSE "considered each of these assessments," and she thought the CSE had "adequate information upon which to make a recommendation" (id.). The school psychologist also testified that, at the December 2017 meeting, the CSE discussed the student's strengths in "verbal comprehension, language and working memory" and that she performed "on grade level in math"; her weaknesses in "processing speed and focus, which affected her reading and writing in the classroom"; and, as reported by the student's fourth grade teacher, that she had "difficulty getting along with her peers," which included "teasing other students and easily losing her temper" (id.). She further testified that the student "did not demonstrate a need for any additional assessments" and based upon the evaluative information, the student "did not show any signs of a learning disability at that time" (id.). With respect to the eligibility category of emotional disability, the district school psychologist testified that it was "based upon her demonstrated emotional concerns and inability to learn absent a health or intellectual impairment" (id.). She further testified that the December 2017 CSE "believed [the student's] difficulties stemmed from [her] emotional difficulties and trouble focusing," that the recommendation for SETSS provided the student with "additional small group academic support in ELA, an area of difficulty," and that the management needs recommended in the IEP supported the student's ability to maintain focus in the classroom (id. at p. 3). The CSE recommended counseling to address the student's "social and emotional difficulties" (id.).

When asked during cross-examination at the impartial hearing how she had "rule[d] out" an ADHD as a "possible reason for [the student's] learning difficulties," the district school psychologist testified that she "wouldn't have been ruling it out because [she was] not doing a

diagnostic evaluation" (Tr. p. 91). She also testified that the student's "attention" was an "area of concern" that was observed as part of the district's assessment of her functioning (id.). When asked if she "suspect[ed] at the time of the evaluation" that the student might "be considered for such a diagnosis," the district school psychologist responded, "[n]ot necessarily"—and noted specifically that "home stressors" could, at times, "play[] a huge role for kids" (Tr. pp. 91-92). She also acknowledged, however, that it would "be perfectly relevant" to consider "whether or not [the student] need[ed] an evaluation for that type of disorder" (Tr. p. 92). Therefore, for this student in particular—who had "home stressors"—"[it was] hard to tell" (id.; see Tr. pp. 103-04 [explaining that when students struggle "with a lot of home stresses . . . their emotional reaction is not a sign of a disability, . . it's an adaptive response to stress," which makes it difficult to "distinguish between what is . . . part of a disability and what is related to normal responses to stress"]). The district school psychologist also testified that she did not "refer [the student] for further evaluation to rule out a diagnosis of ADHD," and had concluded, without ruling out an ADHD, that the December 2017 CSE had adequate evaluative information upon which to make a recommendation for the student (Tr. pp. 93, 96).

During cross-examination, the parent's attorney then referred the district school psychologist to the "Emotional Disability Justification" form (Tr. pp. 100-02; Dist. Exs. 11 at p. 1; 23 at p. 2). The parent's attorney questioned whether the first "Yes" response checked off for question number one of the form meant, "in effect, at that point [that the district school psychologist] would have been ruling out the possibility of ADHD as a factor for her inattention" (Tr. p. 105; Dist. Ex. 11 at p. 1). The district school psychologist agreed, but explained that "with the information that [she] had at that time, [she] did not feel that it could be better explained by these . . . factors" and did not "seek out a neuropsychological evaluation to rule out [an] ADHD" (Tr. p. 105). She also recalled that while she had "found [the student's] eligibility to be . . . less obvious than other cases," the student "needed some support" (Tr. pp. 130-32). The district school psychologist further explained that it would be a "very rare case" where she would suspect an ADHD in a student such as this, unless and until the student was no longer "in a state of emotional distress" from home stressors (Tr. pp. 132-33; see generally Dist. Ex. 6).

Next, the district school psychologist explained the "relationship between a grade equivalent [score] on the Woodcock-Johnson and the standard score" (Tr. pp. 136-37). She testified that, overall, grade equivalent scores were "less reliable" as a result of how those scores were obtained (Tr. p. 137). In this case, she reported grade equivalent scores in the psychoeducational evaluation report to add "additional information" in order to "justify [the district] servicing this [student]," noting further that if she reported only the standard scores and the percentile ranks, those scores would not otherwise justify the "addition of [a] special education program" (id.). In addition, the reporting of the grade equivalent scores in this case served to "broaden the view of her academics" to support the fourth grade teacher's view of how the student presented in the classroom (id.).

The district special education teacher who attended the December 2017 CSE meeting—and who also provided SETSS to the student following that meeting—also testified at the impartial hearing (see Dist. Ex. 24 at pp. 1-3; Tr. pp. 154-212). With respect to the student's difficulties with "emotional regulation, attention, and hyperactivity," the district special education teacher agreed that these could be "signs" of an ADHD, and that the student "could have had that diagnosis" (Tr. pp. 165-66). However, during the time she provided the student with SETSS, she

did not consider referring the student to determine whether she had an ADHD because she worked with the student's behaviors and not a diagnosis (see Tr. p. 166). She further testified that she "would have been working with [the student] the same way" (Tr. p. 167).

During the impartial hearing, the parent testified that, at the December 2017 CSE meeting, she "contested the classification, and [she] asked that [the student] should be evaluated for a different clarification" (Tr. p. 409). In addition, the parent testified that she also told the CSE her belief that the student had "ADHD," and "should be tested for it" (id.). According to the parent, the CSE advised her that "there was no testing, and that [she would] have to do it outside of school" (id.). With respect to the district's evaluations of the student, the parent testified that "they weren't complete because they did not take into consideration the fact that . . . [the student] was having difficulty concentrating, and that [the parent] believed she had ADHD and wanted her to be tested for that" (Tr. pp. 409-10). Prior to the July 2019 neuropsychological evaluation, the parent had not had the student assessed for an ADHD, because, as the parent testified, she "could not afford to take [the student] to get the evaluation because [her] insurance wouldn't pay for it" (Tr. p. 410).

Next, a review of the December 2017 IEP reflects that the CSE relied on, and incorporated, information—including testing results and narratives—drawn directly from the district's psychoeducational evaluation, the social history, and the classroom observation, as well as reflecting the fourth grade teacher's input, when describing the student's present levels of performance and individual needs (compare Dist. Ex. 10 at pp. 1-3, with Dist. Ex. 6, and Dist. Ex. 7, and Dist. Ex. 8). In addition, the IEP included parent concerns, such as the student's distractibility and need for "frequent prompting to stay on task," her need for support to "identify[] and regulat[e] her emotions as well as in building basic social skills with peers," and that the parent would "consult with a developmental pediatrician about [the student's] difficulties with hyperactivity and inattention" (Dist. Ex. 10 at pp. 2-3).[19] As strategies to address the student's management needs, the December 2017 IEP included recommendations for "[o]n task focusing prompts," splitting tasks up into smaller portions, and preferential seating (id. at p. 3).

Overall, when weighing the foregoing evidence in the context of the legal authority that places a greater emphasis on identifying the student's needs as opposed to affixing a particular diagnosis to a student, the evidence supports a finding that the district's psychoeducational evaluation, classroom observation, and social history sufficiently and adequately identified the student's deficits and needs. Based upon the evaluative information available to the December 2017 CSE, the CSE documented the student's difficulties with attention, focus, and hyperactivity—as well as the parent's concerns about them—within the December 2017 IEP (see Dist. Ex. 10 at pp. 1-3). In addition, the December 2017 IEP reflected that the student's focus and attention issues had the "greatest impact in the areas of reading and writing," as reported by the student's fourth grade teacher and as reflected in the psychoeducational evaluation report (compare Dist. Ex. 10 at pp. 2, with Dist. Ex. 8 at pp. 4-5). As such, the district was not obligated to conduct a neuropsychological evaluation or otherwise refer the student to either rule out, or to diagnose, whether she had an ADHD (see MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *12-*13 [S.D.N.Y. Mar. 29, 2018] [finding no procedural violation arising from a lack of a specific

[19] The December 2017 IEP also reflects that the student's "social history [was] significant and her parents ha[d] been provided with referrals for family based therapy" (Dist. Ex. 10 at p. 3).

"autism evaluation" where the CSE had sufficient information about the student's individual needs and noting, in any event, that "there has been no showing that an autism-specific evaluation (or formal autism diagnosis) would have changed [the student's] recommended suite of special education services in any respect"]).

Turning to the parties' concerns regarding the student's eligibility category, the evidence in the hearing record reflects that, at the December 2017 CSE meeting, the CSE found the student eligible for special education as a student with an emotional disturbance (see Dist. Exs. 10 at p. 1; 11). The student's fourth grade regular education teacher attended the December 2017 CSE meeting, and he testified that he did not recall the parent objecting to this eligibility category or that there was any disagreement or dispute concerning the emotional disturbance eligibility finding (see Tr. pp. 247-48, 298; Dist. Ex. 25 at pp. 2-3). When referred to the "Emotional Disability Justification" form at the impartial hearing, the fourth grade teacher explained that he had not seen that form prior to the impartial hearing, but he understood that it would have been completed by the district school psychologist after the CSE meeting and after reviewing and discussing the student's performance at the CSE meeting (see Tr. pp. 248-52; see generally Dist. Ex. 11).

According to the parent's testimony, however, she and her husband were "upset" by the CSE's decision to find the student eligible for special education as a student with an emotional disturbance because they thought "it was not an accurate representation" of the student's disability (Parent Ex. U at p. 3). According to the parent, when they "questioned" the eligibility category at the CSE meeting, the CSE informed them that "they could not offer [the student] services unless they classified her with [e]motional [d]isturbance"; as a result, the parent felt they "had no other option than to go along with the [district's] proposed IEP classification" for the student to receive services (id.). The parent also indicated that, at the December 2017 CSE meeting, she did not discuss "family problems impacting" the student's "learning," and prior to the impartial hearing, she had never seen the "Emotional Disability Justification" form (id.). During cross-examination at the impartial hearing, the parent admitted, however, that the information she reported as part of the social history was correct (see Tr. p. 407).

In light of the evidence described above, and legal authority 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," the weight of the evidence supports a finding that the December 2017 CSE's determination to find the student eligible for special education as a student with an emotional disturbance did not deny the student a FAPE and, in fact, it was appropriate for the CSE to focus on identifying and documenting the student's strengths and weaknesses and making recommendations based upon those needs, rather than a specific disability category. Consequently, the parent's argument must be dismissed.

D. Other Relief

Having found that the IHO's determinations thus far are supported by the hearing record, there remains to be addressed the district's appeal of two aspects of the relief ordered by the IHO. That is, the district argues that the IHO erred in ordering the student's IEP on a going-forward basis to include 12-month services and that the district fund a neuropsychological reevaluation of the student. I will address each of these issues in turn.

1. 12-Month Services

The district argues that the IHO erred in ordering the CSE to convene and develop an IEP for the student to include 12-month school year services. The district notes that the parent did not seek an extended school year for the student and further argues that the hearing record does not support such an order. In her answer, the parent does not set forth a position regarding the district's appeal of this issue.

Awarding prospective IEP amendments, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Here, contrary to the district's argument, the parent did request relief in the form of 12-month services for the student on a prospective basis in her amended due process complaint notice (Parent Ex. A at p. 10). However, there is no basis in the hearing record for a finding that the student needed such services. State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1][v]). "Substantial regression" is defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf).

Here, there is no documentary or testimonial evidence demonstrating that the student lost skills over summer months. Rather, the regular education teacher who taught the student during third and fourth grade testified that the student did not demonstrate substantial regression during summer 2017 (Dist. Ex. 25 ¶ 11). Likewise, the district school psychologist who evaluated the student in fall 2017 and attended the December 2017 CSE meeting averred that the student did not require 12-month school year services because the student did not demonstrate "atypical regression over the summer months" (Dist. Ex. 23 ¶ 24).

Based on the foregoing, the IHO's order for the CSE to reconvene and recommend 12-month services on the student's IEP is reversed.

2. Independent Educational Evaluations

The district asserts that the IHO erred in awarding a neuropsychological IEE as part of the final order in this matter as the IHO had already awarded the parent an independent neuropsychological evaluation as an interim award. The parent contends that the IHO's award of a neuropsychological IEE was proper as the IHO had broad authority to order an IEE at the parent's request or on his own initiative.

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]).[20]

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]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

Additionally, it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11,

[20] 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]).

2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

As noted above, during the impartial hearing held on April 16, 2019, the parent moved for an interim order directing the district to fund an independent neuropsychological evaluation of the student (Tr. pp. 15-17). Counsel for the parent indicated that the request for the independent neuropsychological evaluation was being made to "help move the case forward" and that the parent was reserving her request for the other requested evaluations because "it would not move the case forward for us to wait for all of the evaluations" (Tr. p. 15). In an interim decision dated May 24, 2019, the IHO ordered the district "to pay for an independent neuropsychological evaluation" (Interim IHO Decision at p. 2). The IHO noted that the parent reserved her request for independent evaluations in the areas of speech-language, OT, PT, and assistive technology, as requested in the due process complaint notices (id.; see Parent Exs. C at p. 2; D at p. 2). The neuropsychological evaluation was conducted in July 2019 (see Parent Ex. Q at p. 1).

As argued by the district, the parent requested and was granted district funding for the July 2019 neuropsychological evaluation based on the parent's October 4, 2018 letter disagreeing with the district's most recent evaluation of the student (see Interim IHO Decision; Parent Exs. A at pp. 3, 9-10; C at p. 2; D at p. 2). As the parent received an independent neuropsychological evaluation at district expense based off of the parent's disagreement to the district's then most-recent evaluation of the student, the parent cannot receive another IEE based off of a disagreement with same evaluation as "[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]).

Additionally, there is no indication in the IHO's decision that he was exercising his authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]). In the April 9, 2021 decision, the IHO indicated that he had awarded the parent an independent neuropsychological evaluation as interim relief and noted the parent had reserved a request for evaluations in the areas of speech-language, OT, PT, and assistive technology (IHO Decision at p. 2). Without further reference to a need for an additional neuropsychological evaluation, the IHO ordered the district to fund "IEE's, including a reevaluation by a neuropsychologist and AT evaluations, together with further testing if recommended because of these assessments" (id. at p. 33).[21] While the length of time that has elapsed from the July 2019 neuropsychological evaluation to the IHO's April 9, 2021 final decision in this matter leaves the potential for a gap in the evaluative information available to construct an appropriate award of compensatory education, the IHO did not order the second

[21] In the parent's post-hearing brief, the parent indicated that she was entitled to IEE's in all of the requested areas, but only requested that the IHO order an independent assistive technology evaluation (IHO Ex. I at pp. 14, 17).

neuropsychological evaluation for that purpose as it was a part of his final decision and not to inform the hearing record.

Under these circumstances, the IHO's award of a second independent neuropsychological evaluation in this matter must be reversed.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's findings that the district violated its child find obligations beginning in March 2017, that the December 2017, May 2018, and December 2018 IEPs offered the student a FAPE, and that the student was entitled to 400 hours of compensatory education to remedy the child find violation. However, the evidence in the hearing record does not support the IHO's orders that the student's IEP going forward include 12-month services or that the district be required to fund an independent neuropsychological reevaluation of the student.

In light of these determinations, I need not address the parents' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 9, 2021 is modified by reversing that portion which ordered the CSE to develop an IEP for the student to include 12-month school year services; and

IT IS FURTHER ORDERED that the IHO's decision dated April 9, 2021 is modified by reversing that portion which ordered the district to fund an independent neuropsychological reevaluation of the student.

Dated: **Albany, New York**
July 29, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER