The University of the State of New York

The State Education Department
State Review Officer
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No. 21-172

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

Appearances:
The Law Office of Elisa Hyman, P.C., attorneys for petitioners, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Gesher Early Childhood Center (Gesher) for the 2020-21 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited in detail here. Briefly, the student received special education services through the Early Intervention Program (EIP) and, in February 2018, developmental, educational, speech-language, and occupational therapy (OT) assessments of the student were completed (see Parent Exs. I; L-N). As part of the student's transition from the EIP to the Committee on Preschool Special Education (CPSE), a psychological evaluation, behavioral observation, social history, and home language survey were conducted in June 2018 (see Parent Exs. O-R). During the 2018-19 and 2019-20 school years, the student attended Gesher and

received special education services under IEPs developed by a CPSE (Tr. pp. 192-93; Parent Exs. B; C; see Parent Ex. OO ¶¶ 30-54).[1]

As part of the student's "Turning 5" transition to school-age programming under the CSE, the district conducted a teacher interview and classroom observation of the student in February 2020 (see Parent Ex. E). The CSE convened on March 27, 2020, to formulate the student's IEP for the 2020-21 school year and after determining that the student was eligible for special education services as a student with an other-health impairment, recommended a 10-month program consisting of integrated co-teaching (ICT) services in a general education public school classroom along with related services consisting of counseling, speech-language therapy, and OT (see generally Parent Ex. D).

The parents disagreed with the recommendations contained in the March 2020 IEP and decided to unilaterally place the student at Gesher for the 2020-21 school year (Parent Ex. OO ¶¶ 88, 99-101). In a due process complaint notice, dated September 8, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (see Parent Ex. A). For relief, the parents requested district-funded independent educational evaluations (IEEs), pendency, compensatory education, specified services moving forward, and reimbursement for costs and tuition at the nonpublic school (id. at pp. 14-16).

An impartial hearing convened on October 9, 2020 and concluded on June 14, 2021 after eight days of proceedings (Tr. pp. 1-996). In a motion dated February 5, 2021, the parents requested that the IHO issue an interim order for IEEs, which the district opposed in a response dated February 12, 2021 (Parent Ex. XX; Dist. Ex. 14).[2] In an interim decision dated March 9, 2021, the IHO denied the parents' request for IEEs (Parent Exs. LL; BBB).[3] Specifically, the IHO found that the parents had not expressed disagreement with evaluations conducted by the district

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

[2] The parents have attached additional evidence to their request for review in the form of copies of motions made to the IHO during the impartial hearing and interim orders of the IHO that are already part of the hearing record. 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]). I decline to consider the offered additional evidence as it is unnecessary to render a decision in this matter.

[3] The hearing record contains at least seven other interim orders made during the course of the impartial hearing, concerning the student's pendency placement, consolidation, and evidence and witnesses (see Parent Ex. EE [Interim Order on Pendency dated October 9, 2020]; Parent Exs. II; AAA [Interim Order Denying Motion to Compel dated February 22, 2021]; Parent Exs. LL; BBB [Interim Order Regarding Motion dated March 9, 2021]; Parent Ex. MM [Interim Order Granting Motion to Compel dated March 9, 2021]; Order on Consolidation dated April 15, 2021; Interim Order Regarding Motion dated May 3, 2021; Interim Order Regarding Witnesses dated May 28, 2021; see also Application of a Student with a Disability, Appeal No. 21-170). Parent Exhibits LL and BBB are identical copies of the same March 9, 2021 interim order; in addition, parent exhibits II and AAA are identical copies of the same February 22, 2021 interim order (Parent Exs. II; LL; AAA; BBB).

prior to their September 2020 due process complaint notice and, therefore, did not have a right to IEEs (id. at p. 3). The IHO further found that IEEs "were unwarranted" (id.).

In a decision dated July 6, 2021, the IHO determined that the district offered the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years (IHO Decision at pp. 4-9). Additionally, the IHO determined that the district was not required to fund IEEs because the district had "successfully defended its evaluations" (id. at p. 9). The IHO denied all relief requested by the parents (id. at p. 9-10).

IV. Appeal for State-Level Review

The parents present a large number of claims in the request for review as almost every paragraph therein contains a distinct and discrete allegation (see Req. for Rev. ¶¶ 1-61). Upon review, many of these claims do not merit further discussion due to their general, vague, and conclusory nature. I remind the parents that it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). While the request for review is compliant enough with the practice regulations promulgated by the Office of Sate Review to allow for consideration by an SRO, I note that there are altogether too many general claims of error by the IHO or wrongdoing by the district which merely cite to portions of the record without further factual or legal development of the allegation or assertion that would render it cognizable as a claim subject to review on appeal. Nonetheless, it is possible to glean from the request for review that , the following issues must be resolved in order to render a decision in this matter:

1. Whether the IHO erred in denying the parents' request to consolidate this matter with a different impartial hearing initiated by a later-filed due process complaint notice;

2. Whether the IHO erred in displaying bias or in failing to provide the parents with due process;

3. Whether the IHO erred in determining that the relevant CSEs had complied with necessary procedures with respect to notices and procedural safeguards;

4. Whether the IHO erred in determining that the district offered the student a FAPE during the 2018-19 school year;

5. Whether the IHO erred in determining that the district offered the student a FAPE during the 2019-20 school year;

6. Whether the IHO erred in determining that the district offered the student a FAPE during the 2020-21 school year; and

7. Whether the IHO erred in finding that the district had successfully defended the appropriateness of its evaluations and denied the parents' request for IEEs;

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

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

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

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

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

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

VI. Discussion

A. Preliminary Matters

1. Consolidation

On appeal, the parents argue that the IHO erred in denying their request to consolidate the present matter initiated by a due process complaint notice dated September 8, 2020 with an impartial hearing request dated April 1, 2021, which initiated a subsequent impartial hearing (see Parent Ex. A; Order on Consolidation dated April 15, 2021; Application of a Student with a Disability, Appeal No. 21-170).

State regulations concerning the conduct of impartial hearings provide that when a subsequent due process complaint notice is filed while a due process complaint notice is pending before an IHO involving the same parties and student with a disability, the IHO with the pending due process complaint notice "shall be appointed" to the subsequent due process complaint notice involving the same parties and student with a disability, unless that IHO is unavailable (see 8 NYCRR 200.5[j][3][ii][a]). The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately before the same IHO (8 NYCRR 200.5[j][3][ii][a][2]). When considering whether to consolidate multiple due process complaint notices, the impartial hearing officer is required to consider relevant factors including: (1) the potential negative effects on the child's educational interests or well-being; (2) any adverse financial or other detrimental consequences; and (3) whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the impartial hearing officer from timely rendering a decision (see 8 NYCRR 200.5[j][3][ii][a][4][i-iii]).

In his interim order denying the parent's request for consolidation, the IHO reasoned that it would be unwise to join the matters because there had already been significant proceedings—including "at least" four interim orders—with respect to the parents' first due process complaint notice, and that therefore consolidation would not be in the interests of the student or judicial economy (Order on Consolidation dated April 15, 2021). The parents offer no compelling reason as to why the IHO's finding was error, arguing only that the decision to not consolidate the two matters caused unnecessary delay in this proceeding.[5] However, I find that there is no reason to suspect that the IHO abused his discretion by declining to consolidate the two due process complaint notices.

[5] As a side note, the parents' claims brought in the April 21, 2021 due process complaint notice—initiated to seek the same IEEs as are sought herein—were dismissed as duplicative litigation and on res judicata grounds, that determination was appealed to this office, and the dismissal has been upheld (see Application of a Student with a Disability, Appeal No 21-170).

2. Conduct of Impartial Hearing – IHO Bias

The parents contend that the IHO's evidentiary rulings and his denial of written closing brief in favor of oral closings denied due process and established bias against the parents. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

The parents admit that the IHO's conduct during the impartial hearing did not prevent the parents from "present[ing] a case" in this matter. The parents assert that the IHO did not allow a specific witness to testify because the witness had not been identified as part of the parents' disclosure until well into the impartial hearing process, out of compliance with the "five day" rule (see Interim Decision dated May 3, 2021). However, there can be little prejudice suffered from this ruling, assuming it was an abuse of discretion for the sake of argument, because as the parents also admit, the substance of the witness' testimony was already in the hearing record in the form of two letters recommending certain services for the student written to the CSE and the CPSE (see Parent Exs. W; Z; Req. for Rev. ¶ 6).

The parents also contend that they were prejudiced by the IHO's request for oral closing arguments at the impartial hearing as they had made a request for written closing arguments. However, a review of the parents' oral closing reveals a thorough and well-reasoned closing

argument was offered by counsel for the parents at the conclusion of the impartial hearing, and I am not persuaded that the parents' ability to present their case was impaired by the IHO's requirement that closing arguments be delivered in oral rather than written form (see Tr. pp. 981-94).

B. Parent Participation and Prior Written Notice

The parents contend that the district has not shown that it provided the parents with "due process" in that it did not establish that it provided the parents with all required prior written notices and procedural safeguard notices during the school years at issue herein. The IHO found that although the district had not shown that it provided "adequate procedural notices regarding each IEP meeting" it had shown that it provided "written notices for each school year informing the parents of what services were being provided" and that the parents were "consistently able to participate in IEP meetings in a meaningful way" (IHO Decision at p. 9). For the reasons set forth below, the evidence in the hearing record supports the IHO's finding and does not show that there was a procedural violation that rose to the level of a denial of FAPE in this matter.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Among the procedural requirements in State and federal regulations is the requirement that a district provide parents of a student with a disability with prior written notice "a reasonable time

before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]. Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

The hearing record shows that the parent participated in the August 2018 CPSE meeting, which developed the student's program for the 2018-19 school year (Tr. pp. 829-830, 890-92; Parent Ex. B at p. 2). The district issued a final notice of recommendation in August 2018, outlining the student's services for that school year (Dist. Ex 2).

The hearing record shows that the parent participated in the April 2019 CPSE meeting, which developed the student's program for the 2019-20 school year (Tr. pp. 186; Parent Ex. C at p. 3). The district issued a final notice of recommendation in April 2019, outlining the student's services for that school year (Dist. Ex. 6).

Additionally, although the district did not issue prior written notices for the 2018-19 and 2019-20 school years, there is no indication in the hearing record that the parent was not aware of the recommendations made for the student's programming and the district submitted a response to the parent's due process complaint notice (see Parent Ex. DDD).

The hearing record shows that the parent participated in the March 2020 CSE meeting, which developed the student's program for the 2020-21 school year and that (Tr. pp. 463, 476-80, 511; Dist. Ex. 9). The district issued a prior written notice in April 2020 outlining the student's services for that school year and a school location letter in June 2020 identifying the public school the student was assigned to attend (Parent Ex. DD; Dist. Ex. 11).

Consequently, there is no indication in the hearing record in this case that any lack of a timely prior written notice or CSE meeting notice was a procedural violation that rose to the level of a denial of FAPE as any such violation did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

C. 2018-19 School Year

On August 14, 2018 when the student was approximately two years seven months old and aging out of eligibility for EIP services, a CPSE convened to determine whether the student was eligible for preschool special education programs and services for the 2018-19 school year (Parent Exs. B; OO at ¶¶18-21, 24; see Tr. pp. 888-89). Attendees noted on a sign-in attendance sheet were a representative from the agency that conducted the initial evaluation of the student, a CPSE administrator (CPSE administrator 1), and the parent (Tr. pp. 888-91; Parent Ex. B at p. 2).

In preparation for the student's possible transition to the CPSE, the hearing record reflects that the district conducted and considered multiple evaluative documents to determine whether the student was eligible for special education programs and/or services as a preschool student with a disability. Although the student's August 14, 2018 IEP did not specifically list the dates and names of the evaluation reports used in the development of that IEP, the information included in the August 2018 IEP was consistent with the information in an OT evaluation report and a speech-language evaluation report, both dated February 2018 (compare Parent Ex. B at p. 3, with Parent Exs. I at pp. 1, 3-5; N at pp. 1-4). Further, the August 2018 IEP reflects results of a comprehensive psychological evaluation, a behavioral observation by the same school psychologist who conducted the comprehensive psychological evaluation, a social history, and a home language survey, all of which occurred during June 2018, and a "Child Outcomes Summary Form" dated August 14, 2018 (compare Parent Ex. B at pp. 3-4, with Parent Exs. O-R; V).

Concerning the evaluation results reported in the documentation noted above, the August 14, 2018 IEP indicated that the student was assessed with formal assessment measures and parent interview (Parent Ex. B at p. 3). The August 2018 IEP noted that cognitively, administration of the Wechsler Preschool and Primary Scale of Intelligence–Fourth Edition (WPPSI-IV) resulted in the student obtaining a full scale IQ in the low average range (14th percentile) compared to other children his age (compare Parent Ex. B at p. 3, with Parent Exs. P; V at p. 5). Regarding adaptive behavior skills, the IEP indicated on the Vineland Adaptive Behavior Scales, Third Edition-Comprehensive Interview (Vineland-3), the student obtained an adaptive behavior composite standard score which classified his general level of adaptive functioning as falling into the moderately low range compared with others his age (compare Parent Ex. B at p. 3, with Parent Exs. P at pp. 1, 4-5; V at pp. 3, 6-7). According to results from administration of the Preschool Language Scale-Fifth Edition (PLS-5), and the Rossetti Infant Toddler Language Scale, the student demonstrated receptive and expressive language delays (compare Parent Ex. B at p. 3, with Parent Exs. I at pp. 3-5; V at p. 5). Regarding receptive and expressive language skills, the student functioned within the 12-to-15-month range with some upward scatter into the 18–21-month range (compare Parent Ex. B at p. 3, with Parent Ex. I at pp. 3-5). According to the Peabody Developmental Motor Scales – (Second Edition) (PDMS-2), the student presented with gross motor, fine motor and visual motor delays as well as significant sensory processing difficulties (compare Parent Ex. B at p. 3, with Parent Ex. N at pp. 1, 3-4). The student scored below his age equivalency with regard to his fine motor and visual motor abilities, placing him in the second percentile (compare Parent Ex. B at p. 3, with Parent Ex. N at p. 3).

With regard to the student's academic achievement, functional performance and learning characteristics, consistent with the documentation noted above, the August 2018 IEP indicated that the student could follow instructions with two unrelated actions and sometimes pay attention to a story for at least 15 minutes (Parent Ex. B at p. 3). He could also follow instructions with one action and two objects, and he responded to questions that used "where" (id.). The student used possessives in phrases or sentences and asked questions beginning with "who" (id.). Sometimes the student used "in", "on", "under," and "and" in phrases correctly (id.). The IEP noted the student's strength in his ability to assist his mother with dressing and undressing himself (id.). The IEP reflected the student's academic needs and consideration of parental concerns that

concentrated within the area of attention, as the student had a very hard time sitting in one place for even a short amount of time and he lost concentration easily (id.). Also, it was difficult to get the student to focus on the testing materials presented to him (id.).

Regarding the student's social development, again consistent with the documentation noted above, the August 2018 IEP indicated that the student showed interest in children the same age and sometimes imitated simple movements (Parent Ex. B at p. 4). He smiled in response to praise or compliments and identified himself while looking at an image in a mirror or a photo (id.). The student sometimes used words to express his own emotions (id.). According to the IEP, he used common household objects or other objects for make-believe activities and chose to join other children who were playing, rather than watching them or playing alone (id.). The student sometimes shared toys or possessions when told to do so (id.). He requested help when he encountered a problem beyond his own capability to solve, and apologized for small, unintentional mistakes (id.). The student sometimes used words or gestures to express distress rather than screaming, hitting, throwing something, etc. and sometimes acted appropriately when introduced to new people (id.). The IEP indicated that the student was easily frustrated and was reported to hit, pull hair, and throw himself on the floor at times (id.). The IEP noted the student's social strength was his ability to take turns when asked to do so while playing games or sports (id.). His needs, which included parental concerns, were noted as being that although the student's social development was partially age-appropriate because he was very friendly and he liked to play with peers, his reactions were not always socially appropriate towards others (id.).

With regard to the student's physical development, consistent with documentation noted above, the August 2018 IEP indicated that the student could walk up and down stairs, sometimes alternating feet (Parent Ex. B at p. 4). He could kick a ball while standing, although accuracy was not important (id.). The student could also jump off the ground with both feet without falling (id.). According to the IEP, the student could sometimes run smoothly, changing speed and direction but could not catch a beach ball-size ball from a distance of two or three feet (id.). He could use a twisting hand-wrist motion and could open doors by turning a doorknob or handle (id.). He sometimes unwrapped small objects and sometimes stacked at least four small blocks or other small objects whereby the alignment did not need to be perfect, but the stack needed to remain upright (id.). The IEP noted the student had a history of ear infections and he was allergic to penicillin (id.). The same IEP noted the student's physical development strength was that he could walk up and down stairs, sometimes alternating his feet (id.). His physical needs, which included parental concerns, were that he had slight difficulty with gross motor, and he had difficulty with fine motor functioning (id.).

The August 2018 IEP further noted the student benefited from positive reinforcement, modeling and prompting (Parent Ex. B at p. 4). He was able to participate in all activities given appropriate supports (id.). The August 2018 CSE determined that although the student needed strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others, he did not require a behavioral

intervention plan (BIP) (id.).[6] Further, the CSE determined that the student did not require a particular device or service to address his communication needs, including assistive technology (id.).

The August 2018 IEP included approximately seven measurable annual goals that were each broken down into approximately four to six measurable short-term objectives (Parent Ex. B at pp. 6-9). The annual goals were aligned with the student's needs to attend, specifically focusing on his ability to process auditory information, provide appropriate responses to questions, and follow up to three-step directions (id. at p. 6). Other annual goals were for the student to improve his ability, when given multisensory opportunities and activities, to demonstrate attention to task and age-appropriate self-regulation by controlling his feelings of anger and frustration, and to demonstrate age appropriate fine motor skills, remain seated and focused during structured and unstructured activities, engage in the use of age appropriate coping mechanisms when upset or frustrated, and interact appropriately with peers (id. at pp. 7-8). The short-term objectives associated with each annual goal broke the specific goal into component skills or parts (see id. at pp. 6-9). Consistent with the above described documentation which included evaluation results, student needs, and suggested goals to address those needs provided by the evaluators, testimony by CPSE administrator 1 indicated that evaluators who directly evaluated a student typically proposed goals that aligned with how that student performed on the evaluation, whereupon she would modify the goal and individualize it to that student (Tr. pp. 855, 887, 894, 900).

The August 2018 CPSE determined the student was eligible to receive special education services as a preschool student with a disability and recommended that the student receive individual special education itinerant teacher (SEIT) services for four hours per week, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT, all at the student's childcare location (Parent Ex. B at pp. 1, 10).[7] Testimony by CPSE administrator 1 regarding the recommendation for SEIT services indicated

[6] Although the parent's due process complaint notice included an allegation that the district failed to conduct or consider an FBA or a BIP for the student (Parent Ex. A at pp. 10, 11), the request for review does not mention either an FBA or a BIP and the only allegations included in the request for review that could relate to an FBA or a BIP are that the April 2019 IEP and the March 2020 IEP failed to address the student's interfering behaviors (see Req. for Rev. ¶¶ 31, 45). Accordingly, any allegation that the district failed to conduct an FBA or develop a BIP for the student is outside the scope of review and will not be addressed (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Additionally, to the extent that the issue was raised in the parents' memorandum of law, a memorandum of law is not a substitute for a pleading, which is expected to set forth the appealing party's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). The extent to which the April 2019 IEP and the March 2020 IEP addressed the student's behaviors is discussed below.

[7] State regulation describes that SEIT services "shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]; "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf).

that when making recommendations, she always considered a student's LRE and what was the "right amount of service for a child so that they are not overly supported and become dependent on adult support" (Tr. pp. 960-61). Specific to the student, CPSE administrator 1 testified that the CPSE wanted to give the student the opportunity to develop independence with provided supports (Tr. p. 961). She continued that the student would receive his related services (i.e., speech-language therapy and OT, each twice per week for 30-minute sessions) at the full-day preschool program he attended, and that the CPSE wanted to make sure the student was supported daily; therefore, it provided four hours of SEIT services, for a total of six hours of support per week (Tr. pp. 961-62). At the time of the August 2018 CPSE meeting, the student was receiving EIP services consisting of three and one-half hours of total support per week (Tr. p. 962). The August 2018 CPSE recommendations were "essentially almost doubling the amount of support that [the student] was already receiving" (Tr. p. 962).[8]

In an August 14, 2018 final notice of recommendation, the CPSE informed the parents of the student's eligibility for special education services as a preschool student with a disability and the recommended services that would be provided to the student at his childcare location (Dist. Ex. 2). On the same date, the parent provided signed consent on the same final notice of recommendation for the provision of 10-month preschool services to the student as recommended (id. at p. 1).

In consideration of all the above specific to the 2018-19 school year, the evidence in the hearing record shows that the August 2018 CPSE had accurate and sufficient evaluative information concerning the student's special education needs, and that the August 2018 IEP provided special education supports and services sufficient to meet those needs during the 2018-19 school year. Therefore, there is no basis in the hearing record to disturb the IHO's finding that the district offered the student a FAPE for that school year (IHO Decision at pp. 8-9).

D. 2019-20 School Year

Turning to the 2019-20 school year, the CPSE administrator (CPSE administrator 2) who conducted a requested CPSE review on April 3, 2019, testified that the purpose of that CPSE meeting was to address concerns noted in January 2019 documentation the SEIT agency submitted in its request for an "increase in [the student's] SEIT hours," which at that time was four hours per week (Tr. pp. 177-79; Dist. Ex. 3). CPSE administrator 2 testified that prior to the April 2019 CPSE meeting, the student's service providers submitted a packet to the CPSE (Tr. pp. 353-54). The packet contained all progress reports and any specific goals the provider felt would support the student moving forward (Tr. pp. 190, 354). CPSE administrator 2 testified that in preparation for an April 2019 CSE requested review meeting, she reviewed a quarterly education progress report dated January 29, 2019 written by the student's then-current SEIT services provider, a March 24, 2019 annual review speech-language therapy progress report, a March 26, 2019 OT progress report, and an October 2018 letter from the student's developmental pediatrician (Tr. pp. 177-78;

[8] A June 25, 2018 comprehensive psychological evaluation conducted in preparation for the student's transition from EIP to CPSE indicated that at that time, the student received two 60-minute sessions per week of SEIT services, one 30-minute session per week of speech-language therapy, and two 30-minute sessions per week of OT (Parent Ex. P at p. 1).

181-83, 186; Parent Ex. W; Dist. Exs. 3; 4; 5). She noted that up to that point in time, neither the parent nor any of the student's service providers requested additional evaluations in preparation for the April 2019 CPSE meeting, and she opined that the CSE had "enough information" to address the student's then-current needs (Tr. p. 185).

Review of the student's April 3, 2019 IEP indicated—consistent with testimony by CPSE administrator 2—that CPSE attendees included CPSE administrator 2, the SEIT supervisor from the provider agency, the student's then-current SEIT services provider, and the parent (Tr. p. 186; Parent Ex. C at p. 3).[9] CPSE administrator 2 testified that during the April 2019 CPSE meeting, the parent's main concern about the student's academic functioning was the student's ability to participate in his program at Gesher (Tr. pp. 186-87). Specifically, the parent was concerned about the student's impulsivity, lack of attention and focus, and that he did not demonstrate age-appropriate attention to task (id.).

Review of the April 3, 2019 IEP along with testimony by CPSE administrator 2 also revealed that during the meeting the CPSE discussed the student's evaluative information noted in the March 2019 SEIT, speech-language therapy, and OT progress reports, as well as the October 2018 letter from the student's developmental pediatrician (Tr. pp. 177-78; 181-83, 186; Parent Exs. C at pp. 4-5; W; Dist. Exs. 3; 4; 5).[10] In addition, the April 2019 CPSE discussed the proposed annual goals, at which time they were either included in the student's IEP, not put in the IEP, or altered following discussion around how the goals would be finalized (Tr. pp. 190, 354-56). CPSE administrator 2 reported that typically, she looked at everything and discussed the annual goals with the team at the meeting (Tr. p. 356).

Turning to the annual goals included in the student's April 2019 IEP, there were approximately 12 annual goals broken down into approximately 42 short-term objectives, associated with the various goals and aligned with the student's need to improve on his identified deficits in the areas of fine motor and sensory processing skills; including his ability to follow classroom routines, transition between activities, remain seated and focused during activities, engage in appropriate coping mechanisms when upset or frustrated, engage in cooperative play skills, follow multistep directions containing concepts, respond to age appropriate "wh" questions, and demonstrate comprehension and use of correct pronouns and verb tenses (Parent Ex. C at pp. 6-12; see Parent Ex. C at pp. 4-5). CPSE administrator 2 testified that after the April 2019 CPSE meeting neither the SEIT provider, the SEIT supervisor, nor the parents reached out to her for clarity concerning the annual goals included in the April 2019 IEP (Tr. p. 450).

The April 2019 CPSE recommended to increase the amount of the student's SEIT hours to 7.5 hours per week and maintain his individual speech-language and OT sessions at a frequency

[9] CPSE administrator 2 testified that the April 18, 2019 date on the IEP was a "typo" and that the correct date of the CPSE meeting was April 3, 2019 (Tr. p. 313; Parent Ex. C at pp. 1, 3).

[10] Although the student's Apri1 3, 2019 IEP did not specifically list the dates and names of the evaluation reports used in the development of the IEP, the information included in the IEP was consistent with formal and informal testing as noted in the March 2019 OT and speech-language progress reports (Tr. p. 234; compare Parent Ex. C at pp. 4-5, with Dist. Exs. 4; 5). Formal and informal assessments conducted and noted in the April 2019 IEP included administration of the PDMS-2 in January 2019 and the Clinical Evaluation of Language Fundamentals Preschool-Second Edition (CELF-P-2) (compare Parent Ex. C at pp. 4-5, with Dist. Exs. 4; 5).

and duration of two 30-minute sessions per week each (Tr. pp. 190-91; Parent Ex. C at p. 13). CPSE administrator 2 opined that the April 2019 CPSE recommendations were appropriate to address the student's needs, based on reports and information gathered at the CPSE meeting (Tr. pp. 178-81, 190-93). Furthermore, the parents and the agency that delivered the student's services were present at the April 2019 CPSE meeting and all participants, including CPSE administrator 2, agreed that the requested increase in SEIT services from four to 7.5 hours per week was discussed at the CPSE meeting, and that the increase would be supportive enough to meet the student's needs at that time (Tr. pp. 192-93; Parent Ex. C at p. 3; see Tr. pp. 447-48). According to CPSE administrator 2, at the time of the April 2019 CPSE meeting, the student exhibited behaviors that she thought could be addressed by his SEIT services provider and CPSE administrator 2 testified that the CPSE "...basically, doubled the amount of hours that [the SEIT] was working with [the student]," and therefore the student would receive 15 30-minute push-in direct instruction SEIT sessions per week (Tr. pp. 193, 446-47). In addition, CPSE administrator 2 reported that the SEIT services were delivered at the student's childcare location selected by the parents, and where the student was in a small classroom of 12 students (Tr. p. 193). CPSE administrator 2 testified that the parent stated at the meeting that her preference was for the student to remain at Gesher and the parent also opined that it was "the most appropriate setting for him" (Tr. p. 453). According to CPSE administrator 2, the CPSE was "doing what [it] needed to do to support [the parent's] decision" (id.). CPSE administrator 2 also testified that following the April 2019 CPSE meeting, neither the parents nor any other participant from that meeting requested or discussed the potential need for the student to receive 12-month services and there was no data substantiating regression presented during the CPSE meeting (Tr. pp. 194-95, 443, 445).

Similarly, although the April 2019 CPSE reviewed a letter from the student's developmental pediatrician that suggested that the student may benefit from applied behavioral analysis (ABA) services, according to CPSE administrator 2's testimony, the CPSE did not "prescribe methodology in terms of curriculum" and the parents did not request that the physician attend the CPSE meeting (Tr. pp. 441-42; Parent Ex. W). In addition, regarding the developmental pediatrician's recommendation for parent counseling and training, CPSE administrator 2 stated that typically, a recommendation for parent counseling and training would be based on a student's diagnosis of autism, a diagnosis not applicable to the student at that time (Tr. p. 448; see Parent Ex. W).[11] Furthermore, the CPSE did not recommend parent counseling and training because the parent was at the April 2019 CPSE meeting and she did not request parent counseling and training (Tr. p. 448). CPSE administrator 2 noted that " . . . the parent signed off at the meeting that day

[11] It appears that CSE administrator 2's testimony on this point is in reference to State regulations that provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). Review of the October 2018 developmental pediatrician's letter revealed the student did not receive an autism diagnosis at that time (Parent Ex. W). The same letter indicated the student had delays in motor and language skills, and he had behavioral difficulties in school and at home (id.). According to the developmental pediatrician, the student's "symptoms" included hyperactivity, impulsivity, oppositional and aggressive behaviors, indicative of attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD), but no diagnoses were provided. With regard to parent training and counseling, the letter noted that it was important to ensure "carry over of gains from school to the natural environment" (id.).

with the services that were in place, agreed upon" and that neither the SEIT provider or the SEIT supervisor made "any mention of parent training" (Tr. p. 449; see Dist. Ex. 6). Review of the April 2019 final notice of recommendation and CPSE administrator 2's testimony shows that the parent signed the document at the meeting and was given a copy (Tr. p. 232; Dist. Ex. 6). As such, the April 2019 CPSE did not recommend parent counseling and training (Tr. p. 449; see Parent Ex. C at p. 13).

In consideration of the discussion above concerning the April 2019 IEP, I note that the increase in SEIT services, in conjunction with the previously noted recommended weekly speech-language therapy and OT sessions provided the student with 9.5 hours of special education support per week in his preschool classroom (see Parent Ex. C at p. 13). The increase in recommended SEIT services for the 2019-20 school year was responsive to the SEIT's request, parental concerns, and the student's developing needs (see Parent Ex. C at pp. 4-5; Dist. Ex. 3 at p. 2). Therefore, the evidence in the hearing record supports the IHO's determination that the April 2019 IEP offered the student a FAPE for the 2019-20 school year, and the parents' specific challenges to the April 2019 IEP do not compel a contrary conclusion. However, as set forth below, the district's failure to implement the April 2019 IEP during the 2019-20 school year did constitute a denial of FAPE to the student

1. Implementation of the 2019-20 IEP

The parents allege on appeal that the IHO erred by not finding that the district's failure to fully implement the April 2019 IEP denied the student a FAPE. With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

On appeal, the parents allege that the district failed to fully implement the April 2019 IEP as the SEIT and OT services were not delivered "consistently" during the school year and that after the student's speech-language therapy provider became ill in January 2020, those services were not provided through the end of the 2019-20 school year (Req. for Rev. ¶17).[12] The parent's testimony concerning the failure to deliver speech-language therapy to the student beginning in January 2020 through the end of the 2019-20 school year is unrefuted, and approximately how many sessions were missed can be calculated using the mandates in the April 2019 IEP (Tr. pp.

[12] In its answer, the district does not refute the parent's testimony, but merely indicates that the parents did not provide any evidence of missed services (Answer ¶13). Nevertheless, the vague assertion that the student did not consistently receive SEIT and OT sessions during the 2019-20 school year is insufficient to support a claim for compensatory services, as the parent's testimony dealt solely with speech-language therapy sessions (Parent Ex. OO at p. 9) and the allegation that services were not received "consistently" is insufficient to support a finding that there was a material deviation from the student's IEP as was the case with the speech-language therapy sessions being missed from January through June 2020.

733-36; Parent Exs. C at p. 13; OO ¶¶ 69-72). The failure to implement speech-language therapy for such a large portion of the school year constitutes a material deviation from the IEP and a denial of FAPE. Accordingly, I will order the district to provide the student with two sessions of speech-language therapy for each week of missed speech-language services the district failed to provide to the student for the period from January 1, 2020 through the end of the school year, totaling 48 sessions of speech-language therapy.

E. 2020-21 School Year

Regarding the 2020-21 school year, the district school psychologist who participated in the student's March 27, 2020 "Turning-5" CSE meeting testified that the purpose of that meeting was to determine whether the student was eligible to continue receiving special education services and, if so, the type of services the student needed for kindergarten (see Tr. pp. 461-63; Dist. Ex. 9). The school psychologist participated by telephone at the March 2020 CSE meeting and served as the school psychologist and as the district representative (Tr. pp. 462-63; Dist. Ex. 9 at p. 12). Other participants by telephone included a district social worker, the student's preschool teacher, the SEIT provider, an occupational therapist, and the parent (Tr. pp. 476-78, 492; Dist. Ex. 9 at p. 12).

In preparation for the March 2020 CSE meeting, the district social worker conducted a classroom observation in February 2020 (Tr. p. 463; Parent Ex. E). In addition to the classroom observation report, the CSE reviewed a January 27, 2020 SEIT progress report, a February 20, 2020 OT progress report, and a March 20, 2020 speech-language progress report (Tr. pp. 465, 473-75; Parent Exs. E; X; AA; CC). Review of the March 2020 IEP for the 2020-21 school year reflects detailed information about the student's present levels of performance and individual needs specific to academic achievement, functional performance, and learning characteristics, his social development, and his physical development, with much of the information taken verbatim from the evaluative documentation available to the CSE (compare Dist. Ex. 9 at pp. 1-3 with Parent Exs. E; X; AA; CC). The school psychologist testified that she also reviewed the student's 2018-19 and 2019-20 IEPs, and that the CSE discussed the student's then-current academic, social/emotional, and physical development needs (Tr. pp. 478-80; 521).

In addition to the information from the student's evaluative documentation reflected in the March 2020 IEP present levels of performance, the IEP also indicated that the student's academic strengths included that he was a happy and energetic boy who enjoyed learning and arts and crafts activities (Dist. Ex. 9 at p. 2). Social strengths noted in the IEP were that the student was very attentive to details, he cared about his peers, and he loved pretend play (id.). Physical strengths included in the IEP were that the student's gross motor skills were in the average range (id. at pp. 2-3). Further, the IEP indicated that the student could negotiate the classroom and playground equipment successfully, bounce and catch a ball (3.8 years), kick a stationary ball (4.0 years), ride a tricycle (4.4 years), and alternate feet when descending the stairs (4.6 years) (id. at p. 3).

The March 2020 IEP reflected the student's academic needs and parental concerns, including the parent's report that the student's skills were inconsistent, he was impulsive, and he had a short attention span (Tr. pp. 478-80; Dist. Ex. 9 at p. 2). Socially, the parent expressed concerns about the student's behavior in that he had poor impulse control and became frustrated

when he did not get his way (Dist. Ex. 9 at p. 2). With respect to the student's physical development, the IEP indicated that the student demonstrated poor fine motor skills (id. at p. 3). Specifically, the IEP reflected that the student's PDMS-2 score was in the 5th percentile in the area of grasping and that he presented with an immature grasp while holding a pencil, requiring hand over hand assistance to correct (id.). The student fatigued and frustrated easily, causing poor generalization and carry over of learned skills (id.). The student benefited from hand over hand assistance while engaged in fine motor tasks (id.). The IEP indicated that therapy sessions would continue to work on improving these areas as needed to achieve IEP goals (id.).

The March 2020 IEP included approximately 11 specific and measurable annual goals developed at the CSE meeting that were aligned to the student's academic, social, and physical needs per the evaluative information and parental concerns discussed above, as well as verbal input provided during the CSE meeting (Tr. p. 480; Dist. Ex. 9 at pp. 1-3, 4-6). To further address the student's needs in the classroom, the IEP also included management needs consisting of breaks, redirection, instructions broken down, repetition of directions, graphic organizers, visual aids, hands on learning, positive reinforcement and acknowledgements, small group instruction, writing assistance, visual and verbal cues, and modeling (id. at p. 3). The March 2020 CSE determined that the student did not require positive behavioral interventions, a BIP, or assistive technology and/or services (id.).

The March 2020 CSE determined the student was eligible for continued special education programs and services as a school-age student with an other health impairment because of his ADHD diagnosis and that the CSE felt the student's impulsivity and hyperactivity affected his learning (Tr. pp. 480-81; Dist. Ex. 9 at p. 1). For the 10-month school year beginning in September 2020, the CSE recommended that the student receive integrated co-teaching (ICT) services (11 periods per week for English language arts (ELA) and 10 periods per week for mathematics)—consistent with the recommendation of his preschool teacher for a "mainstream kindergarten, (an ICT classroom),"—and following discussion at the CSE meeting about class size, and with the agreement of everyone at the March 2020 CSE meeting, including the parent (Tr. pp. 481, 511; Parent Ex. E at p. 1; Dist. Ex. 9 at p. 7).[13] According to the school psychologist, the CSE did not "want to hold [the student] back" in a 12:1+1 special class because unlike the student whose skills were emerging, many of the other students in a 12:1+1 special class would have had low cognitive skills and the March 2020 IEP reflected that a 12:1+1 special class in a community school would have been too restrictive for the student at that time (Tr. pp. 511-12; Dist. Ex. 9 at p. 11). The CSE also considered a general education placement with related services but rejected that option, as it was not supportive enough to address the student's needs (Dist. Ex. 9 at p. 11).

[13] State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (NYCRR 200.6[g][2]).

In conjunction with ICT services, the March 2020 CSE recommended related services including, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group—which was consistent with recommendations from the student's preschool teacher and related service providers and discussion during the March 2020 CSE meeting, (Tr. pp. 481-85; Parent Exs. E at p. 1; AA at p. 2; CC at pp. 2-3; Dist. Ex. 9 at pp. 7, 10).

Following the March 2020 CSE meeting, the district sent the parents an April 5, 2020 prior written notice informing them of the district's recommendations for the provision of special education services to the student for the 2020-21 school year (Dist. Ex. 10). The district sent the parents a second letter dated June 11, 2020, notifying them of the public school location where the student's March 2020 IEP would be implemented for the 2020-21 school year (Dist. Ex. 11). The school psychologist testified that she was familiar with the proposed kindergarten ICT "classroom" at the assigned school, that there would have been a seat available for the student at the start of the 2020-21 school year, and that the school would have been able to provide related services (Tr. p. 486).

The school psychologist opined that the program and service recommendation for the student was appropriate for him (Tr. p. 482). She testified that with the support of ICT services, the student could learn alongside general education peers who would model appropriate language and behavior (id.). In addition, the student would receive attention from both teachers in the class as well as individualized and small group instruction (id.). Both the general education teacher and the special education teacher could redirect the student when he displayed impulsivity and hyperactivity (id.). Counseling was recommended on an individual basis so the student could learn strategies to try to become more independent and to learn how to control his impulses (Tr. pp. 483, 485). The CSE also recommended counseling in a small group because the student needed to socialize with another student (Tr. pp. 484-85). According to the school psychologist, the CSE recommended speech-language therapy because the student had difficulty expressing his needs and wants (Tr. p. 483). OT was recommended on an individual basis because of the student's fine motor delays and sensory processing difficulties, and because he was easily distracted (Tr. p. 484).

The school psychologist also testified that 12-month services were not recommended for the student because no one requested the service, a certain amount of regression was typical for all students, and the CSE had no data before it to substantiate that the student demonstrated substantial regression (Tr. p. 485).

With regard to the student's social/emotional functioning, the school psychologist testified that the CSE did not need to conduct an FBA at the time of the March 2020 CSE meeting because the CSE felt his behaviors could be managed in the classroom by the teachers with a class-wide behavior system or a behavior management system for the student (Tr. p. 479). She noted that the CSE did not have anecdotal or incident reports, or data to support that the student's behaviors were "severe" and no participant at the March 2020 CSE meeting expressed the need for an FBA (Tr.

pp. 479-80). Additionally, the CSE provided counseling to support the student's social/emotional concerns (Tr. p. 479).

In consideration of the discussion above regarding the March 2020 CSE meeting and how the CSE went about developing the student's IEP for the 2020-21 school year, the evidence supports the IHO's finding that the district offered the student a FAPE. Specifically, the CSE was responsive to the student's needs and parental concerns, considered available and appropriate documentation about the student, and recommended appropriate special education and related services to meet his needs. Accordingly, I am not persuaded by the parents' specific arguments on appeal with respect to the March 2020 IEP and review of the evidence does not afford a reason to disturb the IHO's findings for the 2020-21 school year.

F. Independent Educational Evaluations

The parents contend that the IHO erred in both failing to grant the parents' requested IEEs as interim relief and in failing to order the IEEs as part of his final decision after he determined that the district had successfully defended its own evaluations (see IHO Decision at p. 9; Parent Exs. XX; BBB).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

As an initial matter, to the extent that the IHO found that the parents could not request IEEs in a due process complaint notice, I agree with the parents that there is no such prohibition. It is well settled that in order for an IEE to be provided at public expense, State and federal regulations only require that "the parent disagrees with an evaluation obtained by the public agency"; the regulations do not speak to how a parent must manifest this disagreement to the district (34 CFR 300.502[b][1];8 NYCRR 200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"] see e.g. Application of a Student with a Disability, Appeal No. 21-177). In past decisions SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance, and have also noted that because this method can be used unfairly, a parent may be in a better position to elicit district funding of an IEE if the IEE was requested outside of the more formal context of an impartial hearing (see, e.g. Application of a Student with a Disability, Appeal No. 21-170; Application of the Dep't of Educ., Appeal No. 21-135; Application of a Student with a Disability, Appeal No. 19-094).

Having received a request for IEEs for the first time in the parents' September 8, 2020 due process complaint notice, the district ought not to be faulted for attempting to defend the appropriateness of the evaluations it conducted at the resulting impartial hearing. As discussed in greater detail above, the district conduced the following evaluations during the time period in question, which the CPSE and CSE relied upon in developing IEPs for the student: In February 2018 while the student was in the EIP the district conducted a speech and language evaluation (Parent Ex. I); a developmental assessment (Parent Ex. L); an educational evaluation (Parent Ex. M); and an OT assessment (Parent Ex. N). As part of the student's transition from the EIP to the CPSE the district conducted a comprehensive psychological evaluation (Parent Ex. P); a behavioral observation (Parent Ex. O); a social history (Parent Ex. R); and a home language survey (Parent Ex. Q).

The due process complaint notice identified the student's primary areas of need as consisting of "expressive, receptive and pragmatic speech delays, delays in social skills, and significant delays in the areas of fine motor skills, visual motor/perceptual skills, sensory processing skills, motor planning and attention/focus skills . . . low muscle tone, decreased upper extremity/proximal strength, and poor body posture" (Parent Ex. A at p. 2). The due process complaint notice also refers to the student's diagnoses of ADHD and oppositional defiant disorder (id.). Having reviewed the content of the evaluations conducted by the district in detail in the above discussion of the student's programming, the hearing record supports finding that the CPSE and CSE considered these evaluations in developing the student's IEPs and the student's needs in the areas of speech-language, social skills, attention and focus, fine motor skills, visual motor/perceptual skills, sensory processing skills, motor planning and gross motor skills were adequately assessed via the testing and other evaluative methods utilized by the district Accordingly, the evidence in the hearing record supports the IHO's determination that the evaluations were thorough and comprehensive in that, collectively, they used a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the student, including information from the parents and the student's teachers and providers that was also employed to determine the content of the student's IEPs (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clark, 48 IDELR 77 [OSEP 2007]). Moreover, there is evidence to show that collectively, the district evaluations relied on technically

sound instruments that assessed cognitive and behavioral factors, in addition to physical and developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Accordingly, I decline to overturn the IHO's determination that the district had "successfully defended" the adequacy of its evaluations (IHO Decision at p. 9).

On appeal, the parents argue that the district failed to assess the student for "[a]utism and ADHD, hearing and vision, assistive technology ('AT'), behavior, executive functioning, transportation, regression during breaks, activities of daily living, pragmatic speech, and whether he needed 1:1 instruction or ABA" (Req. for Review at ¶ 4). The parent further argues that the district evaluations contained no recommendations (id.). While a district is required to 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]), and 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), neither State nor federal regulations require that a district assess the student using a specific evaluation (see 34 CFR 300.304[b], [c]; 8 NYCRR 200.4[b]).

Moreover, the parents have not identified any specific district evaluation, or aspects thereof, with which they disagree nor have they clarified which areas of the student's needs were allegedly neglected by the district that they now seek to have independently evaluated. Rather, they seek specific evaluations (e.g. speech-language, OT, and PT), evaluations focused on categories of functioning (e.g. activities of daily living, pragmatic speech) and diagnostic assessments (e.g. testing for autism and ADHD), without tethering such requests to any of the student's needs as observed or documented by either the parents, teachers, or district evaluators or identified in the due process complaint notice. Although it is generally accepted that when a parent disagrees with an evaluation because the district has failed to assess their child's needs 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 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]), the objective of such an IEE would be to explore an area of demonstrable need exhibited by the student. Absent the identification of a demonstrable need that has been unaddressed by the district's evaluation, there is insufficient basis to find that the district's evaluations were not sufficient and therefore an IEE should not be ordered on speculation that it might reveal some additional diagnosis or heretofore undiscovered new area of need. Moreover, contrary to the parents' allegation that the district's evaluations were lacking because they did not contain recommendations, State regulation does not require that an evaluation include a specific recommendation, rather, an evaluation must "gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program" (8 NYCRR 200.4[b]). Accordingly, as there is insufficient basis in the hearing record to disturb the IHO's finding that the evaluations conducted by the district were thorough and comprehensive, the parents are not entitled to their requested IEEs.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2018-19 and 2020-21 school years, but does not support the IHO's finding that the district offered the student a FAPE for the 2019-20 school year to the extent that evidence in the hearing record shows the district failed to implement the student's speech-language services for part of the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Gesher was an appropriate unilateral placement during the 2020-21 school year or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district will provide the student with 48 30-minute sessions of speech-language therapy as make-up services for the failure to implement speech-language therapy per the student's April 2019 IEP during the 2019-2020 school year.

Dated: **Albany, New York**
November 3, 2021

STEVEN KROLAK
STATE REVIEW OFFICER