



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 22-047**

### **Application of the BOARD OF EDUCATION OF THE GARDEN CITY UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

Shebitz, Berman & Delforte, PC, attorneys for respondents, by Matthew J. Delforte, 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 the decision of an impartial hearing officer (IHO) which found that it failed to conduct comprehensive evaluations of the student and ordered the district to reimburse the parents for the cost of an independent educational evaluation (IEE). The appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

The student attended district public schools from kindergarten through fifth grade and was referred to the CSE during the 2016-17 school year (kindergarten) to determine his eligibility for special education as a student with a disability (Tr. p. 523; Parent Ex. 6 at p. 1). In January and February 2017, the district completed an initial evaluation of the student that included administration of the Weschler Intelligence Scale for Children-Fifth Edition (WISC-V), Wechsler Individual Achievement Test-Third Edition (WIAT-III), Wide Range Assessment of Visual Motor Abilities (WRAVMA), Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition (Beery VMI-6), Behavior Assessment System for Children-Third Edition (BASC-3), Diagnostic Evaluation of Articulation and Phonology (DEAP), and Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) (Tr. p. 523; Dist. Ex. A at pp. 2-3). The evidence

in the hearing record shows that, historically, the student received related services, including speech-language therapy, which was discontinued when the student was in second grade, and physical therapy (PT) (Tr. pp. 163, 605; Parent Ex. 6 at p. 2; Dist. Ex. A at pp. 1, 5).

During "Fall 2018 [or] early 2019" the student received diagnoses of craniosynostosis and ERF gene mutation (Tr. pp. 512, 517). The student's craniofacial surgeon described craniosynostosis as "a condition that involves premature fusion or closure of the growth plates of either the bones of the skull or the skull base," which could "cause growth disturbances that c[ould] be both visible and invisible" and could "be something as clear as hearing loss or vision loss or trouble with breathing which would cause difficulty sleeping or it c[ould] be much, much more insidious and poorly understood like simple academic challenges, inattentive[ness], . . . difficulty with maintaining attention[, or] a broad spectrum of hyperactivity or general learning disabilities" (Tr. pp. 578-79).

The district administered a PT reevaluation in February 2019 (Dist. Ex. J). On April 10, 2019, a CSE convened to conduct the student's annual review and develop his IEP for the 2019-20 school year, and found that the student remained eligible for special education as a student with an other health-impairment (Dist. Ex. A at p.1). The April 2019 CSE recommended that the student receive one 30-minute session of PT per week in a small group and developed one annual goal related to general conditioning exercises (id. at pp. 1, 7). The CSE further recommended the use of a visual cue to remind the student to close his mouth when not speaking and testing accommodations, including extended time and tests administered in a separate location (id. at pp. 7, 8).

Through prior written notice to the parents dated August 29, 2019, the district requested consent to conduct a reevaluation of the student to determine the student's educational needs and continuing eligibility for special education programs and services as part of his mandated three-year "triennial" reevaluation (Dist. Ex. P). The parents provided consent to evaluate the student in January 2020 and completed an updated social history, which noted the student's craniosynostosis diagnosis, ERF gene mutation, low muscle tone, and benign cysts on the brain (Parent Ex. 12; Dist. Ex. P at p. 3). The district completed a PT reevaluation in January 2020 (Dist. Ex. K).

In March 2020 the district shifted to remote instruction in response to the COVID-19 pandemic, and the student's reevaluation was not completed (Tr. pp. 227, 525). A CSE convened on May 21, 2020 to conduct the student's annual review and develop his IEP for the 2020-21 school year (Dist. Ex. B). Finding that the student remained eligible for special education as a student with an other health-impairment, the May 2020 CSE recommended that the student receive one 30-minute session of PT per week in a small group and further recommended a visual cue for the student to close his mouth when not speaking and testing accommodations, including extended time and tests administered in a separate location (id. at pp. 1, 7-8). The May 2020 IEP included two annual goals related to the student's motor skills that focused on increasing his participation in physical education activities (id. at p. 7).

While the timing is somewhat unclear, according to the student's father, in or around February 2021, a team from the craniofacial surgeon's office recommended that the student

undergo a neuropsychological evaluation (Tr. pp. 519-20).<sup>1</sup> According to the student's father, after the February 2021 meeting with the team from the surgeon's office, the parents informed the district during a telephone call of the surgeon's recommendation that the student undergo a neuropsychological evaluation (id.).

The district school psychologist administered the Kauffman Assessment Battery for Children-Second Edition (KABC-II) as part of a psychological reevaluation in March 2021 (Dist. Ex. L at p. 1).

By letter dated April 19, 2021, the parents disagreed with the scope of the district evaluations "that ha[d] been conducted and [we]re being conducted" as not "sufficient to provide a diagnosis" and requested an independent neuropsychological evaluation of the student at public expense (Parent Exs. 2; 4 at p. 1). In particular, the parents indicated that they wanted the IEE "for the evaluation of dyslexia as well as other possible diagnosis" (Parent Ex. 2). The parents identified a preferred evaluator, asked that the district contact her to confirm payment, and stated their intention to schedule the evaluation (id.).

As part of the psychological reevaluation, the school psychologist conducted a classroom observation of the student on May 7, 2021 (Dist. Ex. L at p. 2). On May 19, 2021, the district provided the parents with a copy of the March 2021 psychological reevaluation report (Tr. pp. 307-08).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated May 27, 2021, the district requested an impartial hearing to establish that its evaluations were appropriate, asserting that the parents' request for an IEE at public expense should be denied (Parent Ex. 5). The district contended that the parents had not established a true disagreement with a district evaluation, and that the assessments it conducted beginning with those conducted as part of the student's initial evaluation in 2017 through and including those conducted as part of the "triennial re-evaluation" in 2020 and 2021 were in all respects valid and appropriate (id. at pp. 6-14, 16). In addition, the district argued that the CSE "d[id] not require additional evaluations in order to recommend appropriate special education programs and services for the Student" (id. at p. 16).

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<sup>1</sup> At some point thereafter, a nurse practitioner from the surgeon's office provided the parents with a letter that explained the student had been diagnosed with an ERF gene mutation which could cause cranial abnormalities that put children "at higher risk for speech and language and learning delays"; the letter recommended that the student "undergo a comprehensive neuropsychological evaluation" to "uncover areas of weakness . . . that would respond with further targeted therapy" (Tr. pp. 580-82; Parent Ex. 8). The letter from the nurse practitioner was included in the hearing record but was not dated (see Parent Ex. 8). Although the craniofacial surgeon testified that he believed the letter was written in February 2020 (see Tr. pp. 580-81), the parent indicated the recommendation that the student undergo a neuropsychological evaluation arose from a meeting with a team from the surgeon's office that took place in February 2021 (see Tr. pp. 519-20), and the reference to the student's age in the letter itself tends to support that it was generated in February 2021 (see Parent Ex. 8).

By letter to the district dated June 7, 2021, the parents responded to the due process complaint notice by denying the district's material allegations and asserting they were legally entitled to an IEE at public expense (Response to Due Process Compl. Not.).<sup>2</sup>

### **B. Events Post-Dating the Due Process Complaint Notice**

On June 8, 2021, the student underwent the first day of the independent neuropsychological evaluation that the parents had pursued (Parent Ex. 6).

On June 9, 2021, prior to the completion of the independent neuropsychological evaluation, the CSE convened to conduct the student's annual review and develop his IEP for the 2021-22 school year (Dist. Ex. C at p. 1; see Parent Ex. 6 at p. 1). After consideration of the student's May 2020 IEP, May 2021 classroom observation, and March 2021 psychological evaluation, the CSE determined that the student continued to be eligible for special education as a student with an other health impairment and recommended that he receive one 30-minute session of PT per week in a small group, a program modification listing a visual cue for the student to be reminded to close his mouth when not speaking, and specific testing accommodations (Dist. Exs. C at pp. 7-8; F). The parents disagreed with the recommendations of and data presented at the June 2021 CSE and requested that the district table the student's annual review until after the completion of the independent neuropsychological evaluation (Dist. Ex. F). The June 2021 CSE developed the IEP for the student for the 2021-22 school year but agreed to reconvene upon completion of the independent neuropsychological evaluation to review the June 2021 IEP and make any necessary changes (id.).

"As requested" by the district, in an email dated July 12, 2021, the parents shared a letter from the nurse practitioner recommending that the student undergo a neuropsychological evaluation (Parent Ex. 1 at p. 2; see Parent Ex. 8). In a reply email, the district acknowledged receipt of the letter but reiterated its position that the district had conducted sufficient testing and the CSE had sufficient information to identify the student's needs and develop an appropriate program (id. at p. 1).

The independent neuropsychological evaluation, which had been conducted over three days in June 2021, was memorialized in a report with a "Parent Feedback" date of July 13, 2021 (Parent Ex. 6). The psychologist offered the student a diagnosis of a specific learning disorder with impairment in reading (dyslexia) (id. at p. 7).

The CSE reconvened in August 2021 to review the results of the neuropsychological evaluation and developed a new IEP for the student for the 2021-22 school year with a change in the student's disability category to "learning disabled with dyslexia" (Tr. pp. 315-16, 368).

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<sup>2</sup> Although the parents' response to the district's due process complaint notice was not identified and entered into evidence as an exhibit during the impartial hearing, the district properly included it as part of the hearing record filed with the Office of State Review (see 8 NYCRR 200.5[j][5][vi][b]; 279.9[a]).

### C. Impartial Hearing Officer Decision

On June 22 and September 14, 2021, the IHO conducted prehearing conferences (see June 22, 2021 Tr. pp. 1-27; IHO Ex. XIX).<sup>3</sup> Thereafter the parties submitted various motions, motion arguments, and subpoenas (IHO Exs. I-XII). The IHO issued an interim decision and order on the district's evidentiary motions and the parents' objections to the district's subpoenas dated August 31, 2021 (IHO Ex. XVIII). The hearing record also contains several other interim decisions of the IHO concerning the scheduling of the hearing and the parties' extension requests (IHO Exs. XIV-XVII; XX-XXV). The substantive portion of the impartial hearing began on September 24, 2021 and concluded on February 15, 2022 after six additional days of proceedings (see Tr. pp. 1-735).

In a final decision dated March 14, 2022, the IHO found that the district's evaluations were not sufficiently comprehensive and ordered the district to reimburse the parents for the cost of the independent neuropsychological evaluation the parents had obtained (IHO Decision at pp. 17-23). In the decision, the IHO set forth statutes, State regulations, and case law concerning special education evaluations and the process and requirements for parents to obtain an IEE at district expense (id. at pp. 14-17). The IHO determined that the parents had disagreed with the scope of the district's evaluations and that the relevant district evaluations to be considered were those evaluations conducted in 2020 and 2021 including the January 2020 PT evaluation, the January 2020 social history update, and the psychological reevaluation conducted in March 2021 (id. at pp. 17-18).<sup>4</sup>

The IHO then determined that the district's evaluations were insufficiently comprehensive because collectively they had failed to produce data to determine the student's present levels of academic achievement, failed to determine the student's educational progress and achievement, failed to inquire into the student's levels of knowledge and development in subject and skill areas, and failed to obtain accurate information on what the student knew and could do academically (IHO Decision at pp. 18-20). The IHO found that neither observations from classroom teachers summarized in the psychological reevaluation nor general information included in report cards were sufficient to describe the student's academic functioning, and that the district failed to introduce results or data from reading assessments conducted by the student's teachers in the classroom (id. at pp. 19, 20). Further, the IHO determined that the district was not excused from conducting academic testing based on its assertion that the student had not demonstrated academic difficulties in the classroom because "testing or assessment of a student's academic functioning must be a component of a 'comprehensive' triennial evaluation" (id. at pp. 20-21). The IHO found that the parents had communicated concerns about the student's academic functioning with the student's teacher and shared information about the student's family history of dyslexia and the

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<sup>3</sup> The transcript of the June 22, 2021 prehearing conference is consecutively numbered pages 1-27 (June 22, 2021 Tr. pp. 1-27), thereafter transcripts of the remaining six hearing dates are consecutively numbered pages 1-735 (see Tr. pp. 1-735); therefore, cites to the prehearing conference transcript will be preceded by the date of the proceedings. The hearing record includes a written summary of the September 14, 2021 prehearing conference but no transcript (see IHO Ex. XIX).

<sup>4</sup> With respect to the timing of the psychological reevaluation, the IHO acknowledged the difficulties completing evaluations at that time related to the COVID-19 pandemic and indicated that State guidance instructed districts to continue to conduct evaluations during school closures and when school reopened (IHO Decision at p. 20).

possibility of the student experiencing learning disabilities, which the district "should have listened to" (id. at p. 21).

Next, the IHO determined that the district had not entered any evidence of its criteria for IEEs and found that the independent neuropsychological evaluation the parents obtained was thorough and contained detailed information about what the student "kn[ew] and c[ould] do academically, developmentally and functionally" (IHO Decision at pp. 21-22). Finally, the IHO determined that there were no equitable factors that would impact reimbursement to the parents of the cost of the private evaluation and ordered the district to reimburse the parents for the full cost of the evaluation (id. at pp. 22-23).

#### **IV. Appeal for State-Level Review**

The district appeals, arguing that the IHO erred in ordering the district to fund the costs of the independent neuropsychological evaluation. The district asserts that the IHO erred in finding that its evaluations were not comprehensive because they did not include any assessments of the student's academic functioning and contends that the IHO's conclusion ignored testimony and other evidence from district witnesses, which described alternative methods of assessing the student's academic functioning, including a classroom observation and in-class assessments conducted by the student's teachers and shared with the CSE. Further, the district contends that the IHO erred in finding that the law required the district's reevaluation to include educational testing because reevaluations of students with disabilities need only include assessments as warranted based on the suspected needs of the student, and there was no evidence presented to the CSE that indicated the student had a suspected learning disability. The district argues that the IHO's specific findings that the CSE did not have evaluative data sufficient to determine the student's present levels of academic achievement and that the CSE failed to inquire into the student's levels of knowledge and development in subject and skill areas was also error because the IHO failed to consider the information in the student's report cards, the classroom observation, the psychological evaluation, and class assessments.

The district next contends that the IHO exceeded the scope of the hearing by making a ruling on the timeliness of the district's "triennial" reevaluation. The district also argues that the IHO made several findings of fact in error, and gave undue weight to parent witnesses, prejudicing the district. The district contends that the evidence shows that the CSE was not aware that some of the student's medical providers recommended a neuropsychological evaluation until July 2021 and was unaware of the student's dyslexia and learning disability until it was provided with a copy of the private neuropsychological evaluation, both of which occurred after the June 2021 CSE meeting.

The district requests reversal of the IHO's findings with respect to the district's "three year reevaluation" of the student and reversal of the order requiring the district to reimburse the parents for the cost of the independent neuropsychological evaluation.

In an answer, the parents admit, deny, or otherwise respond to the district's material allegations. In their memorandum of law, which was submitted with their answer, the parents argue that the IHO correctly held that the district failed to conduct a comprehensive and appropriate reevaluation of the student and, as a result the parents were entitled to an IEE at public

expense. In addition, within the memorandum of law, the parents argue that the reevaluation should have included an educational evaluation, a speech-language evaluation, and an occupational therapy (OT) evaluation. In their memorandum of law, the parents next argue that the district unnecessarily delayed its decision to deny the parents' request for an IEE and commence the impartial hearing. The parents also contend that the IHO did not commit substantive or procedural errors in rendering his decision in that he did not err in ruling on the timeliness of the evaluations, did not exceed the scope of the impartial hearing, and properly considered and weighed the evidence in the hearing record.

In a reply to the parents' answer, the district asserts that the parents' claims concerning the need for an OT and a speech-language evaluation are brought for the first time on appeal and are therefore outside the scope of review. The district contends that there was no unreasonable delay in the timing of its rejections of the parents' request for an IEE. Lastly, the district contends that the parents mischaracterize the nature of the June 2021 CSE meeting and that the IHO and the parents erred in reliance on the results of the private neuropsychological evaluation that was not reviewed by the June 2021 CSE.

## **V. Applicable Standards— Independent Educational Evaluations**

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

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

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<sup>5</sup> 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]).



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]).

Except in circumstances not at issue in the present matter, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

### **A. Scope of the Impartial Hearing and Review**

Initially, the district argues that the IHO exceeded the scope of the impartial hearing by addressing the issue of the timeliness of the district's psychological evaluation of the student. Here, the district's concerns about the scope of the impartial hearing are not applicable insofar as the district requested the impartial hearing, not the parents. Given that the appropriateness of the district's evaluations was the subject of the impartial hearing, there was no impediment to the parent arguing or the IHO examining the question of the timeliness of the evaluations, particularly to the extent that such question defined which assessments would be considered as part of the district's reevaluation of the student (see Trumbull Bd. of Educ., 975 F.3d at 169 ["As a practical matter, a parent's right to disagree with an evaluation and obtain an IEE at public expense is tethered to the frequency with which the child is evaluated."]). Ultimately, even if the IHO commented on the timing of the psychological evaluation, she considered it as part of the district's reevaluation and evaluated its sufficiency as argued by the district. Accordingly, her observations about the timing of the evaluation did not result in any findings adverse to the district in terms of her subsequent analysis the relief ordered. Beyond arguing that the IHO exceeded the scope of the impartial hearing by reaching the question of the timeliness of the psychological evaluation, the district does not make any claim that the IHO erred in her analysis about the timing. Therefore, the question of the timing of the psychological evaluation will not be further discussed.

In its reply, the district also argues that the parents raise issues in their memorandum of law accompanying their answer that exceed the scope of review. To the extent that the parent argues additional grounds for sustaining the IHO's decision solely within the memorandum of law, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Davis v. Carranza, 2021 WL 964820, at \*11 [S.D.N.Y. Mar. 15, 2021]; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6 [a]). Thus, any arguments included solely within the memorandum of law have not been properly raised. Accordingly, I decline to address the parents' contention that the district's reevaluation of the student should have included OT and speech-language evaluations or that there was an undue delay

in the district's response to the parents' request for an IEE at public expense, claims which are raised only in the memorandum of law and for the first time on appeal.

In addition, on appeal, the district does not materially dispute the IHO's findings that the parents effectively expressed disagreement with the scope of the reevaluation conducted by the district or which district evaluations were at issue. Accordingly, these determinations will not be reviewed on appeal.

The primary dispute between the parties lies in the IHO's determination that the district's reevaluation of the student was not comprehensive because it lacked required academic educational achievement assessments and therefore did not form an adequate basis for identifying all of the student's special education and related services needs, and it is to this issue that I now turn.

## **B. Appropriateness of the District's Reevaluation**

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see 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]). School districts shall ensure that assessments and other evaluation materials used to assess a student under an initial evaluation or a reevaluation ". . . include those tailored to assess specific areas of educational need and not merely those which are designed to provide a general intelligence quotient" (8 NYCRR §200.4[b][6][iii]; see 34 CFR 300.304[c][2]).

While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine a student's initial eligibility (8 NYCRR 200.4[b][i]-[v]), it is left to the collaborative process of the CSE (with or without a meeting) to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]). State regulations require that, as part of a reevaluation, the CSE, with input from the student's parents

should "review existing evaluation data" and, on the basis of that review, identify what additional data is needed to determine continuing eligibility for special education programs and services and present levels of academic performance and the related developmental needs of the student, and should administer tests and other evaluative materials to gather the data needed (8 NYCRR 200.4[b][4], [5][i]-[iii]).

The district requested permission to evaluate the student through prior written notice dated August 29, 2019, and the student's father provided consent to reevaluate the student in January 2020 (Dist. Ex. P). The August 2019 prior written notice indicated that the CSE was requesting consent to conduct a reevaluation "to determine [the student's] educational needs and continued eligibility" for special education services, and notes that part of the reevaluation would include a psychological evaluation, described in the notice as "an assessment to evaluate verbal and nonverbal cognitive skills, and social-emotional development [that] may also include assessment of basic achievement skills" (*id.* at pp. 1-3).

The district school psychologist who conducted the psychological re-evaluation of the student and who attended the student's April 2019, May 2020, and June 2021 CSE meetings testified that the CSE did not, either formally or informally discuss what areas of the student's performance should be assessed, nor did the CSE meet with the parents to discuss what areas should be assessed (Tr. pp. 311-12; Dist. Exs. A at p. 1; B at p. 1; C at p. 1; L at p. 5). The student's father testified that he expected the evaluation to be "as comprehensive as it had been three years prior," which, as described in the June 2021 IEP, included the administration of multiple measures to assess the student's speech-language skills, behavioral and emotional skills, visual motor skills, cognitive ability, and academic skills (Tr. pp. 599-600; Dist. Ex. A at pp. 2-4).

The IHO found that the district's reevaluation of the student consisted of the January 2020 social history update, the January 2020 PT evaluation, and the psychological reevaluation conducted in March 2021 with the classroom observation portion completed in May 2021 (IHO Decision at pp. 17-18; *see* Parent Ex. 12; Dist. Exs. K; L). Neither party challenges the IHO's finding about which assessments were at issue. Because of the timing of the reevaluation of the student which forms the basis of the parents' disagreement in this matter (i.e., beginning in January 2020 and not being completed until around May 2021 with the district psychologist's completion of a classroom observation), the discussion about the sufficiency of the district's reevaluation spans two school years and more than one CSE review process.<sup>6</sup> Accordingly, the information gathered by or available to the district over this period of time will be summarized below chronologically to the extent the evidence in the hearing record allows such delineation. Finally, the information which the parents assert they shared with the district will be separately examined.

### **1. Information Obtained by or Available to the District during the 2019-20 School Year**

As part of the district's reevaluation, the district solicited a social history update, which was completed by the student's father (Parent Ex. 12; Dist. Ex. P at p. 1). In the social history update,

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<sup>6</sup> As noted above, the timing of the district psychological reevaluation is not at issue on appeal. The psychological reevaluation was reportedly delayed due to circumstances surrounding the COVID-19 pandemic (*see* Tr. pp. 227, 246, 525).

the father noted the student's diagnoses, emphasizing that the student had received the diagnosis of craniosynostosis since the last district evaluation (Parent Ex. 12 at pp. 1, 3). The social history update reflects the father's report that the student was "doing well" in his special education program and "working on PT and speech," which was helping the student's "muscle tone and functioning daily," but that, when services were "pulled back" or "removed," he experienced regression (id. at pp. 1-4). The parents also shared that, at that time, the student was "work[ing] on agility training and other training and ha[d] a tutor weekly" (id. at p. 2). While the parents did not state any concerns they had with the student's special education program, they checked the box "yes," indicating that they would like to speak with the social worker regarding updated information and/or concerns about the student (id. at pp. 3, 4).

The January 2020 PT reevaluation conducted by the student's physical therapist consisted of a report of the student's progress in the areas of school-based gross motor skills and described the student's range of motion, muscle strength, and endurance (Dist. Ex. K at p. 1). In addition, the physical therapist administered a functional skills assessment for school-based PT and reported that the student demonstrated "[a]ge level or above" skills in all areas (id. at p. 2).

The student's third-grade teacher testified that she utilized running records to assess the reading ability of the students in her class in the fall of 2019 and in January 2020, adding that she was not sure that running records were administered in June 2020 due to the shift to remote learning (Tr. pp. 126-27). She explained the typical process for intervening when a student falls below the threshold on a running record and described general practices for collecting information on a student's reading performance but did not speak specifically to the performance of the student in the instant matter (Tr. pp. 128-31). The third-grade teacher also referred to assessing the performance of all students through review of classwork and homework and unit tests, and through the administration of the Cognitive Abilities Test (CogAT), a standardized test administered to all students in third grade to determine cognitive ability and determine students' need for support or eligibility for gifted programming but did not speak to the student's performance on any of these assessments, and documentation of the student's performance on such tests or assessments was not included in the hearing record (Tr. pp. 132-41, 175, 179-80).

Regarding the student's classroom performance in third grade, the student's third-grade teacher described him as being a funny, well-liked boy who did his work and who was "on an average level in all academics" (Tr. pp. 151, 157). She indicated that the student was "overall average," but handwriting neatness was something that she worked on with him and that she had discussed with the parents (Tr. p. 157). The third-grade teacher reported that, during the third trimester of third grade, instruction was virtual and lessons were on slides, which the "team" would take turns walking the students through (Tr. p. 158). She described work that was largely "independent," including reading assignments, but noted that the class was able to meet in reading book clubs "toward the end" (Tr. pp. 158-59).<sup>7</sup>

On his final 2019-20 third grade report card, the student had predominately threes in all subject areas for the second trimester of the 2019-20 school year, however he had several twos in

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<sup>7</sup> The student's third-grade teacher also reported that the student occasionally fell in the classroom (Tr. pp. 172-73).

reading, writing, and math which, according to the key on his report card, signified that the student was "approaching the standards" but did not "consistently meet grade level expectations and may require assistance" (Dist. Ex. M at pp. 1-2). The skills where the student received twos included demonstrating critical thinking skills and applying strategies in reading; correctly spelling high frequency words, using strategies to plan, draft, revise and edit his writing, and using appropriate, varied, and descriptive language in writing; and demonstrating an understanding of numeric operations and algebraic thinking in math, and applying mathematical reasoning (id. at p. 2). For the third trimester of the 2019-20 school year no grades were entered on the report card, however there were roman numerals entered that were unexplained in the report card key (id. at pp. 1-3). The third-grade teacher testified that she did not know what these represented but opined that they might have been an error or "computer glitch" and ventured that since these roman numerals were mostly in the third trimester, "there [were] only certain areas that [they] were assessing at that time because of quarantine and being virtual" (Tr. pp. 154, 176-78; Dist. Ex. M at pp. 1-3). She clarified that while [teachers] submitted grades for the student in the third trimester, they didn't submit "all of the grades" due to "COVID" and "being [un]able to accurately assess . . . given the fact that [students] were home on computers," and stated that they "were able to assess some math . . . not all of the math, some reading, some writing, and maybe social studies and science" (Tr. pp. 181-83).

The May 2020 IEP present levels of academic performance noted that the student was reading on grade level (guided reading level O), was able to answer questions about the main idea, was able to solve word problems and knew number facts, his writing was on grade level, and he could apply the correct grammar and capitalization, organize paragraphs, and provide details, and could make connections and understand the language used (Dist. Ex. B at p. 5). The third-grade teacher testified that this was an accurate representation of the student's performance in third grade (Tr. pp. 163-64), and, at the May 2020 CSE meeting, the student's third-grade teacher shared that the student was "on grade level academically" (Tr. pp. 161-62, 231-34).

## **2. Information Obtained by or Available to the District during the 2020-21 School Year**

The student's psychological reevaluation included administration of the Kaufman Assessment Battery for Children – Second Edition (KABC-II) in March 2021 (Dist. Ex. L at p. 1). The school psychologist indicated that to prepare for the evaluation she reviewed the student's previous testing to get a better understanding of the student's "cognitive skills . . . during the last testing," reviewed the student's IEP to glean information regarding the student's strengths and deficits and what services he had received, and determined if the evaluation measure she was using was appropriate (Tr. p. 247). She also reviewed the student's psychological file—which included previous district testing, committee notes, and information from meetings, spoke to the student's classroom teacher to obtain feedback about the student's classroom performance, and in May 2021 completed a classroom observation (Tr. pp. 249-50; see Dist. Ex. L at pp. 1-2).

The school psychologist reported that she was able to easily establish rapport with the student, the student was attentive during testing, and he appeared motivated and worked diligently on all items presented (Dist. Ex. L at p. 2). The student obtained a fluid-crystallized index score in the 79th percentile, which was in the average range (id. at p. 3). The student scored in the average range or above on all KABC-II scales (id.). However, on the planning scale—which the school

psychologist explained measured "fluid intelligence" and "look[ed] at reading ability and solving new novel problems"—the student scored in the 91st percentile on the pattern reasoning subtest but only in the 37th percentile on story completion subtest (*id.* at pp. 3-4). While the March 2021 psychological reevaluation report included a planning scale score (70th percentile) the report noted, and the school psychologist explained, that the discrepancy between the student's scores on the pattern reasoning and story completion subtests rendered the planning scale score "not interpretable" insofar as it was necessary "to look at the two subtests further to glean what his ability level [wa]s in this area" (Tr. pp. 272-73; Dist. Ex. L at pp. 3-4). The school psychologist further reasoned that the student "might have been a little bit stronger in solving patterns and that could have been the reason that he performed better" (Tr. p. 273). She noted that the student's score on the story completion subtest was still within the average range (Tr. p. 274). Additionally, while the student scored within the average range on the crystalized ability/knowledge subtest (55th percentile), he demonstrated variability that the school psychologist described as "personal weakness" compared to some of the student's other cognitive abilities (Dist. Ex. L at pp. 3-4; *see* Tr. pp. 273-74). The crystalized ability/knowledge subtest was described by the school psychologist as measuring the "breadth and depth of knowledge including verbal communication, information, and reasoning of previously learned procedures" (Tr. pp. 274-75; Dist. Ex L at p. 4). During her testimony the school psychologist opined that the student's scores on these subtests were not cause for concern "because based on his performance and also the feedback from his teacher . . . he was performing within grade level expectations" (Tr. p. 275). Overall, the school psychologist concluded that the student's cognitive skills were intact and that no additional academic testing was necessary (Tr. p. 278).

In her report, the school psychologist noted that during the classroom observation the student began working on a math worksheet immediately, completed the assignment within the allotted time, engaged in appropriate interactions with his peers during the activity, and was receptive to teacher feedback (Dist. Ex. L at p 2). She also reported that during the observation the student fell but recovered quickly and continued with the task at hand (*id.*).

The psychological reevaluation report addressed the student's classroom performance through a teacher feedback section, with information provided by the student's fourth-grade teacher that indicated that he was "a hardworking student" who was "academically performing on grade-level in all subject areas" (Dist. Ex. L at p. 2). The student reportedly understood what he read and was able to transfer the material from his lesson into his independent work, excelled in science, participated often, was organized in his work and assignments, and fell in the classroom (*id.*).<sup>8</sup> The school psychologist opined that this teacher feedback was important to "get a picture of how the [student was] functioning academically in the classroom [and] any strengths or weaknesses [he] may have" (Tr. p. 386).

The fourth-grade teacher testified that during the 2020-21 school year the teacher assessed the student by administering the NWEA benchmark assessment in reading and math; "Reading Writing Records," which was a reading test that evaluated reading accuracy, fluency, and comprehension; and unit tests in math, science, and social studies (Tr. pp. 42-43). She could not

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<sup>8</sup> The student's fourth-grade teacher reported that the student fell "almost daily, certainly weekly . . . either [out of] his seat or sometimes he would just be walking" (Tr. pp. 47-48, 71).

recall how the student performed on these assessments (Tr. pp. 42-43, 51-52). Further, the hearing record does not include any records of the student's performance on such assessments.

The student's fourth-grade teacher described him as a hard-working student who did not seem to be struggling, but also testified that he was one of "a couple readers" who "seemed to need more intervention from [her]" and benefitted from "small groups and instruction and did well once he received the instruction" (Tr. pp. 44, 50). The fourth-grade teacher reported that the student had no difficulty coming up with ideas for writing and could further develop them when given extra scaffolds such as a rubric (Tr. pp. 53-55). The fourth-grade teacher further stated that the student "definitely needed" support with editing for spelling and punctuation and added that the student's independent spelling, punctuation, and capitalization were inconsistent, but he would correct his errors if she worked with him, although this "still would not create a perfect paper" (Tr. pp. 56-57, 83-85). The fourth-grade teacher also described how instruction was tiered, with some students being able to focus more on learning to use complex sentences or adding dialogue, and indicated that the student still had to master the basics of punctuation and editing to improve flow and reader comprehension, so she "was not showing him the enriched things to do with his editing" because he still needed the basics (Tr. pp. 56-58). On the other hand, the teacher indicated that the majority of students could benefit from extra editing and revising of lessons (Tr. pp. 57-58). While the student was noted to need this additional teacher support with reading and writing, this was not reflected on the student's report card, where he received all "threes" for the third trimester of fourth grade and was noted to be meeting standards in all areas (Dist. Ex. N at pp. 1-2).

To prepare for the student's June 2021 CSE meeting, the student's fourth-grade teacher indicated that she thought about what she would "bring up to the parents about what [the student's] strengths [were]" and added that when it was time for the CSE she would have her grade book and a student portfolio with her (Tr. pp. 66-67). However, no scores from the NWEA benchmark assessment, results of running records or grades from any classroom assessments were included in the student's June 2021 IEP, nor was there even a description of the student's academic performance as there was in the May 2020 IEP (Tr. pp. 51-53; compare Dist. Exs. B at p. 5; with Dist. Ex. C at p. 5).

### **3. Parents' Concerns**

The student's father testified that the parents first shared the student's craniosynostosis diagnosis with the district when the student was in second grade (2018-19 school year) and discussed their concerns, including that they were "continuing to learn what other issues may be involved with [the diagnosis]" at the May 2019 CSE meeting and with the CSE "every year thereafter," and with each of the student's teachers and providers (Tr. p. 512). The father reported that craniosynostosis was associated with low muscle tone and "a number of developmental challenges in the school . . . a higher incidence of autism . . . dyslexia or dyslexia-related disabilities," and low muscle tone impacting speech and "every aspect of [the student] including his education" (Tr. pp. 515-16). He asserted that the parents informed the CSE of the student's craniosynostosis diagnosis "constantly and [with] every teacher and provider" and conveyed to the district that there was a significant family history of dyslexia, "at numerous CSE meetings and in numerous history discussions since [the student] was in kindergarten" and "every year at every CSE meeting" (Tr. pp. 517-18, 521, 523, 527-28). In addition, the parents discussed their concerns about the student's "progress on his reading and his writing . . . with his teachers, including his

fourth-grade teacher" in addition to their concerns about the student's performance in math (Tr. p. 529). Finally, as summarized above, in or around February 2021, the parents shared with the district the recommendations of the student's medical team from the craniofacial surgeon's office that the student undergo a neuropsychological evaluation (Tr. pp. 519-20).

The student's third- and fourth-grade teachers testified that they did not have any academic concerns about the student and were not aware of the family history of dyslexia (Tr. pp. 78-79, 163, 171; see Tr. p. 65; Dist. Exs. B at pp. 4-8; L at p. 2). The school psychologist stated that she did not recall the parent sharing the family history of dyslexia or concerns about reading at the student's 2018-19 CSE or at the time of the 2019-20 "reevaluation date" (Tr. pp. 360-62). She related that, to prepare for the May 2020 CSE, for which she acted as chairperson, she reviewed the student's report card, his IEP progress report, and his March 2019 IEP and did not recall any academic concerns noted in those records (Tr. pp. 231-33).

#### 4. Summary

Overall, while the hearing record shows that the academics were not the student's most prominent area of need, there is insufficient basis in the hearing record to disturb the IHO's conclusion that the district evaluations were not sufficiently comprehensive to assess the student in all of areas of suspected disability given the lack of academic testing. Contrary to the parents' expectations, State regulations do not require a reevaluation to include all of the components of an initial evaluation (see Tr. pp. 599-600; compare 8 NYCRR 200.4[b][i]-[v], with 8 NYCRR 200.4[b][5]).<sup>9</sup> The IHO seemed to take a slightly broad view of the reevaluation requirements, implying that academic testing would be required in all instances, and overlooked the requirement that the CSE conduct a review of existing data in determining what the reevaluation should include (see IHO Decision at p. 19; see also 8 NYCRR 200.4[b][4], [5][i]-[iii]).

Nevertheless, in the current matter, there is evidence in the hearing record that the parents communicated information about the diagnoses that the student had received since his initial evaluation and the possible ramifications of the identified syndromes, as well as information about the family's history, the fact that the student received support from a tutor, concerns about the student's performance in school, and the recommendation of the student's medical team that he undergo a neuropsychological evaluation. While the district witnesses did not recall the parents sharing all of this information, the district witness' equivocal testimony is insufficient to rebut evidence that the parents shared their concerns with the district. The IHO weighed this information in finding that the district evaluations were insufficient, and the district has not pointed to a persuasive basis for disturbing that determination.

The district's main arguments focus on the district's access to other sources of information about the student's academic needs. However, the district did not offer into evidence documentation about the student's classroom-based performance. For example, the district did not offer evidence about the student's performance on any of the classroom-based assessments about which the third and fourth grade teachers testified (see Tr. pp. 42-43, 51-52, 130-41, 175, 179-80).

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<sup>9</sup> The parents' expectations are understandable, particularly given that the notice to the parents of the assessments the district intended to conduct was not so detailed that it should have alerted the parents to the district's plan to conduct a more limited psychological evaluation (see Dist. Ex. P).



Further, while the school psychologist's "behavioral observations" provided anecdotal information that described the students behavioral and work habits in the classroom, it did not speak to the student's academic performance on the mathematics worksheet he completed during the observation or include any quantitative assessment of the student's academic skills or progress (Parent Ex. L at p. 2).

Further, at the time of the psychological reevaluation, it had been four years since the student's last psychological evaluation, which had been conducted as part of his initial evaluation for special education in January 2017 (see Tr. p. 169; Dist. Ex. L). At the time of his initial evaluation the student was four months into kindergarten and his academic testing using the WIAT-III measured early academic skills including alphabet writing fluency and early reading skills (Dist. Ex. A at p. 3). Considering this, and given the student's ERF gene mutation and craniosynostosis diagnoses, his family history of dyslexia, and the parent's concerns, there is insufficient basis in the hearing record to disturb the IHO's finding that the district had a responsibility to ensure that there was sufficient data on all areas of suspected disability, including the student's academic ability, as part of the district's reevaluation of the student for the CSE to determine both accurate present levels of performance and eligibility for special education programs and services.

## **VII. Conclusion**

Having found insufficient basis in the hearing record to disturb the IHO's determination that the district's reevaluation of the student was not sufficiently comprehensive, the necessary inquiry is at an end. The IHO's order to the district to reimburse the parents for the cost of the private neuropsychological evaluation as an IEE at public expense stands. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 30, 2022**

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**STEVEN KROLAK  
STATE REVIEW OFFICER**