



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-058

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the North Rockland Central School District.**

### **Appearances:**

Gutman Vasiliou, LLP, attorneys for petitioner, by Mark Gutman, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered her son appropriate educational programs and related services for the 2020-21 and 2021-22 school years and denied her request to be reimbursed for her son's tuition costs at the Shrub Oak International School (Shrub Oak) for the 2020-21 and 2021-22 school years. The appeal must be dismissed.

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

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student in this matter has been the subject of a prior impartial hearing, as well as a State-level administrative appeal, regarding educational programs for the 2017-18, 2018-19, and 2019-20 school years (Application of a Student with a Disability, Appeal No. 21-085). As the parties are familiar with the student's educational history and the extensive procedural history, the facts and procedural history underlying the prior matter will not be recited here in full.

The student is eligible for special education as a student with multiple disabilities and has received diagnoses of spastic diplegia (a form of cerebral palsy), as well as mild intellectual disability, and attention deficit hyperactivity disorder (ADHD), combined presentation (Tr. pp. 387-88, 692, 1407; Dist. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 1; 9 at p. 1; 14 at p. 1; 22 at pp. 1-4, 13, 15-16; 28 at p. 1; 80 at p. 1).<sup>1</sup> He experiences difficulty with motor planning, which affects his ability to move the proper oral muscles necessary to produce sounds (Tr. p. 815). The student has been described as communicative, friendly, social, and a "minimally verbal to mostly non-verbal communicator," although at times he can make verbal utterances which can be understood by familiar listeners (see Tr. pp. 355-56, 444, 816-17, 851-52, 991, 1061, 1188-89, 1461, 1568, 1637, 1722, 1731, 1739, 1783, 1792; Dist. Exs. 11 at p. 1; 14 at p. 11; 20 at p. 2). The student utilizes eye contact, facial expressions, gestures, sign language, word approximations, and an assistive technology device to communicate (see Tr. pp. 300-01, 356, 367, 371, 444-45, 471, 663-64, 815-816, 909, 946, 1061, 1188-89, 1358, 1370, 1373, 1426, 1568, 1722, 1731, 1784; Dec. 1, 2021 Tr. pp. 1787, 1822-23, 1861; Dec. 7, 2021 Tr. p. 1942; Dist. Exs. 9 at p. 7; 11 at p. 1; 19 at p. 2).<sup>2</sup> However, the inability to communicate effectively has caused the student to experience frustration (Tr. pp. 372, 815-16; Dec. 1, 2021 Tr. p. 1880; Dec. 7, 2021 Tr. pp. 1942-43, 1986-88, 2006; Dist. Ex. 19 at p. 3). Physically, the student exhibits an uneven and slightly crouched gait and has a history of using bilateral orthotics but is capable of ambulating and transferring independently (see Dist. Exs. 1 at pp. 1, 7, 8; 2 at pp. 1, 9-10; 3 at pp. 1, 10; 7 at p. 1; 14 at pp. 8, 10; 17 at p. 1; 18 at pp. 1, 16; 21 at pp. 2-3; 35 at pp. 1-2; 69 at pp. 1-2).

At the beginning of the 2016-17 school year, the student was a resident of another school district and he attended a 12-month 8:1+2 special class at a Board of Cooperative Educational Services (BOCES) placement—the Jesse Kaplan School (the Kaplan School)—with the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 1 at pp. 1, 13-14, 16). During that school year, in March 2017, the student moved into the district but he continued to receive the same special education program and related services at the Kaplan School (Dist. Exs. 2 at pp. 1, 15-16, 18; 3 at p. 2).<sup>3</sup> From February 2018 to April 2018, BOCES conducted psychological, educational, OT, PT, and speech-language therapy re-evaluations of the student (see generally Dist. Exs. 4-8). The student attended the Kaplan School during the 2017-18, 2018-19, and 2019-20 school years (see Dist. Exs. 3 at pp. 1, 18; 4 at p. 1; 9 at pp. 1, 17; 10 at p. 1; 14 at pp. 1, 17-18, 20).

On January 27, 2020, the physical therapist at the Kaplan School completed a recommendation sheet indicating that the student should "[g]raduate" from PT (Dist. Ex. 17 at p. 1). The justification provided was that the student could ambulate independently in the school and

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<sup>1</sup> The student's eligibility for special education as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>2</sup> The transcript for hearing dates December 1, 2021, December 7, 2021, and December 9, 2021 are numbered incorrectly as the transcript contains two sets of pages that are paginated 1,720 to 1,862. Therefore, for purposes of this decision, the date of a December 2021 transcript will precede the reference to the pages cited.

<sup>3</sup> Throughout the record there are documents from the Haverstraw-Stony Point Central School District and the North Rockland Central School District; according to the IHO this is a historical distinction that refers to the same school district (IHO Decision at p. 5 n.1; see Tr. p. 67).

perform all functional transfers independently and safely (id.). Further, the recommendation indicated that the student had no needs at the time, as the student was able to functionally participate in his education and was not limited in his access to any educationally based activities in the school setting (id.).

During an earlier impartial hearing to contest the student's placement and program for the 2017-18, 2018-19, and 2019-20 school years, independent educational evaluations (IEEs) of the student were conducted (Dist. Ex. 78 at pp. 7-8). These IEEs, which were admitted into the hearing record, included a PT evaluation, an OT evaluation, an assistive technology evaluation, a speech-language evaluation, and a neuropsychological evaluation (see Dist. Exs. 18-22).

The February 27, 2020 independent PT evaluation report noted that, according to the parent, the student received a diagnosis of autism spectrum disorder at the age of three; the report did not mention that the student's cerebral palsy diagnosis (Dist. Ex. 21 at pp. 1, 6). According to the physical therapist, the student demonstrated poor functional mobility and significant gross motor delays, which impaired his ability to participate in school in an age appropriate, safe, and independent manner (id. at pp. 6-7). An independent OT evaluation of the student was completed on March 4, 2020, and the occupational therapist recommended that the student receive three 30-minute sessions of individual OT per week to address fine motor skills, muscle strength, postural control, bilateral coordination, visual perception, and instrumental activities of daily living (IADLs) (Dist. Ex. 18 at pp. 1, 15, 18, 20).

An independent neuropsychological evaluation was conducted over three days in March 2020 (Dist. Ex. 22 at p. 1). The evaluator noted that severe impairments in the student's expressive language and articulation skills complicated assessment of the student's cognitive functioning (id. at p. 14). Additionally, he reported that the student's communication deficits contributed to his significant delays in adaptive and academic skills (id. at pp. 14, 15). However, current test results were consistent with reports from school and home, which indicated that the student possessed relatively strong receptive language skills (id. at p. 14). Accordingly, the evaluator determined that based on previous and current testing, diagnoses of a mild intellectual disability and attention deficit hyperactivity disorder, combined type were warranted (id. at pp. 14-16). Noting that the student generally did not have use of a communication device at home and that his parents had not received training on the device, the independent evaluator suggested that the student be re-evaluated once he had sufficient training with a communication device (id. at p. 14). In contrast to the reported diagnosis in the independent PT evaluation, the independent neuropsychological evaluation concluded that the student did not meet the profile of an individual with autism spectrum disorder and that delays in social functioning were primarily due to the student's impaired communication skills (id. at p. 15). Specifically, the evaluator recommended in part that the student be placed in a program that provides emotional, behavioral, and academic support for students with communication disorders, which would most likely be a private school program, with one hour of special education instruction five days per week, one hour of parent counseling and training per week, five sessions per week of individual speech-language therapy (id. at pp. 16-18).

A speech-language pathologist conducted an assistive technology IEE that was completed on March 10, 2020, and she indicated that the student should, in addition to other recommendations, use an iPad with the TouchChat application "in all his naturally occurring

communicative environments" and noted that exposure to the system needed to be consistent for the student to become a successful communicator (Dist. Ex. 19 at pp. 1, 7, 8, 11-12). The speech-language pathologist recommended that the student's family, staff, and providers receive training on how to use the device to "optimize" the student's performance (id. at p. 8). Further, the evaluator recommended that the student have access to an iPad at home to improve literacy skills and encoding (id. at p. 11).

The same speech-language pathologist who conducted the student's assistive technology IEE also completed an independent speech and language evaluation on March 10, 2020 (compare Dist. Ex. 19 at p. 1, with Dist. Ex. 20 at p. 1). She determined that the student presented with severe delays in all areas of language functioning; however, his ability to use language and program his device indicated a higher level of linguistic ability and cognitive functioning than test results indicated (Dist. Ex. 20 at p. 12). The speech-language pathologist recommended that the student receive four 30-minute sessions per week of individual speech-language therapy, specialized reading instruction provided by a reading specialist, one 30-minute session daily of independent reading using teacher driven practices from the reading program, consistent use of an augmentative and alternative communication (AAC) system in all environments to increase and support emergent expressive language (id. at pp. 12-13).

In response to the COVID-19 pandemic and statewide school building closures, the Kaplan School established a remote educational instruction program, which began on March 23, 2020 (Tr. pp. 132, 170, 930, 937, 956; Dist. Ex. 24 at p. 1). However, the student did not begin participating in remote instruction until May 2020 (Tr. pp. 936, 957-58).

The district convened a CSE on June 1, 2020 and reconvened on June 11, 2020 to review the recent IEEs obtained by the parent and to create a program for the 2020-21 school year (Dist. Ex. 28 at pp. 1-3). The June 2020 meeting information summary indicated that the CSE reviewed IEEs and updated progress reports (id. at pp. 1-3, 6). According to the meeting summary, the parent raised no concerns during the CSE meeting, noting that any "concerns would go through her attorney" as all her requests were noted in the IEEs and had been communicated through her attorney (id. at p. 1). The CSE determined that the student required strategies to address behaviors that impeded his learning, but that he did not require a behavioral intervention plan (BIP) (id. at pp. 15, 20). Additionally, the June 2020 IEP reflected that the student required an assistive technology device, which the CSE recommended be used in the home (id. at pp. 16, 20). For the 2020-21 school year, the CSE recommended a 12-month program in an 8:1+2 special class at the Kaplan School (id. at pp. 3, 19-21, 23). For related services, the CSE recommended two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute session of parent counseling and training per month (id. at p.

19).<sup>4</sup> Access to an AAC device was recommended daily throughout the school day (id. at p. 20).<sup>5</sup> The CSE did not recommend that the student receive PT as a related service (id. at p. 19).

During summer 2020, the Kaplan School continued to provide programming by way of remote instruction (Tr. pp. 298, 634, 985-86). In September 2020, the Kaplan School began to provide services in a hybrid model that consisted of both in-person and remote instruction (Tr. pp. 173-74, 295-96, 542, 986). Beginning in November 2020, students were allowed to receive in-person instruction four days per week and one day remotely (Tr. pp. 174, 296-297, 987).

On January 22, 2021, the parents sent a 10-day notice of unilateral placement to the district, noting their objection to the June 2020 IEP and the program recommended for the 2020-21 school year (Parent Ex. VV at p. 1).<sup>6</sup> Specifically, the parents stated that as part of a prior impartial hearing, IEEs were conducted of the student which indicated that he was in need of more intensive services and a new school placement (id.). The parents indicated that every recommendation made by the evaluators was ignored and the same placement and services continued to be provided to the student, causing the student to fail to make appropriate progress (id. at pp. 1-2). The parents also voiced objection to the district failing to provide the student with an assistive technology device (id. at p. 2). Therefore, the parents expressed their intent to enroll the student in Shrub Oak at public expense and indicated that they would be seeking funding or reimbursement from the district for all tuition costs, related services, and transportation expenses for the remainder of the 2020-21 school year (id.).<sup>7</sup>

#### **A. February 2021 Due Process Complaint Notice**

In a February 10, 2021 due process complaint notice, the parent asserted that the district failed to provide the student with a FAPE during the 2020-21 school year, that unilateral placement of the student at Shrub Oak would be appropriate for the student, that equitable considerations weighed in favor of an award of tuition reimbursement, and that the student was entitled to relief

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<sup>4</sup> The CSE also recommended supplementary aids and services/program modifications of: refocusing and redirection; a positive reinforcement plan; additional time to process verbal information; check for understanding; directions presented in a clear concise manner; directions or prompts repeated; and directions/instructions paired with visual models or visual cues (Dist. Ex. 28 at pp. 19-20).

<sup>5</sup> The CSE recommend supports for school personnel of: three 30-minute sessions per week of training and implementation support from the technology department; weekly speech-language consultation during the summer and the 10-month school year to assist with and program the student's device; and yearly training and implementation support from the technology department to review and set up the student's assistive technology device (Dist. Ex. 28 at pp. 20-21).

<sup>6</sup> Parent Exhibits Y and VV appear to be identical (compare Parent Ex. VV, with Parent Ex. Y). The IHO is reminded of her obligation to exclude from the hearing record any evidence she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). For purposes of this decision, Parent Exhibit VV is cited.

<sup>7</sup> Shrub Oak has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

(Dist. Ex. 36 at pp. 1-2, 8). The parent raised claims pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a), and New York State regulations.<sup>8</sup>

The parent asserted that the district failed to provide the student with a program uniquely tailored to meet his needs for the 2020-21 school year (Dist. Ex. 36 at p. 5). Specifically, the parent alleged that the student's placement was not equipped to meet his needs, failed to utilize research-based interventions, and caused the student to make inappropriate progress (*id.*). The parent asserted that the district also failed to consider other placements that could have addressed the student's communication needs (*id.*). Additionally, the parent alleged that the district ignored five IEEs that indicated the student needed a new placement (*id.*).

The parent argued that, during the 2020-21 school year, the district failed to conduct a functional behavioral assessment (FBA) and failed to develop and implement a BIP, despite the district having documented the student's aggressive behaviors, which on one occasion resulted in staff having to physically restrain the student (Dist. Ex. 36 at p. 6).

The parent alleged that, during the 2020-21 school year, the district failed to recommend an appropriate frequency of speech-language therapy and OT, while also having removed PT (Dist. Ex. 36 at p. 6). The parent stated that the related services provided were inappropriate because the student was non-verbal, struggled with communication skills, was delayed in the development of expressive and receptive language skills, failed to make progress with visual perception and fine motor skills, and had low safety awareness and limited muscle tone in his trunk and extremities (*id.* at p. 6).

The parent asserted that during the 2020-21 school year, the district failed to provide the student with an appropriate assistive technology device because the student did not use the device to communicate unless he was prompted (Dist. Ex. 36 at p. 6). The parent also argued that the student preferred another device that he had previously trialed (*id.*). Furthermore, the parent asserted that there was a lack of training provided to both the student and parent regarding use of the assistive technology device (*id.*).

Additionally, the parent argued that also with respect to the 2020-21 school year, the district failed to develop attainable, meaningful, and measurable goals that addressed all areas of the student's needs (Dist. Ex. 36 at p. 7). Specifically, the parent stated that the student's IEP, which was implemented in July 2020, contained three behavioral goals with no explanation as to

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<sup>8</sup> Both of the due process complaint notices at issue contain allegations relating to section 504; however the IHO did not address such claims. The parties do not address this claim on appeal, however, it is noted that even if the IHO had addressed the parent's claim regarding section 504, an SRO would have no jurisdiction to review any portion of the same as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). In fact, courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. 2013]; see also *F.C. v. New York City Dep't of Educ.*, 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]).

how the student would make progress towards the goal, as no BIP was created to address problematic behaviors (id.). Additionally, the parent argued that there were no spelling goals, there were minimum assistive technology goals, and there were inappropriate goals relating to sentences (id.). The parent also indicated that previously recommended OT goals and speech-language goals were not incorporated into the student's IEP (id.). Lastly, the parent argued that goals that had not been achieved in the year prior were inappropriately removed from student's IEP (id.).

The parent argued that, during the 2020-21 school year, the district failed to provide transportation to the student, causing delay, and making the child remain at the Kaplan School, in violation of Education Law § 4402(4)(d), under the guise that it needed to determine whether the unilateral placement was similar to the public school, despite having been provided with information regarding the program available at Shrub Oak (Dist. Ex. 36 at pp. 5, 7).

With regard to the parent's unilateral placement of the student at Shrub Oak, the parent argued that the private school was an appropriate placement for the student, as it could provide all services that were recommended in evaluations, which were more than what was provided by the district and it allowed for the student to "receive a meaningful education and make progress towards goals" (Dist. Ex. 36 at p. 8).

Regarding equitable considerations, the parent asserted that she regularly attended IEP meetings, cooperated with the district throughout the student's education, only requested services that the student needed, had not rejected prior placements, and never prevented the district from recommending a placement or from evaluating the student (Dist. Ex. 36 at p. 8). Additionally, the parent alleged that she made every attempt and provided enough time for the district to meet the student's needs and recommend an appropriate program (id.).

For relief, the parent requested that the IHO immediately issue an interim order requiring the district to provide transportation to and from Shrub Oak, as well as compensatory academic tutoring for the failure to implement transportation in a timely manner (Dist. Ex. 36 at p. 9). Additionally, the parent requested a finding that the district denied the student a FAPE for the 2020-21 school year and an order requiring the district to fund the cost of the student's tuition at Shrub Oak for the 2020-21 school year, as well as for the 2021-22 and 2022-23 school years as compensatory education to address the district's "deliberate indifference" to the needs of the student and the district's failure to provide the student with an appropriate placement (id.). The parent also requested for the IHO to order the district to fund compensatory education services, provided outside of school hours by independent providers in the areas of speech-language therapy, OT, and PT (id.). The parent further requested that such services be available to the student for at least two years from the date of the decision and for the district to fund transportation costs to and from all compensatory education sessions (id.). The parent requested that the district provide the assistive technology device that had been recommended by the independent provider along with private training for the device (id.). Lastly, the parent requested such other and further relief that the IHO deemed just and proper to ensure the provision of a FAPE (id.).

On February 22, 2021, by way of a letter from its attorneys, the district responded to the parent's due process complaint notice stating that "after careful consideration and review of all evaluative materials and school reports" the CSE had "recommended that the student continue to



be classified as a student with a disability and receive special education services as indicated" on the student's IEP (Dist. Ex. 37 at p. 1). The district stated that a less restrictive program was considered but had to be rejected due to the student's current functioning levels and skills (*id.*). The district further stated that, at the June 2020 CSE meeting, information had been requested about what other program or type of program the parent was looking for, but the district did not receive a response (*id.* at p. 2). The district then asserted that "[s]ome or all allegations in the complaint are barred by the principals of stare decisis, collateral estoppel and/or res judicata" (*id.*). Regarding transportation, the district asserted that it did not deny transportation, but rather was required to determine whether the Shrub Oak programming was similar to the programming developed by the CSE pursuant to Education Law § 4402(4)(d), but such information could not be obtained from Shrub Oak and that the district was prepared to provide transportation upon confirmation of the two programs similarity (*id.*).

The district argued that the request to fund the student's placement at Shrub Oak for the 2021-22 and 2022-23 school years was inappropriate and unavailable as a matter of law (Dist. Ex. 37 at p. 8). The district also claimed that the parent could not simultaneously argue that the district should be required to provide an assistive technology device and training that is appropriate, while also claiming that the unilateral placement at Shrub Oak was appropriate in the absence of the device (*id.* at p. 4).

Lastly, the district alleged that the parent failed to comply with the procedures required for student grievances made pursuant to section 504 prior to requesting an administrative hearing (Dist. Ex. 37 at p. 4). However, the district stated that, without waiving any rights or defenses, it reserved the right to appoint a hearing officer to adjudicate such claims in accordance with the district's 504 procedures (*id.* at pp. 4-5).<sup>9</sup>

## **B. Events Transpiring Between Due Process Complaint Notices**

Following the February 2022 due process complaint notice, the student ceased attending the Kaplan School on or about February 26, 2021 (Tr. pp. 168-69, 408, 410, 1282, 1777-78). The parent followed through with her intention to unilaterally place the student at Shrub Oak, a private day and boarding school for students who are on the autism spectrum, which the student began attending in March 2021 (Tr. pp. 1187-88, 1719, 1777-78; Parent Exs. HH at p. 1; JJ at p. 1; KK at p. 1). When enrolled at Shrub Oak, the student was initially placed in the "founder's program," the most restrictive of the school's programs, that was geared towards students with "level 3 autism," who had "high needs" in terms of communication and regulation, and required 1:1 support in addition to a classroom teacher (Tr. pp. 1719-21; 1780-81). However, the student was quickly transferred to another class in the "elementary program" because he exhibited a "very high" level of communication despite being non-verbal and lacked certain behaviors typically shown by students in the founder's program and due to his academic abilities in the areas of reading, writing, and arithmetic (Tr. pp. 1719-22).

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<sup>9</sup> Federal regulations indicate that use of the IDEA's hearing procedures is permissive for hearing procedures under section 504, not mandatory. Accordingly, "[c]ompliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement (34 CFR 104.36)

On May 17, 2021, Shrub Oak conducted what the private school described as an "Individualized Transdisciplinary Education Plan" (ITEP) meeting (Parent Ex. OO at pp. 1, 35). Shrub Oak staff recommended that the student receive the following related services: two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, one 30-minute session of individual PT per week, and one 30-minute session of individual counseling services per week (*id.* at p. 33). The ITEP indicated that the student needed the following supplemental aids and services: breaks from instruction to regulate, additional processing time, visual schedules, relationship based learning, a small class size, 1:1 program support, prompting to facilitate peer interactions, guidance on developing and maintaining friendships, 1:1 behavior support, a behavioral plan, prompting and adult behavioral support, breaks to regulate behavior, adaptive tools to support writing, 1:1 environmental support, and weekly updates to the parent by a social worker (*id.* at p. 31). The ITEP also included updates on the student's progress from June 25, 2021, and August 13, 2021, relating to the student's academic achievement, clinical achievement, functional performance, and goals (*id.* at pp. 4-26, 35). The ITEP indicated that the student used an AAC device and/or American Sign Language (ASL) to communicate, in addition to vocalizations and gestures (*id.* at pp. 16-19, 32). Regarding an assistive technology device, the ITEP noted that the student needed the same to "increase, maintain or improve functional capabilities" (*id.* at p. 32).

On May 24, 2021, the undersigned SRO rendered a determination on the parent's appeal of an IHO decision rendered in the prior matter relating to the 2017-18, 2018-19, and 2019-20 school years (Application of a Student with a Disability, Appeal No. 21-085; *see* Dist. Ex. 78). In the decision, the undersigned dismissed the parent's appeal and found that the CSE programming offered by the student's former district of residence was appropriate, and a FAPE was offered for the 2017-18, 2018-19, and 2019-20 school years (*id.* at p. 33).

On May 26, 2021, the parent signed an enrollment contract for the student's attendance at Shrub Oak for the period from July 1, 2021 to June 30, 2022; such contract included provisions for the student's academic program, clinical services, and related services (Parent Ex. UU at pp. 1, 5-10, 12).

The CSE convened on June 15, 2021 for the student's annual review and to develop an IEP for the 2021-22 school year, with an implementation date of July 7, 2021 (Dist. Ex. 80 at pp. 1, 6-7). The CSE recommended a 12-month program in an 8:1+2 special class at the Kaplan School (*id.* at pp. 22-23). For related services, the CSE recommended two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a small group setting, two 30-minute sessions of individual OT per week, and one 30-minute session of parent counseling and training per month (*id.* at p. 22).<sup>10</sup> The CSE did not recommend that the student receive PT services (*id.* at p. 22). The IEP reflected that the student required an assistive technology device, which the CSE recommended also be used in the home, and access to an AAC device was recommended daily throughout the school day (*id.* at pp. 16,

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<sup>10</sup> The CSE also recommended supplementary aids and services/program modifications of: refocusing and redirection; a positive reinforcement plan; additional time to process verbal information; checking for understanding; directions present in a clear concise manner; directions broken into shorter steps, directions or prompts repeated; directions/instructions paired with visual models or visual cues; and the use of a calculator (Dist. Ex. 80 at pp. 22-23).

23).<sup>11</sup> The IEP indicated that the student required strategies to address behaviors that impeded his learning, but that he did not require a BIP (id. at p. 16). Additionally, the CSE determined that the student needed special transportation accommodations including a small bus or vehicle with an attendant (id. at p. 26).

In a 10-day notice, dated June 18, 2021, the parent voiced objection to the June 2021 CSE meeting and resulting IEP, repeating arguments set forth in her January 22, 2021 letter (Parent Ex. WW at pp. 1-2; see Parent Ex. VV). With regard to the June 2021 IEP, the parent stated that despite many service providers indicating that the student regressed in the early part of the school year, nearly identical services continued to be provided to the student (id. at p. 2). Therefore, absent an appropriate placement for the student, the parent intended to continue the student's enrollment at Shrub Oak at public expense and seek funding or reimbursement from the district for all tuition costs, related services, and transportation expenses for the remainder of the 2021-22 school year (id.).

On June 18, 2021, the district completed an OT re-evaluation of the student (Dist. Ex. 81 at p. 3).

### **C. July 2021 Due Process Complaint Notice**

By due process complaint notice dated July 2, 2021, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year, asserting many of the same claims that were set forth in the February 10, 2021 due process complaint with regard to the 2020-21 school year (compare Dist. Ex. 36 at p. 1, with Dist. Ex. 91 at p. 1). Specifically, the parent argued that the district failed to provide the student with a FAPE during the 2021-22 school year, that the unilateral placement of the student at Shrub Oak was appropriate, that equitable considerations weighed in favor of the parent's request for tuition reimbursement, and that the student was entitled to relief (Dist. Ex. 91 at pp. 1-2, 7-8). This due process complaint notice again made claims pursuant to the IDEA, section 504, and State law and regulations (id. at p. 1)

Specifically, the parent alleged that for the 2021-22 school year the district recommended the same inappropriate placement notwithstanding that the student had failed to make progress, especially with communication, and also regressed since attending that placement (Dist. Ex. 91 at pp. 5-6). The parent stated that for the first time the district "admitted that [the student] had regressed significantly and [had] done nothing to stop or reverse this regression" (id. at p. 6).

The parent continued to make arguments regarding the district's failure to develop and implement a BIP, asserting that during the most recent impartial hearing it was revealed that the student continued to have behavioral incidents (compare Dist. Ex. 36 at p. 6, with Dist. Ex. 91 at p. 6).

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<sup>11</sup> The CSE recommend supports for school personnel of: three 30-minute sessions per week of training and implementation support from the technology department; two 30-minute session per week of speech-language consultation regarding device programming; and two hours of training and implementation support per year from the technology department to review and set up the student's assistive technology device (Dist. Ex. 80 at p. 23).

With regard to the 2021-22 school year, the parent asserted similar arguments as with the prior school year regarding the district having failed to recommend an appropriate frequency of speech-language therapy, OT, and PT, as well as having failed to provide the student with an appropriate assistive technology device and training (compare Dist. Ex. 36 at pp. 6-7, with Dist. Ex. 91 at pp. 6-7).

The parent alleged that the district failed to develop attainable, meaningful, and measurable goals that addressed all areas of the student's needs and that the established goals were not attainable due to the student's regression (Dist. Ex. 91 at p. 7). Furthermore, the parent argued that the district "continued to create goals which skirted around [the student's] needs" citing that the use of a calculator was added when the student became unable to add or subtract double digit numbers (id.).

For relief, the parent sought a finding that the district denied the student a FAPE during the 2021-22 school year (Dist. Ex. 91 at p. 8). In addition, the parent requested that the district fund the cost of the student's tuition at Shrub Oak, fund assistive technology training, and provide an assistive technology device as recommended by an independent assistive technology provider (id.). Lastly, the parent requested such other and further relief that the IHO deemed just and proper to ensure the provision of FAPE to the student (id.).

#### **D. Events Subsequent to July 2021 Due Process Complaint Notice**

In July 2021, the district completed PT, speech-language, and psychoeducational evaluations of the student (Dist. Exs. 82; 83; 87). In addition, on August 7, 2021 and September 23, 2021, the district completed a triennial educational evaluation (Dist. Ex. 88). On November 4, 2021, Shrub Oak completed an OT evaluation of the student (Parent Ex. SS).

#### **E. Impartial Hearing Officer Decision**

An impartial hearing convened on April 30, 2021 and concluded on December 7, 2021 after eleven days of proceedings (Tr. pp. 1-1862; Dec. 1, 2021 Tr. pp. 1720-1930; Dec. 7, 2021 Tr. pp. 1931-2076; Dec. 9, 2021 Tr. pp. 2077-2210). While the proceedings were underway, the IHO determined in a consolidation order issued on September 7, 2021 that the February 2021 due process complaint notice concerning the 2020-21 school year and July 2021 due process complaint notice concerning the 2021-22 school year would be addressed together in a single proceeding (IHO Ex. I). The IHO stated that the parent desired consolidation and that the district did not object, despite the district having already concluded presenting its witnesses (id.; see also Dist. Exs. 36 at p. 1; 91 at p. 1). The IHO found that there were substantial common issues of law and fact, there were no negative effects on the student's educational interests or well-being that would unduly delay the determination, and that consolidation would limit the litigation expenses for both parties (IHO Ex. I at p. 1).

In a decision dated April 17, 2022, the IHO found no basis for a conclusion that the district failed to offer the student a FAPE during the 2020-21 and 2021-22 school years (IHO Decision at pp. 40-41, 47). Therefore, the IHO declined to address the appropriateness of the unilateral placement or equitable considerations, dismissed the matter, and awarded no relief (id. at p. 47).

The IHO specified that, because the district provided a FAPE to the student, there was no basis for an award of compensatory relief (id.).

Initially, within her findings of fact, the IHO noted that the district initially requested parental consent to re-evaluate the student for the 2021-22 school year in January 2021 and the district made two additional requests, but that consent was not received until June 2021 (IHO Decision at pp. 25-26). The IHO found that the re-evaluation was further delayed by the parental schedule which limited testing to Fridays and by backlogs resulting from the COVID-19 pandemic (id. at p. 26).

The IHO went on to address six distinct arguments that had been made by the parent with regard to the student being provided a FAPE: the appropriateness of the programs, goals, and related services; the provision of PT to the student; the sufficiency of the student's communication needs being met by way of an assistive technology device and training; how the student's behavioral needs were addressed; the need for a sensory diet; and transportation (IHO Decision at pp. 35-46).

First, with regard to the program offered by the district, the IHO determined that it was "virtually the same" as the program provided in prior years, which had been determined by an SRO to be appropriate for the 2017-18, 2018-19, and 2019-20 school years (IHO Decision at p. 35). The IHO stated that progress made under a prior IEP supported the appropriateness of a future IEP that offered a similar program (id.). The IHO acknowledged that although regression was observed when the student returned to school in September 2020, after a period of remote instruction, this was not unique to the student (id. at p. 36). The IHO found that the goals set forth in the student's IEP addressed the student's areas of need known at the time of its development (id.). Even further, the IHO stated that "notwithstanding pandemic related circumstances affecting the delivery and reception of instruction" the student achieved all social, emotional, and behavior goals, as well as a motor skill goal and an ADL goal (id.). Even further, the IHO determined that the student made progress with all other goals, acknowledging both that "under normal circumstances the goals would have been achievable" but that achievement was not required to establish that a FAPE was provided (id. at pp. 36-37). The IHO found that repetition of certain goals for the 2021-22 school year was also not a basis for finding that a denial of FAPE occurred (id. at p. 37). The IHO further stated that the parent's claims regarding certain goals being vague, repetitive, or otherwise deficient did not provide a basis that the IEP was defective or that a FAPE was not provided, under these circumstances (id. at pp. 37-38).

With regard to the parent's argument that the district's failure to provide PT to the student during the 2020-21 school year constituted a denial of FAPE, the IHO disagreed, citing concerns regarding the PT IEE and the fact that the student's school physical therapist had concluded that there "was nothing more that was needed from a physical therapist to enable the student to appropriately access his education" (IHO Decision at pp. 39-41) As for the 2021-22 school year, the IHO again found that the absence of a PT recommendation for the 2021-22 school year also did not constitute a denial of FAPE, as the student only fell on one occasion, evidence regarding certain skills were contradictory, and the student did not require assistance or close supervision for navigation in the school environment (id. at pp. 40-41).

The IHO found no merit to the parent's argument that the student's communication needs were not met because the assistive technology device and training provided were inadequate, the student was unable to adapt to the software on the communication device properly, and that the student did not progress with using the device, as the evidence did not support such claims (IHO Decision at p. 41). Specifically, the IHO found that there were differences in professional opinion as to which software application, the Proloquo2Go or LAMP, was the most appropriate (id. at p. 42). The IHO found that the student's "very strong desire to communicate vocally" had "limited the effectiveness of efforts to enhance independent use" of the assistive technology device (id.). The IHO found that opportunities for the parent to receive training with the assistive technology were repeatedly offered by the district, but no response had been received from the parent (id. at p. 43). Even further, the IHO stated that the staff at the Kaplan School had the requisite level of skill with the LAMP application software on the student's communication device to facilitate and encourage its use (id.).

In addressing the parent's claim that the student's behavioral needs were ignored because an FBA and BIP were not completed, the IHO indicated that the absence of the same does not always constitute a denial of a FAPE even when behaviors are present (IHO Decision at p. 42). The IHO declined to consider claims concerning the district's response to the student's aggressive behaviors during years prior to those at issue (id. at pp. 43-44). The IHO stated that the SRO had found in the prior matter that there was no evidence of a persistent pattern of interfering behaviors such that failure to conduct an FBA and develop a BIP would result in a denial of a FAPE (id. at p. 44). The IHO found that the district's determination that no FBA or BIP was required at the time the IEP was developed was appropriate and did not constitute a denial of FAPE (id.). Similarly, the IHO indicated that subsequent behaviors that occurred during the 2020-21 school year did not demonstrate that the student needed an FBA because instances of aggression declined (id.). In fact, the IHO found that during the 2021-22 school year the student had only one behavioral incident and Shrub Oak did not conduct an FBA or develop an BIP (id. at p. 45). Accordingly, the IHO concluded the lack of an FBA or BIP did not constitute a procedural defect or denial of a FAPE (id.).

The IHO found that the parent did not assert sensory diet claims in either of the due process complaint notices at issue and the district did not waive the requirement that the claim be plead properly (IHO Decision at p. 45). Therefore, the IHO stated that such claims would not be addressed except to note that, although a sensory diet could enhance student attention, appropriate classroom strategies were also effective for such purpose and that Shrub Oak never requested that a sensory diet be provided by the CSE (id.).

About the district having failed to provide transportation after the January 2021 10-day notice, the IHO found that it was uncontested that appropriate district staff were not aware that the student did not receive transportation in a timely manner (IHO Decision at p. 46). Even further, the IHO indicated that the pandemic delayed the district in being able to decide whether Shrub Oak was similar to the Kaplan School (id.). The IHO also found that for a week in July 2021 the district transported the student to the Kaplan School rather than Shrub Oak, causing the student to not attend for a week (id. at p. 47). However, the IHO found that, even if the parent established entitlement to relief for the 2020-21 school year, the student was receiving services at the Kaplan School, making any educational loss de minimis (id.). Lastly, in making findings of fact, the IHO determined that the district initially requested parental consent to re-evaluate the student for the

2021-22 school year in January 2021 and the district made two additional requests, however consent was not received until June 2021 (*id.* at pp. 25-26). The IHO found that the re-evaluation was further delayed by the parental schedule which limited testing to Fridays and by backlogs resulting from the pandemic (*id.* at p. 26).

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

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 and 2021-22 school years. The parent argues that the IHO was incorrect in denying her request for direct funding to Shrub Oak and raises four specific arguments on appeal.

Initially, the parent asserts that the IHO failed to consider circumstances of the COVID-19 pandemic when determining whether the district provided the student with a FAPE. The parent alleges that the IHO improperly stated that the impact of the pandemic on the 2020-21 school year instruction was unclear, when the district was truly aware of the impact it had on the student. Specifically, the parent argued that regression occurred because of remote learning commencing in March 2020. The parent argues that the student's regression was not discussed or addressed by the district and that the district continued the same program for the student. Additionally, the parent asserts that the district failed to offer compensatory services, evaluate the student after becoming aware of regression in June 2020 or September 2020, or reconvene the CSE to develop an appropriate IEP for the student.

Next, the parent claims that the IHO erred in finding that the district attempted to evaluate the student timely but did not receive timely consent. The parent argues that such finding was incorrect, was not based upon documentary or testimonial evidence, and in effect excused the district's failure to notice the student's regression. The parent argues that if the district did evaluate the student timely, upon returning from remote learning, it would have noticed the student's regression and may have developed an appropriate IEP.

Third, the parent argues that the IHO erred in failing to address the parent's claims regarding sensory needs due to inaccurately stating that such claim was not raised in the parent's due process complaint notice. The parent asserts that the due process complaint notice alleged a failure of the district to provide an appropriate program and appropriate OT. The parent argues that the hearing record revealed the student had significant sensory needs that were not identified or understood by the district. The parent also asserts that, as a result of the district having not evaluated the student to determine his sensory needs, there was nothing in place to address when the student became dysregulated, which should have been considered when determining whether the student was provided with an appropriate education.

Finally, the parent contends that the IHO was incorrect in concluding that by the time of the June 2020 IEP and June 2021 IEP, the student had made progress, met benchmarks, or achieved each of his goals. The parent asserts that testimony and evidence regarding the student's alleged progress was inconsistent. The parent's position was that the district disregarded the student's present levels of performance and independent evaluations, causing the student's regression to go unaddressed.

Therefore, the parent seeks a finding that Shrub Oak was an appropriate unilateral placement for the student, as the witnesses and documents presented at the hearing established that it could meet the student's academic, social, communication, fine, and gross motor needs. The parent also seeks a finding that equitable considerations favor an award of full tuition for the school years in question. Accordingly, the parent seeks an order directing the district to fund the student's tuition at the unilateral placement for the 2020-21 and 2021-22 school years.

In its answer, the district denies the parent's allegations that are material to the dispute and argues that the IHO's decision should be upheld in its entirety. The district argues that the claims associated with the student's sensory needs were not sufficiently pled in the due process complaint notices. In addition, the district contends that several of the parent's arguments in her request for review are noncompliant because they do not provide sufficient citations to the hearing record. To the extent that the parent seeks tuition reimbursement for the 2020-21 and 2021-22 school years, the district maintains that the parent must demonstrate that all three prongs of the analysis set forth in Burlington/Carter fall in her favor. However, the district argues that the parent failed to raise any argument on appeal relating to the issues of the appropriateness of the unilateral placement and equities, in turn making her ineligible for any relief.

With regard to the analysis of the FAPE issues, the district argues that both IEPs developed for the 2020-21 and 2021-22 school years were based on the most up-to-date information available at the time in which they were developed and considered the progress that the student had made in the year prior. The district argues that although testimony indicated that the district had a backlog of evaluations to be conducted during the 2020-21 school year, the student's evaluation was not delayed due to any action or inaction on the part of the district, as multiple attempts were made to secure parental consent.

Regarding the parent's allegation of regression, the district disputes when it could have been first noticed and how much regression occurred. The district argues that the record did not support the student having experienced any regression during the 2019-20 school year. The district asserts that the IHO was correct to find that at the time of the June 2020 CSE meeting, the impact of the pandemic was unclear because it was not known whether in-person instruction would return in September 2020 and it was not known what the re-entry plan would look like due to uncertainty surrounding the pandemic. Similarly, the district argues that the impact the pandemic had on the student could not have been known at the start of the 2020-21 school year because it was unknown how often the Kaplan School would be providing remote, in-person, or hybrid instruction as safety risks were being weighed in real time.

Although the district acknowledges that the student demonstrated some weakness in Fall 2020, the district asserts it proactively attempted to remedy them, despite the parent not being available for a November 2020 CSE meeting to review the student's program. The district argues that any regression was temporary and did not constitute a dramatic decrease in skills, as the student's cognitive functioning had consistently been measured in the moderately delayed range, even prior to the pandemic. However, the district states that the student again made progress with many of his annual goals and achieved his social and emotional goals by February 2021. The district states that, because the student ceased attending the Kaplan School in February 2021 to be unilaterally placed at Shrub Oak, the parent cannot argue that the student should have made a full year's progress during the 2020-21 school year when he was not in attendance at the recommended



placement for the entire period. This district argues that this is especially so when during the last third of the year after transition to Shrub Oak, there were reports being made with regard to the student experiencing significant behavioral issues.

In a reply, the parent argues that the IHO erred in failing to review arguments regarding the appropriateness of the student's unilateral placement. The parent argues that the claims she made on appeal preserved the issue surrounding the appropriateness of Shrub Oak. However, the parent argues in the alternative that, if the SRO was to find that a FAPE was not provided by the district and that she did not preserve arguments regarding the appropriateness of the unilateral placement and equities, a remand to the IHO to address the parties' dispute over the appropriateness of Shrub Oak would be fitting to resolve this matter. The parent also asserts that any argument that the equitable considerations were not in her favor was the district's burden.<sup>12</sup>

## 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

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<sup>12</sup> In opposition, the district submits a letter, citing 8 NYCRR 279.6(a) to argue that the parent is not entitled to address her failure to raise such issues by way of a reply, as a reply is only reserved for responses to procedural defenses or the submission of any additional documentary evidence submitted with an answer.

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>13</sup>

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<sup>13</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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

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

## **VI. Discussion**

### **A. Preliminary Matter—Scope of Review**

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Findings made by the IHO in several areas were not challenged by the parent. The parent's due process complaint notices alleged that the district failed to conduct an FBA, as well as develop and implement a BIP for the student, that the district failed to provide the student with an appropriate assistive technology device and training, that the annual goals included in the June 2020 and June 2021 IEPs were not sufficient, attainable, meaningful, or measurable, that the district failed to recommend an appropriate frequency of speech-language therapy and OT, while also discontinuing PT for the student, and that the district failed to provide the student with transportation (Dist. Exs. 36 at pp. 6-7; 91 at pp. 6-7). The IHO made specific findings regarding the lack of an FBA or BIP, the student's access to a communication device, the sufficiency of the annual goals, the lack of PT, and the district's provision of transportation (IHO Decision at pp. 37-47). On appeal, the parent does not assert that the IHO erred in these determinations or otherwise allege that the IHO failed to address any alleged violations by the district that were raised in her

due process complaint notices.<sup>14, 15</sup> As such, the parent is deemed to have abandoned these FAPE challenges and the IHO's findings regarding the lack of FBA and BIP, the student's access to assistive technology, the sufficiency of the annual goals, the lack of PT, and transportation have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Although still seeking reimbursement relief for Shrub Oak, the thrust of the parent's allegations of violation by the district have been reformulated and recast considerably since she set forth her claims in the due process complaint notices, and, with respect to the issues pursued on appeal, it is questionable whether the claims were even properly before the IHO. It is to these questions I now turn.

## **B. Sensory Needs**

Before turning to the merits of the parent's arguments on appeal relating to the student's sensory needs, it is necessary to examine if such claims were properly raised as issues to be addressed during the impartial hearing. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

The parent alleges that IHO erroneously determined that the student's need for a sensory diet was not among the claims asserted in her due process complaint notice (Req. for Rev. at pp. 7-8). More specifically, the parent asserts that it was not that she was arguing that the district failed to offer a sensory diet to the student (id.). Rather, the parent argues that the student's sensory needs went unidentified by the district and that the district failed to provide an appropriate program and adequate OT services to meet the student's needs (id. at p. 2). The parent argues that such issues were raised in the due process complaint notice, constituted a denial of a FAPE, and demonstrated that the district had a "complete lack of understanding" of the student's sensory needs (id. at pp. 2, 7-8). The parent states that the district's failure to evaluate the student to determine his sensory needs caused there to be "nothing in place to address when [the student] becomes dysregulated" (id. at p. 8).

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<sup>14</sup> To the extent that the parent argues that the IHO erred in finding that the student made progress or met benchmarks in each goal and that the student's regression was evidence by the identical goals were set forth in the student's IEP (Req. for Rev. at pp. 2-4), the issue of the student's progress or lack thereof is discussed below.

<sup>15</sup> With respect to related services, on appeal, the parent only sets forth arguments regarding the degree to which the IEPs addressed the student's sensory needs. The issue of the student's sensory needs was not raised in the parents' due process complaint notice, as discussed further below. However, the issue is addressed out of an abundance of caution.

Review of the due process complaint notices reveal that it was the parent's position that the district failed to recommend an appropriate frequency of related services, including OT, as the district "consistently recommended two 30-minute OT sessions per week, even though the [s]tudent ha[d] struggled to make progress with his visual perception and fine motor skills, particularly in the area of writing" (Dist. Exs. 36 at p. 6; 91 at p. 6). There was no mention of sensory needs among the problems identified for the hearing.

In the memorandum of law which accompanied the request for review, the parent alleges that the "claim regarding occupational therapy can be reasonably read to include allegations regarding sensory processing, a skill that the [d]istrict acknowledges is within the scope of occupational therapy" (Parent Mem. of Law at p. 12). The problem with that reasoning is that there are a myriad of special education deficits that can potentially fall within the scope of services that an occupational therapist can address, either in whole or in part, but that does not mean that every such area of deficit that occupational therapist could address must be ruled on. Some specific facts related to the area of concern or problem must be identified as a problem in the due process complaint, and in this case the parent specifically identified visual perceptual and fine motor skills in the area of writing, not sensory concerns. The parent next argues that, even if claims regarding the student's sensory needs were not sufficiently raised in the due process complaint notice, the district "opened the door" by presenting a rebuttal witness who testified about the student's sensory needs, namely, the previous assistant principal at the Kaplan School who became the district's assistant director of special services (Parent Mem. of Law at p. 12; see Tr. pp. 971, 2121). However, the testimony cited by the parent did not discuss the student's individual sensory needs, but rather described "the concept of stimming," that students at the Kaplan School "all typically exhibit self-stimulatory behaviors," and that the Kaplan school would provide replacement behaviors to students who had behaviors that interfered with instruction (see Tr. pp. 2126-28).

The district disputes the parent's allegation, arguing that the parent simply having made a general claim that the district failed to provide an "appropriate placement and failed to recommend appropriate related services" did not constitute sufficient notice that the parent was arguing that the district ignored the student's sensory needs (Answer ¶ 17).

In this instance, as demonstrated above, the IHO was correct in finding that the due process complaint notices cannot be reasonably read to include and allegation that district denied the student a FAPE due to a failure to address sensory deficits experienced by the student (see IHO Decision at p. 45). Even if the parent's claim regarding the student's sensory needs was properly raised, it is not supported by the evidence in the hearing record. Rather, it seems that the parent's arguments reply primarily from evidence of events that post-date the relevant June 2020 and June 2021 CSE meetings, specifically the November 2021 OT evaluation conducted by Shrub Oak (Parent Ex. SS; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).<sup>16</sup> For

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<sup>16</sup> As part of the November 2021 OT evaluation, the Shrub Oak occupational therapist opined that the student was

that matter, the November 2021 OT evaluation post-dated the parent's February 2021 and July 2021 due process complaint notices (see Parent Ex. 36; 91), which—to the extent that evaluation brought the sensory issue to the parent's attention—tends to lend further support to the IHO's finding that an issue about the student's sensory needs was not raised in the due process complaint notices. Similar to the IHO, I do not find that it was permissible to hold a hearing regarding sensory needs that went unexamined by the district because the parent did not adequately identify them as topics for the impartial hearing process. Accordingly, it is not permissible in this proceeding to find the district denied the student a FAPE on this basis. However, because a reviewing court may not agree, out of an abundance of caution, the following findings of fact related to the relevant evidence available in the hearing record are provided in the alternative, which show that the district was aware of and addressed the student's sensory needs.

### **1. June 2020 IEP**

Review of the student's June 2020 IEP reveals the CSE had multiple evaluation assessments and progress reports available to it that were conducted as far back as 2014 and as recent as March 2020 (Dist. Ex. 28 at pp. 6-10).

With regard to sensory processing, the March 2020 independent OT evaluation indicated that, based on clinical observations, parent and teacher feedback, and the student's head teacher's completion of the School Companion Sensory Profile 2, the student demonstrated "difficulty regulating his arousal and attention levels, difficulty interpreting sensory information and impaired behavioral and emotional responses to sensory input" (Dist. Ex. 18 at pp. 11-15). According to the report, throughout the evaluation, the student required verbal encouragement in order to persevere and sustain his effort and arousal levels to complete given tasks (*id.* at p. 15). The report indicated that he required frequent movement breaks and adult support due to decreased self-advocacy skills although in the 1:1 testing environment, the student did not demonstrate any significant behavioral or emotional outbursts and was easily redirected to non-preferred tasks when given external supports (i.e., visual timers, verbal praise, frequent movement/snack breaks) (*id.*). The occupational therapist reported that like many students his age, the student was socially motivated and interested in his peers and that it was important that he continue to receive individualized support as well as external motivators (i.e., visual token reward charts, behavior plans) in order to facilitate his academic progression (*id.*).

Although the June 1, 2020 IEP did not include a specific paragraph about the student's sensory processing per se, review of the IEP shows that it identified the student's difficulties with attention and emotional regulation as reflected in the March 2020 independent OT evaluation

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mostly independent with activities of daily livings (ADL) and IADL tasks but had sensory needs that moderately impacted his functioning within the classroom (Parent Ex. SS at p. 6). According to the occupational therapist, the student benefitted from exploration of sensory strategies, tools, and techniques to assist with regulation and attention (*id.*). The report indicated that the student had deficits in fine motor coordination and visual-perceptual skills that impacted his performance on visual-motor integration tasks (*id.*). The occupational therapist reported that the student required gestural or verbal prompting to hold his writing utensil with appropriate force, as he often fatigued quickly when engaged in fine motor tasks (*id.*). Additionally, the student was deemed to displayed difficulty with handwriting organization and efficiency (*id.*). Further, the occupational therapist indicated that the student also demonstrated inconsistent posture in standing and seated positions which impacted his daily functioning in the school setting (*id.*).

report, and strategies used to address those needs (compare Dist. Ex. 18 at p. 15, with Dist. Ex. 28 at pp. 10, 12, 13). Specifically, the June 2020 IEP indicated that if the student started to show signs of frustration, he used his learned coping strategies that continued to be successful at that time (Dist. Ex. 28 at p. 10). For example, he would count to ten, ask a teacher for help, or complete deep breathing exercises (id.). The IEP indicated that the student worked well for recognition of on-task behavior and a variety of tangible reinforcers (id. at p. 12). The CSE identified that the student used building level strategies to help him calm down when he began to get upset, including using deep breathing and visuals to deescalate, which were "most of the time" effective, noting that overall his problem behaviors had decreased as a result of the strategies put in place (id.). According to the IEP, the student was still easily distracted and required verbal reminders to remain on task, and he needed to maintain attention to task when external stimuli was introduced (id. at pp. 12, 13). Further, the IEP indicated that the student needed to continue identifying emotional responses to different situations and increase waiting time for a preferred item (id. at p. 13).

Additionally, the teacher's report included in the June 2020 IEP did not indicate that the student's sensory needs significantly affected his in-school behavior or ability to make progress (Dist. Ex. 28 at p. 10). Specifically, the student continued to progress well in academic areas, he had increased independence, and his behavior was "more compliant" than the prior year (id.). The IEP indicated that the student was able to wait for his turn, shared materials with peers, and increased his ability to interact with his peers during unstructured leisure time with limited supervision, such that he completed a puzzle, played simple educational games, colored, and played with cars (id.). According to the IEP, the student followed posted classroom rules, gathered materials necessary to completed tasks, showed emerging skill at raising his hand when he needed assistance, actively participated in group lessons and communicated with a variety of people (id. at p. 12). He was able to express his feelings across settings and demonstrated understanding of happy, sad, mad, angry and jealous (id.). The IEP indicated that the student was able to learn new tasks relatively quickly with supports and that he enjoyed a variety of instructional settings (id. at p. 13). Further, the student continued working on his IEP goals and was expected to achieve them that school year (id. at p. 10).

Review of the June 2020 IEP also does not show that the student's sensory needs affected him physically to the degree it reduced his ability to navigate the school environment, rather, the IEP indicated that he ambulated independently for long distances in school and during outdoor school activities, and independently and safely negotiated his classroom and performed all functional transfers (Dist. Ex. 28 at p. 13). Specifically, the IEP indicated that the student was able to negotiate school and bus steps, open doors, ambulate through doorways, negotiate obstacles in the hallway, curbs and inclines as well as move through congested hallways appropriately and safely (id. at pp. 13, 15).

Consistent with the March 2020 independent OT evaluation report, the June 2020 IEP included management needs that addressed the student's needs to remain regulated and focused on tasks (Dist. Ex. 28 at p. 15; see Dist. Ex 18 at p. 15). Management needs included in the June 2020 IEP consisted of language boards, AAC devices, written words and picture icons used frequently in the classroom, highly structured classroom environment, firm limits, positive reinforcement, daily picture/word schedule, bilateral foot orthotics/continue to increase wearing tolerance, classroom desk and chair, verbal prompting to use both hands during typing tasks as well as redirection to focus on task, and use of an AAC device at home to foster communication (Dist. Ex.

28 at p. 15). Further, the June 2020 IEP included annual goals for the student to identify emotional responses to different situations and use strategies to deal with those feelings and emotions, increase waiting time for a preferred item, and maintain attention to tasks when external stimuli is introduced (id. at pp. 17-18). Additionally, the CSE recommended that the student receive two 30-minutes of individual OT per week (id. at p. 19).

As such, review of the June 1, 2020 IEP shows that the parent's claims that the CSE had a "complete lack of understanding" of the student's sensory needs and that there was "nothing in place to address when [the student] becomes dysregulated" is without merit and does not lead me to the conclusion that the district denied the student a FAPE for the 2020-21 school year on this basis.

## **2. June 2021 IEP**

Continuing with the alternative findings for the following school year, review of the student's June 2021 IEP reveals that the CSE had multiple evaluation and progress reports available to it that were conducted as far back as 2014 and, at this CSE meeting, as recent as April 2021 (Dist. Ex. 80 at pp. 6-10).

Specific to the student's sensory skills, the June 2021 IEP reflected reports that the Shrub Oak occupational therapist was "conducting ongoing clinical observations and assessment of sensory needs" (Dist. Ex. 80 at p. 14). According to the IEP, the student enjoyed participating in a variety of sensorimotor activities including prone tunnel crawling, scootering, jumping on a trampoline, crashing on a crash mat, spinning on rotary chairs, and swinging on a platform swing (id.). The IEP reflected that alternative seating options had been trialed within the classroom including a wiggle cushion and rocker chair to support participation in seated classroom activities (id.). However, the IEP also indicated that according to an April 23, 2021 notation from Shrub Oak, there was "insufficient data to summarize any potential progress made," and that the service determination would be finalized at an ITEP meeting at Shrub Oak (id. at pp. 14-15). An April 2021 BOCES report reflected in the IEP indicated at that time, the student was distracted by visual and auditory stimuli, however he responded well to directions (id. at p. 15). The student's OT need for "2021" identified in the June 2021 IEP was that he improve his hand strength for fine motor skills and as of June 2021, "[t]here [were] no additional parent concerns at this time" including concerns about the student's sensory skills (id.). Additionally, review of the June 2021 IEP present levels of performance does not show that the student's sensory processing needs significantly affected his classroom performance or performance during related services (see id. at pp. 10-15).

Classroom management needs per an April 2021 BOCES recommendation and included in the June 2021 IEP were for an augmentative communication device, clear pools in a structured classroom setting, high rates of reinforcement in the form of social praise/attention and tangibles, visual supports, classroom chair and desk, first/then board, slant board, and twist and write pencil or wide barrel pencil/crayons (Dist. Ex. 80 at p. 15). Additional classroom management needs recommended by Shrub Oak and included in the June 2021 IEP were for access to adaptive scissors, pencil grips, slant board as well as colored borders on papers when writing (Dist. Ex. 80 at pp. 15-16). The June 2021 IEP also included annual goals to improve the student's independent use of learned techniques or strategies to appropriately gain attention, identify emotional responses to different situations and use strategies for dealing with feelings and emotions, maintain attention



to task when external stimuli is introduced, and read facial expressions/body language to identify others' feelings and how he should react (*id.* at pp. 19, 20-21). The June 2021 CSE further recommended that the student receive two 30-minute sessions per week of individual OT services (*id.* at p. 22).

As with the 2020-21 school year, the evidence in the hearing record regarding the student's sensory needs and how they were addressed in the June 2021 IEP does not provide a sufficient rationale to disturb the IHO's finding that for the 2021-22 school year the district offered the student a FAPE.

### **C. Regression/Progress**

The parent argues that the IHO failed to consider circumstances of the COVID-19 pandemic and the impact that it had on the student (Req. for Rev at p. 1). Specifically, the parent asserts that the pandemic caused the student to regress and that the district should have taken action to modify the student's program when it determined that progress was no longer being made (*id.*). However, the parent alleges that the district continued to offer the same program to the student (*id.*). In addition, the parent argues that the IHO incorrectly concluded that by the time of the development of the June 2020 IEP and the June 2021 IEP the student had made progress and met benchmarks in each of his goals (Req. for Rev at pp. 2, 8).

Initially, the parent's allegations regarding regression as set forth in her due process complaint notices, did not include allegations that the student experienced a loss of skill as a result of the remote delivery of instruction during the COVID-19 pandemic (*see* Dist. Exs. 36; 91). Allegations about regression were set forth in the July 2021 due process complaint notice only, which asserted that the district denied the student a FAPE for the 2021-22 school year, and were specific to alleging that the student regressed and struggled to make progress with his visual perception and fine motor skills, particularly in the area of writing (Dist. Ex. 91 at pp. 5-8). Additionally, the parent's argument focused on concerns regarding the student's communication skills (*id.* at p. 5). In the July 2021 due process complaint notice, the parent also cited testimony from the proceedings that had already begun since the parent's February 2021 due process complaint notice, and argued that the staff from the Kaplan School "revealed, for the first time, that [the student] ha[d] actually started regressing significantly," noting in particular testimony about the student's ability to use his device to communicate and to add and subtract (*id.* at pp. 4-5).

Putting aside for a moment the COVID-19 pandemic and the effect of remote instruction, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (*see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers*, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, *Schaffer v. Weast*, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). Most recently, the Supreme Court 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.*, 137 S. Ct. at 999). 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). Moreover, the IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192).

Further, an IEP must be evaluated prospectively as of the time it is created and the parents may not rely on evidence that the student did not make progress to establish that the IEP pursuant to which the student received services was not appropriate (R.E., 694 F.3d at 186-88; see C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at \*18-\*27 [S.D.N.Y. Mar. 30, 2018]). Thus, taking into account that the parent only raised allegations about regression in the July 2021 due process complaint notice, which set forth allegations specific to the district's offer of a FAPE for the 2021-22 school year, and the prospective nature of the IEP analysis, the relevant question is whether the evidence in the hearing record shows that the student made progress during the 2020-21 school year under the June 2020 IEP, such that the June 2021 CSE's similar recommendations were appropriate. As the parent made no allegations in her February 2021 due process complaint notice relating to the student's regression or lack of progress leading up to the June 2020 CSE meeting, I decline to address any such arguments raised for the first time on appeal.

Turning to the analysis of the June 2021 IEP, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

The evidence in this case shows that student attended the Kaplan School for the 2020-21 school year from July 2020 until on or about February 26, 2021 when the parent removed the

student from the district prior to his unilateral placement at Shrub Oak (Tr. pp. 168-69, 175, 179, 410, 444, 540; see Parent Ex. VV at p. 2). Review of the March 23, 2021 progress report for student's IEP annual goals and short-term objectives for the 2020-21 school year reflects that the student made progress, as he achieved several of his short-term objectives and annual goals by the time he left the Kaplan School in late February 2021 (Dist. Ex. 46; see Dist Ex. 41).<sup>17</sup>

Specifically, with regard to a reading annual goal for the student to identify common 15 common blends/digraphs in words that make a distinct sound 80 percent of the time for three consecutive days, by August 2020, the student had made "great progress" with "[b]r" blends as he was able to identify the correct word when shown a picture and a choice of two words (brush, bread, great, groom, brain) with over 80 percent success (Dist. Ex. 46 at p. 2). Similarly, with regard to the "[c]r" blend, the student was able to identify the correct word when shown a picture and choice of two words (cry, crab) with over 80 percent success, and crane, crack, crib, crab with over 70 percent success (id.). By November 2020, the student was "working hard" toward the goal and making progress, working on "cl, fl, pl, bl, and sl" blends by identifying the correct blend when shown a field of four pictures (id.). By January 2021, the student continued to make progress toward the goal, mastering "l" and "h" blends (id.).<sup>18</sup>

With regard to a math annual goal for the student to add 10 double digits together without using visuals and without regrouping to get the correct answer, comments included in the IEP annual goal progress report indicated that by January 2021, the student was having "a lot of difficulty" solving problems in his head or using manipulatives; in November he was taught to compute addition problems into a calculator (Dist. Ex. 46 at p. 5). Since November, the student had mastered using a calculator to solve both single and double digit addition problems (id.). The progress report reflected that by January 2021, the student had achieved three short-term objectives of adding four, six, and eight double digits together without using visuals and without regrouping 80 percent of the time for three consecutive days (id. at pp. 5-6). Similar progress was noted in the same progress report specific to an annual goal for the student to solve eight double digit subtraction problems with 80 percent accuracy for three consecutive days by June 2021 (id. at pp. 6-7). The progress report indicated that in late November, the student was taught to compute subtraction problems into a calculator, and by January 2021, the student had achieved the short-term objectives associated with the subtraction math goal (id.).<sup>19</sup>

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<sup>17</sup> The hearing record also includes a "program tracking sheet" district staff used to "break down and create programs for students based on their IEP goals" that showed when various target skills were introduced and when the student achieved mastery of specific target (Tr. pp. 58-591, 672-74; Dist. Ex. 41).

<sup>18</sup> The March 23, 2021 progress report for annual goals and objectives for the 2020-21 school year reflected that the student was working hard toward but had difficulty with the annual goal for identifying short vowel sounds in a variety of contexts (Dist. Ex. 46 at p. 3).

<sup>19</sup> The student's special education teacher testified that in fall 2020 she was concerned that the student was not making progress toward his math annual goals but that the introduction of a calculator in November 2020 did not change those goals, rather, "we were still working on the goal that was being addressed which was double-digit addition and subtraction, I just used an intervention strategy to help [the student] get there" (Tr. pp. 532, 646-48).

One of the student's speech-language annual goals was designed for him to navigate on his AAC device to retell a story including characters, setting and/or plot given scaffolding questions provided by an adult, 80 percent of the time for three consecutive occasions (Dist. Ex. 46 at p. 8). Comments included in the progress report indicated that the student used his device to respond to direct questions related to material presented, using single words on his device or when asked, combining words to form a short utterance (*id.*). The January 2021 comment in the progress report indicated that the student's recall of a short paragraph was positive, he was able to search his device to locate answers to questions (*id.*). According to the progress report, retelling a story using AAC device was very time consuming and the student's ability to answer related questions indicated his understanding of content of material (*id.*). With regard to the annual goal for the student to navigate on his device to identify and label an item in and out of view when it was described using function, form or category, by November 2020 the student had achieved the short-term objective expecting him to identify an item in view when it was described using function, form or category (*id.* at p. 9). The progress report indicated the student demonstrated positive ability to locate described items on his AAC device, and he appeared to enjoy the task and navigated from page to page to locate a correct response (*id.*). In the event he could not locate an item, he attempted to spell it, and when asked if he would like an item to be placed on the device, the student generally replied, "yes" and he and the speech-language pathologist completed that task together (*id.*). By January 2021, the student was also making progress toward the short-term objective of navigating on the AAC device to identify an item out of view when it was described using function, form, or category (*id.* at p. 10).

With regard to social/emotional/behavioral goals, by January 2021, the student achieved the annual goal for him to identify emotional responses to different situations and use strategies for dealing with these feelings/emotions, with 80 percent accuracy for three consecutive days (Dist. Ex. 46 at p. 11). He also achieved an annual goal to increase waiting time for a preferred item, as well as an annual goal that he maintain attention to task when external stimuli was introduced, with 80 percent accuracy for three consecutive days (i.e., peers, staff, phone calls) (*id.* at pp. 11-13).

The 2020-21 IEP annual goals progress report included a motor skills annual goal that by June 2021, the student would demonstrate near point copying, typing a ten word list with minimal cues to maintain place (Dist. Ex. 46 at p. 14). By January 2021, the student had achieved the short-term objective to demonstrate near point copying, typing a five word list with minimal cues to maintain place and he was also able to type three to five simple sentences on his iPad with minimal cues to maintain his place (*id.*). With regard to the annual goal for the student to print three sentences with correct form, size, spacing and orientation to the writing line with minimal visual cues with 80 percent success for three consecutive occasions, by January 2021, the progress report comments indicated that the student was able to copy sentences with moderate visual cues and occasional visual cues; however, his writing was often floating above the writing line and often

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The special education teacher opined that the student would probably not have been able to achieve the math annual goal without the use of a calculator by the end of the school year (Tr. p. 648).

the letters were large (id. at p. 15). According to the progress report, the student did better with writing on the line and sizing when provided with visual borders and highlighting the writing line (id.).

With regard to daily living skills, the IEP annual goals progress report included an annual goal for the student to use a measuring cup to measure wet and dry liquids, with 80 percent success for three consecutive days by June 2021 (Dist. Ex. 46 at p. 16). By January 2021, the student had achieved short-term objectives to use a measuring cup to measure wet/dry liquids with 80 percent accuracy (id.). Comments included in the progress report reflected that the student could identify the correct measurement needed for a recipe for 1 cup, 1/2 cup, 3/4 cup and 1/4 cup (id.).

Turning to testimony regarding the student's performance during the 2020-21 school year, the BOCES school psychologist at the Kaplan School stated that the student successfully used visuals in the classroom including a first/then board, which enabled him to understand what task he needed to complete or the appropriate behavior he needed to demonstrate prior to earning the desired reinforcement (Tr. pp. 175-77). She indicated that leading up to February 2021 the student had been a "great student" (Tr. pp. 241-42).

The student's occupational therapist during the 2020-21 school year testified that she provided OT to the student in the classroom and they worked on fine motor skills by peeling stickers and manipulating smaller objects, as well as completing perceptual activities such as mazes, connect the dots, and handwriting, and that the student sometimes used his iPad for typing (Tr. pp. 389, 392-93). The occupational therapist observed the student in the classroom completing activities such as opening or closing the door by grabbing the handle, taking off his backpack without assistance, as well as donning and doffing his jacket that contained a zipper (Tr. pp. 394-95). Additionally, the student successfully used his first/then board with the occupational therapist (Tr. p. 397). According to the occupational therapist, the student's left side was weaker; however, he used his left hand as a functional assist, so that he held paper down while writing and cutting, and he stabilized his backpack with his left hand while taking things out of it (Tr. p. 400). The student was able to carry an object using both hands together and with his dominant right hand was able to write, cut, and manipulate smaller objects (Tr. pp. 400-01). Review of the OT session notes from the 2020-21 school year through February 2021 generally shows that when he attended sessions, the student successfully participated in fine motor and visual perceptual activities with cues from the occupational therapist (see Dist. Ex. 75).

The Kaplan School speech-language pathologist who had worked with the student for two years and most recently during summer 2020 testified that the student was funny, bright, and could retain information and use it in a variety of settings (Tr. pp. 806, 814, 836). Review of the speech-language therapy session notes from summer 2020 generally shows that the student successfully used his AAC device during sessions (Dist. Ex. 75 at p. 1). The student's Kaplan School speech-language pathologist from September 2020 to February 2021 opined that the student "was doing very nicely in the sessions that I provided for him" in that he was answering questions and listening and she felt they had a good rapport (Tr. pp. 430-31, 442-44). She reported that the student used the LAMP (Language Acquisition through Motor Planning) Words for Life application on his

communication device "very well," and that he was able to "navigate through the device to find all sorts of things" (Tr. p. 447; see Tr. p. 301). The student's "go-to" on the device was single words, but when pressed, he linked words together in sentences that included a noun, a verb and an object (Tr. pp. 447-48, 460-61). At times the student put four to five words together on his AAC device (Tr. p. 478). Review of the speech-language therapy session notes from the 2020-21 school year from September 2020 through February 2021 generally reflects that the student successfully used his AAC device during therapy, and that he also participated in oral motor activities to improve speech sound production (see Dist. Ex. 75).

Additional information about the student's communication abilities during the 2020-21 school year through February 2021 came from the student's special education teacher who testified that the student was "very fluent" using LAMP as he knew how to access all parts of the application, and how to use it to communicate his wants and needs and participate in school (Tr. pp. 540, 552). Although the student usually used his (device) to communicate, the teacher also observed the student using word approximations, sign language and writing to communicate what he wanted (Tr. pp. 635-36, 641-42). Additionally, the student volunteered information or volunteered to answer a question posed by raising his hand, using his classroom iPad, or using his AAC device (Tr. pp. 636-37).

Specific to the parent's allegation that the student exhibited regression, the student's special education teacher testified that, when she saw the student had difficulty with double-digit addition and subtraction upon returning to school in-person, she testified she had to "backtrack" and work on single-digit addition and subtraction (Tr. p. 633). After observing that the use of manipulatives and worksheets were not helpful to the student, the teacher introduced the use of a calculator as an intervention to assist the student in becoming more functional in math (Tr. pp. 629, 632-33). She addressed the regression the student and his classmates demonstrated following remote instruction upon returning to partial in-person instruction through reteaching, familiarizing the student and other students with the schedule and routines, transitioning, and getting into the flow of the school building (Tr. pp. 632-33). Testimony by the Kaplan School summer 2020 speech-language pathologist also indicated that with the pandemic she saw "a lot of student regression" and that students needed constant repetition and drilling (Tr. p. 835). According to the speech-language pathologist, "[e]ven if [students] have mastered a goal, they need to constantly be utilizing it because they could lose it and regression is a big part of our students" indicating this was the reason for extended school year services (id.).

The parent argues that, leading up to the June 2021 CSE meeting, the district failed to timely conduct evaluations of the student, and that by finding that the parent did not timely providing consent for the same, the IHO excused the district's failure to notice that the student had regressed (Req. for Rev. at p. 1).<sup>20</sup> However, as summarized above, the district had sufficient

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<sup>20</sup> The parent explicitly states that her "position is not that the [d]istrict failed to evaluate as a new and separate claim" and, instead, that "the [d]istrict should not be excused from failing to spot regression as a result of their decision not to evaluate when (1) the student had just had a major transition and (2) the [d]istrict disagreed with the results of the latest evaluation" (Req. for Rev. at p. 7). Indeed, the parent did not raise an issue about the timeliness of the district's evaluations in her due process complaint notices (see Dist. Exs. 36; 91). To the extent the IHO made a finding about the timing of the parent's consent and the district evaluations (IHO Decision at p.

information about the student's progress or lack thereof to develop an appropriate IEP for the student for the 2021-22 school year.

Review of the June 2021 IEP indicates that, in addition to attendees from the district and BOCES, other attendees included the parent, a family friend, and multiple individuals from Shrub Oak (Dist. 80 at p. 1). In addition to the previously noted information about OT and specifically the student's sensory processing, the June 2021 IEP also included other information provided by Shrub Oak specific to multiple notations dated April 23, 2021 about how the student functioned at Shrub Oak in English-language arts (ELA), science, mathematics, speech-language, social development, an on-going OT evaluation, and PT (Dist. Ex. 80 at pp.10-15).

As previously noted, the June 2021 added additional classroom management needs recommended by Shrub Oak for access to adaptive scissors, pencil grips, slant board, and colored borders on papers when writing (Dist. Ex. 80 at pp. 15-16). Consistent with the IHO's finding of facts, the June 15, 2021 CSE recommended the same program provided during the 2020-21 school year, including AAC training and support (Dist. Ex. 80; IHO Decision at p. 27). Annual goals were developed after consideration of the various reports concerning the 2020-21 school year progress (Tr. pp. 1287, 1302-304, 1308-309). A social/emotional goal to address student behaviors was retained at the request of Shrub Oak although Kaplan School staff opined it was no longer necessary based on the student's performance at the BOCES program (Tr. pp. 1333-34). Some goals were amended, and others carried over, but Shrub Oak attendees expressed no disagreement with the goals (Tr. pp. 1318-321, 1332; Dist. Exs. 28; 80). The use of a calculator for teaching double-digit addition, which testimony by the student's special education teacher from the previous school year indicated she implemented with the student as an intervention during the 2020-21 school year, was added to the June 2021 IEP (Tr. pp. 629, 1314-317, 1335; Dist. Ex. 80). Further, while the June 2021 CSE concluded that although the student needed strategies, including positive behavioral interventions, supports and other strategies to address his behaviors, the IEP indicated that a BIP was not needed (Dist. Ex. 80 at p. 16). The school psychologist from the Kaplan School testified the student successfully used and benefited from said strategies (Tr. pp.170-71, 223-224).

Although the student may not have made the progress the parent desired, the evidence in the hearing record does not lead me to the conclusion that he exhibited regression such that he was unable to make progress toward his IEP annual goals and short-term objectives prior to his removal from the Kaplan School in February 2021. In consideration of the hybrid remote/in-person instructional model in fall 2020, review of the student's performance at the Kaplan School during the 2020-21 school year until his removal at the end of February 2021 shows that he demonstrated progress in the classroom and during related services toward his IEP annual goals and short-term objectives. To the extent that any loss of skill occurred related to the remote delivery of instruction, as discussed below, the CSE should, to the extent it has not already done so, discuss whether compensatory services may be warranted. However, such loss of skill need not define the student's educational planning needs on a going-forward basis in the face of other evidence that the student's

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25), the IHO's finding on that point is not supported by the hearing record, which includes concessions from district witnesses that evaluations of the student were due to be conducted prior to the June 2021 CSE meeting but there is no documentary evidence that the district sought the parent's consent in January 2021 (see generally Tr. pp. 231, 1290-94, 1327-28; Dist. Ex. 79). Such an error on the part of the IHO does not warrant reversal of her findings overall as the remainder of the evidence supports her conclusions.

in-person educational programming was meeting his needs. Based on the Kaplan School staff's familiarity with the student as reported during the June 2021 CSE, in conjunction with input from Shrub Oak and documentation available to the CSE, the hearing record shows it was reasonable and appropriate that the June 2021 CSE carried forward recommendations for the student for the 2021-22 school year (compare Dist. Ex. 28, with Dist. Ex. 80). Therefore, there is no basis to disturb the IHO's determination that the district offered the student a FAPE for the 2021-22 school year on this basis.

#### **D. Effect of Remote Instruction—COVID-19 Pandemic**

Notwithstanding that the parent did not raise an issue regarding the effect of remote instruction during the COVID-19 pandemic on the student in her due process complaint notices (see Dist. Ex. 36; 91), in her decision, the IHO appeared to make findings about the impact of the COVID-19 in an indirect and somewhat contradictory way. Specifically, the IHO stated that "although I conclude that the circumstances to be considered should include the impac[t] of the pandemic and the effect of remote instruction, I find that this student's circumstances absent the pandemic support a conclusion that the district offered a program reasonably calculated to enable the student to 'make progress appropriate in light of . . . [his] circumstances'" (IHO Decision at p. 46). Given the IHO's references to the pandemic and effect of remote instruction, I will briefly discuss the guidance on the issue; however, as the parent did not allege in her due process complaint notices that the district refused to address or insufficiently addressed any loss of skill that the student experienced due to the remote delivery of instruction, the parent's allegations on appeal are without merit.

Both the United States Department of Education (USDOE) and the State Education Department's (SED's) Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf>). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, the USDOE and SED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232;



"Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at <https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf>). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

Beginning in May 2020 and through summer 2020, the student received remote instruction (Tr. pp. 298, 634, 936, 957-58, 985-86). In September 2020, the student received instruction in a hybrid model consisting of both in-person and remote instruction, and by November 2020, in-person instruction was available four days per week (Tr. pp. 173-74, 295-97, 542, 986-87).

The parent does not go so far as to allege on appeal that the closure of schools and delivery of remote instruction during the pandemic, on their own, support a finding that the district denied the student a FAPE. Instead, the parent alleges that the student experienced regression that the district was obligated to address. The district appears to acknowledge that the student experienced some loss of skill related to the school closures and remote instruction, but, as noted above, the teachers and providers at the Kaplan School implemented strategies and interventions to attempt

to address such losses (Tr. pp. 629, 632-33, 835). There is also some evidence that the district attempted to meet formally or informally with the parent in November and December 2020 to discuss the student—and in particular the parent's concern about a math goal—but it is unclear the extent to which the parent's concern about the student's loss of skill due to the remote delivery of instruction was the intended subject matter of those attempts (Tr. pp. 97-99, 583, 607, 609-11, 620-21, 628-29, 646-48; Dist. Exs. 39 at p. 2; 43 at p. 1; 56 at p. 1; 76 at pp. 1-3; 77 at p. 1). Although the district was making attempts to conduct an additional CSE meeting and communicate with the parent,<sup>21</sup> absent from the parent's allegations is any indication that she requested a CSE to consider or that a CSE has explicitly considered whether the student may need additional services to make up for lost skills due to the closure of schools and the change in the delivery of services as a result of the pandemic, which as discussed above, is the process contemplated by the USDOE and the SED's Office of Special Education. Indeed, as noted, the parent's due process complaint notices do not include any allegations relating to a CSE's consideration of compensatory education or lack thereof as a result of responsive measures by the government to mitigate the public health threat from COVID-19.

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student or that the district has refused to engage in this process. Under these circumstances, there is no basis to disturb the IHO's finding that the district offered the student a FAPE. However, the parties, if they have not already done so, should conduct a review of the student's present levels of academic achievement and functional performance as envisioned by federal and state education authorities and convene a CSE to engage in educational planning for the student, which should include a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely. Once a CSE conducts such a review, if the parent disagrees with the recommendations thereof, she may pursue dispute resolution through one of the mechanisms described above.

## **VII. Conclusion**

Based on the foregoing, review of the evidence in the hearing record supports the IHO's findings that the June 2020 and June 2021 IEPs were reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Having found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, I need not reach the issues of whether Shrub Oak was an appropriate unilateral placement for the student or whether equitable considerations support the parent's request for relief and the

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<sup>21</sup> In my view it would have been ill-advised under the circumstances presented in this case for the district to proceed with further CSE meetings that were in excess of the annual review requirements unless the parent was willing and able to attend such a meeting, or else the district would have run the risk of committing a procedural denial of a FAPE by significantly impeding the parent's participation had a CSE meeting in fall 2020 proceeded in her absence.

necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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**  
                         **July 8, 2022**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**