The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 22-105

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed her claims pertaining to the 2017-18 and 2018-19 school years and denied compensatory education services. Respondent (the district) cross-appeals from the IHO's determination that it denied the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 received early intervention services consisting of speech-language therapy and physical therapy (PT) until she was three years old (Parent Ex. E at p. 3; Dist. Ex. 16 at p. 18). The student then attended a preschool program and was subsequently admitted to a district school—The Talented and Gifted School for Young Scholars (TAG)—for kindergarten (2014-15 school year) (Parent Ex. E at p. 2; Dist. Exs. 9 at p. 3; 16 at p. 19). At the time of the impartial hearing the student continued to attend TAG (Parent Ex. M at p. 1).

After referral from the student's mother, the CSE conducted an initial evaluation and held a meeting on March 1, 2018 (third grade) to determine whether the student was eligible for special education services (Dist. Exs. 1 at p. 1; 8; see Dist. Exs. 11-12). The March 2018 CSE determined that the student was not eligible for special education services because she did not have a qualifying disability (Dist. Exs. 12 at p. 1; 13 at p. 1). The student's mother reported that, although the student did not have an IEP, the district "informally" provided the student with special education teacher support services (SETSS) two times per week from March until June 2018 and that she also worked with a teacher after school one time per week (Parent Ex. M at p. 2; see Dist. 17).[1]

The student remained at TAG for the 2018-19 school year (fourth grade) (Parent Ex. M at p. 2). In or around February 2019 the student received a "promotion in doubt" letter (Tr. pp. 194-96, 201-02; Parent Ex. M at p. 2; Dist. Exs. 16 at p. 18; 17).[2] As a result the parent sought private tutoring for the student in English Language Arts (ELA) and math, which the student received from February 2019 through summer 2019 (Parent Ex. M at pp. 2-3). The parent, who indicated that she held a master's degree in education, also reported that she provided the student with daily support during the 2018-19 school year (id. at p. 3).

The student continued to attend TAG for the 2019-20 school year (fifth grade) (Parent Ex. M at p. 3). The parent reported that the student's grades were inconsistent and the student "showed clear signs of falling behind academically" (id.). Messages exchanged between the parent and the student's teacher in October and November 2019 indicated that the student had difficulty completing and handing in homework assignments, which affected her grades (Parent Ex. D). In December 2019, the parent sought a comprehensive neuropsychological evaluation to assess the student's underlying difficulties in school related to attention, forgetfulness, reading, and writing" (Parent Ex. E at p. 1). In a report dated May 1, 2020, the neuropsychologist determined that the student met the criteria for diagnoses of attention-deficit hyperactivity disorder (ADHD), combined presentation, and other specified anxiety disorder (id. at p. 11). The report highlighted the student's "significant problems in [] executive functioning, including selective and sustained attention and impulse control" (id. at pp. 9, 10). The report also noted that the student had some difficulty maintaining control of her emotions (id. at p. 9).

The parent provided the district with a copy of the May 1, 2020 neuropsychological evaluation report and, on June 24, 2020, the CSE convened to determine the student's eligibility for special education services (Dist. Ex. 16 at p. 18; see Dist. Exs. 17-19). During the June 2020 CSE meeting, the CSE considered the May 2020 private neuropsychological evaluation report as well as teacher reports, and parental concerns (Dist. Ex. 19 at pp. 1, 3-7). As a result of the meeting, the June 2020 CSE determined that the student was not eligible for special education services because she did not present with any academic deficits and she could participate in the general education curriculum (id. at pp. 1, 8). However, the CSE identified strategies and resources to address the student's management needs and stated that due to the symptoms associated with student's ADHD diagnosis "she would benefit from more consistent teacher check-ins and check-

[1] The parent also reported that she paid out-of-pocket for the student to receive after school reading support during the 2017-18 school year and summer 2019 (Parent Ex. M at p. 2).

[2] The promotion in doubt letter was not entered into evidence.

ins from the school's SETSS provider while participating in remote learning in order to keep better pace with her peers" (Dist. Ex. 19 at p. 8).[3] The district provided the student a plan pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) for the 2020-21 school year (see Parent Ex. M at p. 4; Dist. Ex. 22). [4]

The student continued to attend TAG for the 2020-21 school year (sixth grade) (Parent Ex. M at p. 4). In September 2020, the special education teacher at TAG began meeting with the student for 10 minutes a day, which later increased to 20, to help her organize and track her assignments (Tr. pp. 191-92, 203-05, 209). In a letter dated January 8, 2021, the parent requested that the district develop an IEP for the student (Dist. Ex. 24). The parent stated that whatever supports had been provided through the 504 plan and the school's special education teacher had been neither sufficient nor appropriate for the student (id.). The parent indicated that despite the student's high average IQ she had received a 65 in both ELA and math for the first marking period as well as grades in the low 70s for Spanish, career studies, and art (id.). She noted that the discrepancy was "incomprehensible" and indicative of the student's needs for a special education program (id.). In response, the district conducted a virtual classroom observation on March 9, 2021, a March 16, 2021 psychoeducational evaluation, and a social history (see Dist. Exs. 26-28). On March 25, 2021 a CSE meeting was held to determine the student's eligibility for special education services (Dist. Exs. 30 at p. 1; 31 at p. 1). The March 2021 CSE found the student was not eligible (Dist. Exs. 31 at p. 1; 32 at p. 1; 33 at p. 2). However, the CSE noted that "[the student] would benefit from more consistent teacher check-ins, classroom based interventions, and testing accommodations provided through a 504 Plan" (Dist. Ex. 31 at p. 9).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 8, 2021, the parent alleged that the district failed to offer the student a FAPE for the 2017-18, 2018-19, 2019-20, and 2020-21 school years (see Parent Ex. A).[5]

The parent contended that in October 2017 during the 2017-18 school year (third grade), she requested the district evaluate her daughter to determine whether she required special education services as a result of "her declining academic performance and her struggles with executive functioning, handwriting, reading numbers and letters in the correct order, spelling, articulation, inattentiveness, and distractibility" (Parent Ex. A at p. 3). According to the parent, despite the student's "struggles" which were noted in the evaluations conducted by the district, the CSE found the student ineligible for special education services (id.).

In connection with the 2018-19 school year (fourth grade), the parent argued that no CSE meeting was held, and the student did not receive any special education services (Parent Ex. A at

[3] The parent reported that she paid for the student to attend summer reading instruction (Parent Ex. M at p. 4).

[4] The parent indicated she was never provided with a written copy of the 504 plan nor told what accommodations were included in the plan that may have been created (Parent Ex. M at p. 4; see Dist. Exs. 23; 24).

[5] A copy of an email attached to the due process complaint notice indicates that it was sent to the district after business hours on June 8, 2021 (Parent Ex. A at p. 12).

p. 3). The parent further alleged that in February 2019 the student received a "[p]romotion in [d]oubt letter" indicating that the student may not advance to the fifth grade (id.). As a result, the parent claimed that she sought private tutoring for the student for the remainder of the 2018-19 school year together with tutoring during the summer 2019 and the student advanced to the fifth grade (id. at pp. 3-4).

With respect to the 2019-20 school year (fifth grade) the parent again asserted that the student did not receive special education services (Parent Ex. A at p. 4). The parent alleged that, at the beginning of the 2019-20 school year, the student's progress reports showed she was failing math (id.). The parent indicated she disagreed with the district's evaluation of the student and obtained a private neuropsychological evaluation of the student, which was completed on May 1, 2020 and included a number of recommendations for the student (id. at pp. 4-5). The parent alleged that she provided the May 2020 private neuropsychological evaluation to the district, but the district failed to hold a CSE meeting prior to the end of the 2019-20 school year (id. at p. 5). The parent claimed that the student struggled academically and socially/emotionally during the 2019-20 school year and failed to make "meaningful progress" (id.).

According to the parent, she requested another CSE meeting which was held on June 24, 2020 to determine the student's eligibility for special education (Parent Ex. A at p. 5). The parent argued that the neuropsychologist who conducted the May 2020 evaluation discussed the student's academic performance and recommended special education, such as ICT services or special education teacher support services (SETSS); however, the district again found the student ineligible for special education and, instead, recommended a 504 plan for the student (id.). The parent indicated she never received a copy of the 504 plan (id.). The parent claimed that the only accommodation offered to the student during the 2020-21 school year was extra time on tests (id.). Further, the parent asserted that she learned that the student's special education teacher at TAG was meeting with the student in 10-15 minute sessions to help with the student's executive functioning and organizational skills; however, the parent was unsure if this was a part of a 504 plan (id. at pp. 5-6).[6]

The parent alleged that the student continued to struggle academically during the 2020-21 school year and the parent was "repeatedly contacted" by the school as the student was missing assignments and was struggling to keep track of her assignments (Parent Ex. A at p. 6). The parent asserted that, on January 8, 2021, she again referred the student to the CSE to determine the student's eligibility for special education and informed the district that the supports provided under the 504 plan were not sufficient (id.). The parent claimed that the district conducted a psychoeducational assessment of the student on March 16, 2021; however, she was not provided with a copy of the report and was informed at a March 2021 CSE meeting that the assessment "consisted merely of teacher reports and involved no objective testing of [the student's] cognitive or academic abilities" (id.). The parent indicated that she disagreed with this evaluation as it did not "thoroughly assess [the student] in all areas of her suspected disability" (id. at pp. 6, 10). On March 26, 2021, a CSE meeting was held, which the private neuropsychologist attended and stated that the student required special education (id. at p. 6). The parent claimed that the March 2021

[6] The evidence in the hearing record failed to clarify the frequency of these meetings (see Tr. pp. 198, 209-10; Parent Exs. A at p. 6; M at p. 4).

CSE "acknowledged that [the student] ha[d] significant issues with her executive functioning and attention and that these issues [had] a direct impact on her grades" (id.). The parent argued that the March 2021 determination that the student was not eligible for special education was predetermined and the March 2021 CSE did not have sufficient evaluative information to make an eligibility determination (id. at p. 7).

According to the parent, after the March 2021 CSE meeting, the student began meeting with a special education teacher for 30 minutes per day to attempt to address the student's executive functioning and organization and with the social studies teacher for an extra period per day to review material and assist with organization and planning; the parent alleged that these supports were helpful, but, for the 2020-21 school year, the student continued to struggle and performed "below her academic potential" (id. at pp. 7-8).

In addition to the above allegations, the parent made more general allegations with respect to the district's alleged failures for all four school years at issue (Parent Ex. A at p. 8). For each of the school years at issue, the parent alleged that the district failed to meet its child find obligations; failed to evaluate the student or rely upon sufficient evaluative information to justify its recommendations; failed to recommend services for the student; failed to provide valid prior written notices; failed to annually inform the parent of her procedural safeguards; failed to provide the parent with meeting minutes for any of the CSE meetings; and predetermined that the student was not eligible for special education services thereby precluding the parent from meaningful participation (id.). The parent also argued that she participated and cooperated with the district and that equitable considerations favored the parent for purposes of compensatory education services (id. at p. 9).

As a separate issue, the parent reiterated her disagreement with the March 2021 district psychoeducational evaluation (Parent Ex. A at pp. 9-10). The parent asserted that the evaluation was not sufficiently comprehensive to identify all of the student's special education needs (id. at p. 9). The parent further alleged that the district failed to assess the student's needs in the area of occupational therapy (OT) despite the student's struggles with executive functioning and attention (id.). The parent requested an independent educational evaluation (IEE) consisting of a comprehensive independent neuropsychological evaluation and an independent OT evaluation (id. at p. 10).

As relief for the alleged denial of FAPE for each of the school years at issue, the parent requested a finding that the district violated its child find obligations, that the district denied the student a FAPE, that the student required an IEP, and that the district failed to thoroughly evaluate the student in all areas of suspected disability (Parent Ex. A at p. 10). As interim relief, the parent requested an independent neuropsychological evaluation and an independent OT evaluation (id.). Next, the parent requested reimbursement for out-of-pocket tutoring expenses and reimbursement for the May 2020 private neuropsychological evaluation (id. at p. 11). Additionally, the parent requested that the district be directed to convene a CSE meeting to develop an IEP in accordance with the "findings and recommendations of the interim evaluations" or, if no interim evaluations were ordered, to develop an IEP that included individual SETSS for executive functioning and academic support one time per day for 60 minutes (id.). Lastly, the parent requested compensatory educational services in accordance with the proof to be provided at the impartial hearing (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 5, 2022 and concluded on June 1, 2022 after four days of proceedings (Tr. pp. 1-374).

On April 12, 2022, the district made a motion to dismiss the parent's claims for the 2017-18 and 2018-19 school years as untimely under the applicable statute of limitations (IHO Decision at p. 3). The parent opposed the motion and the IHO reserved decision on the motion until the conclusion of the impartial hearing (id.).

In a decision dated July 11, 2022, the IHO dismissed the parent's claims for the 2017-18 and 2018-19 school years as being outside the applicable statute of limitations and determined that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 10-12).[7]

In her decision, the IHO first addressed the parent's claims relating to the 2017-18 and 2018-19 school years (IHO Decision at pp. 10-11). In connection with the parent's claims for the 2017-18 school year, the IHO determined that the claims arose on March 10, 2018, the date the parent received the prior written notice (id. at p. 11). The IHO noted that a claim must be filed "not more than two years before the date the parent or public agency 'knew or should have known about the alleged action that forms the basis of the complaint'" (id. at p. 10). Since the due process complaint notice was filed on June 9, 2021, and the IHO found the parent's claims accrued on March 10, 2018, the IHO found that the parent's claims for the 2017-18 school year were barred by the applicable two-year statute of limitations (id. at p. 11).

Next, the IHO held that the parent's claims related to the 2018-19 school year required a separate analysis because of the tolling of the statute of limitations due to the COVID-19 pandemic (IHO Decision at p. 11). The IHO referenced executive orders tolling the statute of limitations, from March 20, 2020 until November 3, 2020 (id.). The IHO held that the parent "was aware" of and "should have known" of the parent's claims by September 5, 2018, the start of the 2018-19 school year, as the parent was aware the student was not receiving a special education program at the start of the school year (id.). Therefore, the IHO held that the two-year statute of limitations plus the COVID-19 tolling meant that the parent's claim for the 2018-19 school year needed to be filed prior to April 22, 2021 and therefore, the parent's June 2021 due process complaint notice was not timely as to those claims (id.).

The IHO then addressed the parent's claims pertaining to the 2019-20 and 2020-21 school years and found that the student was denied a FAPE for both school years (IHO Decision at pp. 11-12). The IHO found that both the June 2020 and March 2021 CSEs considered the private neuropsychological evaluation which recommended that the student be classified and receive ICT services or SETSS, but "disregarded" the recommendations made by the private neuropsychologist

[7] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited consecutively with the cover sheet as page one (see IHO Decision at pp. 1-24). It should also be noted that the IHO issued a Findings of Fact and Decision and a Corrected Findings of Fact and Decision on July 11, 2022. It appears that the corrected Findings of Fact and Decision was issued to correct the case number assigned to this matter. Therefore, for the purposes of this appeal all references to the IHO decision shall be to the Corrected Findings of Fact and Decision.

(id.). The IHO found that the district did not present anything to counter the neuropsychologist's recommendations, "other than assertions that the student's high functioning precluded classification," which the IHO found unavailing due to the promotion in doubt letter and the supports the district had put in place for the student, as well as the supports and interventions that the parent provided for the student (id. at p. 12). The IHO held that the failure to find the student eligible for special education services constituted a denial of FAPE for both school years (id.).

As relief, the IHO ordered the district to "immediately" convene a CSE meeting to classify the student as a student with a disability and develop an IEP that recommended at least five hours per week of individual SETSS and a minimum one hour per week of individual counseling (IHO Decision at p. 12). Next, the IHO ordered the district to reimburse the parent for expenses relating to the May 1, 2020 private neuropsychological evaluation (id.). The IHO ordered the district to fund an OT IEE and comprehensive neuropsychological IEE both by a "qualified independent evaluator" of the parent's choice and "at a reasonable market rate" (id. at p. 13). Then, the IHO ordered the district to convene a second CSE meeting upon receipt of the IEEs to "update" the student's IEP to include "the findings and recommendations" contained within the IEEs (id.). Lastly, the IHO ordered the district to fund 160 hours of individual tutoring compensatory education services by an independent provider of the parent's choice and "at a reasonable market rate(s)" (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's July 11, 2022 decision raising 17 enumerated issues for review, asserting that:

1. The IHO failed to identify District Exhibits 24-33 and Parent Exhibit N, which had been entered into evidence during the hearing;
2. The IHO failed to include Parent Exhibit N in her certification of the hearing record and included an incomplete copy of Parent Exhibit M;
3. The IHO erred in dismissing the parent's claims for the 2017-18 and 2018-19 school years as barred by the applicable statute of limitations
4. The IHO erred in failing to find the statute of limitations was tolled due to the district's failure to provide the parent with a copy of the procedural safeguards notice;
5. The IHO erred in failing to find that the district denied the student a FAPE for the 2017-18 and 2018-19 school years;
6. The IHO failed to address all of the parent's claims raised in the due process complaint notice and ignored some of the relief requested by the parent, i.e., reimbursement for tutoring expenses;
7. The IHO's award of 160 hours of individual tutoring as compensatory education was arbitrary as the hearing record demonstrates that 500 hours of individual tutoring was necessary;
8. The IHO erred in failing to order cognitive behavioral therapy (CBT);
9. The IHO erred in ignoring the parent's request for additional compensatory education based on the recommendations contained in the ordered IEEs;
10. The IHO failed to address equitable considerations raised by the parent;

11. The IHO failed to issue her decision timely as the decision was issued over one year after the due process complaint was filed but the hearing record did not include written orders extending the compliance date;
12. The IHO erred in failing to order a comprehensive neuropsychological IEE at the rate of $7,000 and instead ordered an independent neuropsychological evaluation at a reasonable market rate;
13. The IHO improperly considered the district's closing brief as it was not timely;
14. The IHO ignored Parent Exhibit N as it was not cited in her decision;
15. The IHO impeded the development of the hearing record by limiting the parent's questioning during re-direct testimony by the neuropsychologist;
16. The IHO improperly admitted incomplete district exhibits and exhibits that were not timely disclosed over the parent's objections;
17. The IHO decision "was vague and failed to include clear legal findings with citations on 'substantive grounds.'"

The parent requests findings that the parent's claims for the 2017-18 and 2018-19 school years were not barred by the statute of limitations, that the district did not provide the student with a FAPE for the 2017-18 and 2018-29 school years, that the award of counseling be substituted with an award of CBT; that the award of 160 hours of 1:1 tutoring be substituted with an award of 500 hours of 1:1 multisensory tutoring and executive functioning instruction, that the award of an independent neuropsychological evaluation be set at a rate not to exceed $7,000.00, that the district reimburse the parent for all out of pocket expenses for tutoring during the school years at issue, and that the district be directed to fund any compensatory education recommended in the awarded IEE.

The district submitted an answer generally denying the material allegations contained in the parent's request for review. The district argues that the IHO properly dismissed the parent's claims with respect to the 2017-18 and 2018-19 school years based on the applicable two-year statute of limitations. The district contends that it complied with its child find obligations as the district had no notice of a possible disability prior to the parent's referral of the student to the CSE on October 13, 2017. Further, the district argues that child find did not require the district to conduct another evaluation of the student during the 2018-19 school year as the student "was promoted to the fourth grade," did not evidence a disability, made progress in the regular education classroom during the 2018-19 school year, and was promoted to fifth grade.

The district further argues that the IHO properly denied the parent's request for 500 hours of compensatory education. The district argues that the testimony of the director of EBL Coaching that the student required 500 hours of individual tutoring for executive functioning and writing had "little to do with [the student's] needs or the [district's] failure to provide [the student] with a FAPE." Further, the district argues that the recommendation for compensatory services failed to take into consideration the student's current functioning within the classroom (id.).

Additionally, the district contends that the parent's request for reimbursement of tutoring expenses was properly denied by the IHO because the hearing record failed to provide evidence of the tutoring expenses or the services provided, therefore, the parent failed to meet her burden of proof. The district argues that the parent's request for additional compensatory services was properly denied because it was not asserted in the parent's due process complaint notice and solely

addressed by the parent in her closing brief. In connection with some of the parent's procedural arguments, the district argues that its closing brief was timely as evidenced by emails attached to the answer, and that although Parent Exhibits M and N were not initially submitted with the hearing record, they were submitted shortly thereafter, together with a corrected certification of record.

The district cross-appeals from the IHO's findings that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years because it failed to classify the student as a student with a disability and failed to offer the student an IEP. The district contends that both the June 2020 and March 2021 CSEs "properly determined" that the student did not qualify for special education services. The district argues that both CSEs had sufficient evaluative information to make eligibility determinations and the information presented to the CSEs did not evidence that the student's diagnoses of ADHD or anxiety adversely affected her educational performance in either the 2019-20 or 2020-21 school years. In its cross-appeal, the district further seeks to annul the IHO's directive that the CSE develop an IEP with SETSS and counseling services as this constituted prospective relief. Under the same premises, the district argues that the CSE should not be directed to develop an IEP with CBT. Lastly, the district seeks to reverse the IHO's order for the district to fund a comprehensive neuropsychological IEE and OT IEE as the hearing record failed to demonstrate that the parent had requested these evaluations prior to the filing of the due process complaint notice.

In reply to the district's answer, the parent submits that the additional evidence submitted by the district should not be considered or entered into the hearing record as it is not responsive to the parent's allegation.[8] The parent notes that neither party appealed from the IHO's order directing the district to reimburse the parent for the costs for the May 1, 2020 neuropsychological evaluation.[9] In answer to the district's cross-appeal, the parent asserts that the district did not offer

[8] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Furthermore, pursuant to State regulation, the hearing record includes "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" as well as "any subpoenas issued by the impartial hearing officer in the case" (8 NYCRR 200.5 [j][5][vi][b], [d]). Review of the district's additional evidence indicates that the series of emails constitute written communications between the IHO and the parties, some of which could be considered a part of the hearing record as a request for an extension of the time to file a closing brief. The parent asserts that the email communications are incomplete and asserts that the attachment to the district's initial submission of the closing brief was not readable and that the district submitted its closing brief in a readable format at a later date. The IHO admitted the later email correspondence into the hearing record (see IHO Ex. I) and addressed the parent's arguments regarding the district's closing brief (IHO Decision at pp. 3-4). Review of the parent's arguments does not provide any basis to depart from the IHO's decision to accept the district's closing brief as this is a matter within the IHO's discretion. Accordingly, the district's additional evidence is not necessary; however, the exhibits are accepted solely for the purpose of ensuring the completeness of the hearing record on appeal to the extent that they might be considered a written request for an order from the IHO.

[9] As such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

a reason to disturb the IHO's finding of a denial of FAPE for the 2019-20 and 2020-21 school years. The parent requests that the relief sought in the cross-appeal be denied.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

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).

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

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

VI. Discussion

A. Preliminary Matters

1. Conduct of Impartial Hearing

The parent makes two main assertions with respect to the development of the hearing record by the IHO in this proceeding. The first is that the IHO improperly admitted documents into the evidence in violation of the five-business day disclosure rule and the second is that the IHO erroneously limited the re-direct examination of one of the parent's witnesses by the parent's counsel. I will address each in turn.

The parent also argues that the IHO improperly considered the district's closing brief and entered incomplete district exhibits into evidence. Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Since the parent failed to allege any specific prejudice in connection with any of the allegations regarding the IHO's conduct of the hearing, there is no basis to disturb the IHO's decision based on these allegations (see 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]).

In addition, the parent asserts that the IHO decision failed to reference all of the evidence admitted into the hearing record and failed to cite to all of the exhibits in the hearing record. According to the parent, this indicates that the IHO did not considered the entire hearing record in rendering her decision.

State regulations provide in relevant part that the "decision of the [IHO] shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "possess knowledge of, and the ability to conduct hearings in accordance with appropriate legal practice and to render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn.

Contrary to the parents' contention, while State regulations call for IHOs to draft decisions in conformity with "appropriate standard legal practice," the regulations do not require IHOs to

include citations to every exhibit, a minimum number of transcript pages, or that a decision must be a certain page length in order to meet this mandate (see 8 NYCRR 200.1[x][4][v]). Here, the IHO's decision—consistent with State regulation—included citations to the evidence in the hearing record in support of her findings of fact, as well as citations to applicable law (see generally IHO Decision).

a. The Five-Day Exclusionary Rule

Turning to the IHO's acceptance of district evidence over the parent's objection, State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii][c]; see 8 NYCRR 200.5[j][3][iv]).

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

On May 5, 2022, the district offered 34 exhibits into evidence (Tr. pp. 3-5; see Dist. Exs. 1-34). Parent's counsel argued that District Exhibits 24-34 were not timely disclosed and objected to the introduction of the exhibits into evidence based upon the five-day disclosure rule (Tr. p. 8). Counsel for the district argued that a system malfunction prevented her from timely disclosing the exhibits (Tr. pp. 8-9). District's counsel further argued that the five-day disclosure rule was discretionary and the IHO could allow the exhibits into evidence (Tr. p. 11). Parent's counsel, on the other hand, argued that the five-day disclosure rule was not discretionary, and he had "an unequivocable right to prohibit the introduction of such evidence as not being timely disclosed" (id.). The IHO at that time excluded district exhibits 24-34 as untimely (Tr. p. 10); however, the district exhibits were marked for identification and the hearing proceeded (Tr. pp. 30-32).

Prior to the next scheduled hearing date, the district presented a written position statement requesting that the district exhibits be admitted and the parent opposed the admission of district exhibits during the hearing (see Tr. pp. 134-40). The IHO determined that, as of the May 18, 2022

hearing date, the parent had the district exhibits since April 29, 2022 and the IHO allowed the admission of district exhibits 24-33 as timely disclosed (Tr. pp. 130-31, 140-41, 149-50).[11]

Hearing officers are charged with making a determination of whether the student received a FAPE based on substantive grounds (20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]), and, if necessary, they must take steps to ensure that an adequate hearing record has been completed upon which to base a decision (see 8 NYCRR 200.5 [j][3][vii]). In this case, the IHO took appropriate measures to alleviate any undue surprise to the parent. Other than the technical defect, the parent has failed to articulate sufficient prejudice as a result of the IHO's discretionary determination to allow the district's documents into the hearing record as evidence [] (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]; see Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd, 700 F. App'x 25 [2d Cir. 2017] ["Like all procedural rules and deadlines, those set in this sort of administrative proceeding were set to ensure a fair and expedited process, not a summary 'gotcha' game. No prejudice from the failure to notice Assistant Principal Dinneny's testimony five days before the hearing (as opposed to the four days' notice given before her testimony) was articulated"]).

Based upon the foregoing, I will not disturb the IHO's determination to admit district exhibits 24-33 into evidence.

b. Witness Re-direct Examination

Turning next to the parent's assertion that the IHO limited her re-direct examination of one of her witnesses, the neuropsychologist who she selected to conduct an IEE, a review of the hearing record does not support the parent's claim.

An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]).

On redirect of the parent's neuropsychologist, parent's counsel asked: "In your experience, do you -- have you been able to observe the type of services recommended by [the director of EBL Coaching], 500 hours or so of services and the type of services, multisensory kind of

[11] Of note, district exhibit 34 was not entered into evidence (Tr. p. 5). However, parent's counsel believed it was admitted into evidence (Tr. p. 284). The exhibit was described as a series of emails between the parent and one of the school psychologists (Tr. pp. 285-87). This office never received a copy of district exhibit 34 and there was no indication that this exhibit would alter any of the conclusions set forth in this decision.

tutoring/executive function coaching, result in an ability to catch a student like [the student] up" (Tr. p. 331). District counsel objected to the question on the basis that it was outside the scope of cross-examination and the question had no bearing on this student (id.). The IHO sustained the objection (Tr. pp. 331-32).

The parent argues that this testimony was relevant to the neuropsychologist's "opinion concerning the compensatory services owed to the student and was in direct response to cross-examination questioning from the [district] concerning [the neuropsychologist's] recommendation for compensatory services" (Req. for Rev. at p. 9). The inquiry on cross examination was very brief, which had the effect of confirming that the neuropsychologist agreed with the recommendation of EBL coaching (Tr. pp. 323-24). I find no prejudice in precluding additional testimony along this line, especially when the director of EBL coaching was also called by the parent as a witness and who could be asked to explain the basis of her opinion and recommendations.

Based upon my independent review of the testimony of the parent's neuropsychologist, I believe the IHO properly exercised her discretion in limiting the redirect testimony and, even if there was error, it was harmless.

2. Timeliness of Impartial Hearing Decision

The parent argues that the IHO's decision was untimely because the decision was "issued over thirteen months after the filing of the [due process complaint notice]" (Req. for Rev. at p. 8). The parent argues that the IHO should have issued a decision "within 75 days of the filing of the [due process complaint notice]" (id.). The parent contends that under State regulation the timeline may be extended at the request of the parties and the IHO must respond to such request in writing but that there were no written orders extending the compliance deadlines entered into the hearing record.

Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. §300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. §300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). Additionally, under State regulation, "[i]n cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision" (8 NYCRR 200.5[j][5]).

At the June 1, 2022 hearing date parent's counsel objected to an extension of the compliance date which was granted by the IHO (Tr. pp. 370-72). The parent's objection was that

the student did not have an IEP which the parent argued the student required, and it was a full year since the filing of the due process complaint notice (Tr. p. 371). This was the first time noted in the hearing record that the parent made any objections to the timeliness of the proceedings. There is no other documentation in the hearing record regarding the compliance date, extensions of the compliance date, or the parent's objection thereto.[12]

In this instance, although the parent asserted at the June 2022 hearing that the student did not have an IEP in place, the due process complaint notice in this proceeding concerns the student's education for the 2017-18 through the 2020-21 school years—school years which had for the most part been completed by the time of the filing of the due process complaint notice in June 2021 and for which the parent is requesting compensatory education (see Parent Ex. A). Accordingly, even if the IHO had issued the decision late, a delayed decision in this instance does not warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"]; see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]. According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline.'"] citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

B. Statute of Limitations

Much of the parties' dispute revolves around the IHO's determination that the parent's claims related to the 2017-18 and 2018-19 school years were barred by the statute of limitations. I will address each school year in turn.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR

[12] The failure to include documentation regarding extensions of the timeline granted by the IHO lies with the IHO. It is also not clear when the IHO was appointed to hear this matter. It has been acknowledged that the district has been swamped with an unprecedented number of due process hearing requests and is facing corrective action and class litigation over long delays in that process (see New York City Department of Education Compliance Assurance Plan" [May 2019], available at https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf; J.S.M. et al v. New York City Department of Education et al, 1:20-CV-00705 [filed 2/7/2020, EDNY]).

200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

Exceptions to the timeline to request an impartial hearing apply if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

1. 2017-18 School Year

The IHO found that the parent's claims related to the 2017-18 school year arose on March 10, 2018, the date the parent received prior written notice of the March 2018 CSE ineligibility determination (IHO Decision at p. 11). The prior written notice for the March 2018 CSE meeting was dated March 7, 2018, and the IHO presumed that the parent received the prior written notice by mail on March 10, 2018 (see Dist. Ex. 13). The parent does not dispute this fact and admits she was aware of the district's ineligibility determination at the March 2018 CSE meeting (Req. for Rev. at p. 2).

The parent contends that the March 10, 2018 date of accrual selected by the IHO was erroneous (Req. for Rev. at p. 2). Initially, the parent claims that the IHO did not separately consider accrual dates for each of the parent's allegations regarding the school years at issue.

As noted above, a determination of when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H., 2014 WL 3866430, at *16).

On review of the parent's due process complaint notice, the parent's claims regarding the 2017-18 school year were that the district held a CSE meeting in February 2018, more than 60 days after the parent's referral of the student in October 2017, and the CSE did not find the student eligible for special education (Parent Ex. A at p. 3). Of the parent's more general allegations, not attributed to any specific school year but which could apply to the 2017-18 school year, the parent alleged that the district did not meet its child find obligations and "did not rely upon sufficient and appropriate evaluative and documentary material to justify its recommendations" (id. at p. 8).

The hearing record shows that the parent referred the student for an evaluation in October 2017 (Dist. Ex. 1). According to the referral, the student was "struggling with reading, writing, mathematics"; she was "having difficulty pronouncing words and fluency"; she was having "a

difficult time with writing (poor penmanship and length of time executing tasks"; and she became "frequently distracted" (id.).

The district conducted a social history update, a classroom observation, an OT evaluation, a speech-language evaluation, and a psychoeducational evaluation of the student, which was completed in February 2018 (Dist. Exs. 3; 4; 5; 6; 9). According to the evidence, the CSE then convened on March 1, 2018 to review the evaluative information and determined that the student was not eligible for special education (Dist. Ex. 12). The district sent the parent a letter, dated March 1, 2018, identifying the evaluations that were conducted, notifying the parent of the determination that the student was not eligible, and providing a summary of the results of the district's evaluations and describing the student's present levels of performance (id. at p. 1). The district then sent a prior written notice of the CSE's determination to the parent on March 7, 2018, which included a description of the evaluative information considered by the CSE (Dist. Ex. 13). Although the parent testified that the evaluations "were not adequately explained to [her]."

Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or, at the latest, upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd, 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd, 2018 WL 3650185 [2d Cir. Aug. 1, 2018]).

Under the circumstances, there is no basis for departing from the IHO's determination that the parent's claims for the 2017-18 school year accrued when they were informed of the March 2018 CSE's determination that the student was not eligible for special education. The parent was present at the March 2018 CSE meeting, she was informed of all of the evaluative information considered by the CSE, and she was aware of the CSE's determination that the student was not eligible for special education.

On appeal, the parent contends that the IHO failed to address an assertion that the parent did not have "critical facts" with respect to the student's diagnoses and special education needs to support her claims for the 2017-18 school year until she received the May 2020 neuropsychological evaluation report. According to the parent's testimony, the May 2020 evaluation was "the first time . . . that [the student] was diagnosed with Attention-Deficit Hyperactivity Disorder ('ADHD') or Other Specified Anxiety disorder" and that "it was not until receipt of the evaluation report . . . that [she] fully understood that the [district] [e]valuation failed to thoroughly assess [the student] in all areas of suspected disability, including in her primary areas of need like attention and executive functioning" (Parent Ex. M at p. 3). However, review of the parent's initial October 2017 referral shows that, at that time, the parent was concerned about the student's attention, noting that the student became "frequently distracted" (Dist. Ex. 1). The October 2017 social history also noted that the parent expressed concerns regarding the student's difficulties with focusing and her need for "constant promptings, redirections and reinforcements in order to complete an academic task" (Dist. Ex. 9 at pp. 1-2). Based on the information available as to what the parent knew at the time of the March 2018 CSE's determination, the evidence shows that the parent was already expressing concerns regarding the student's difficulties in the areas of attention and executive functioning, such that any claim that the district did not evaluate the student

in those areas would have accrued when the parent was provided with the results of the district's evaluations as of the March 2018 CSE meeting.

The parent further argues that the IHO erred in failing to "toll" the statute of limitations due to the district's failure to provide her with a copy of the procedural safeguards notice. The parent testified that she did not recall receiving a copy of the procedural safeguards notice until January 2021 and did not recall being informed of her due process rights by a district employee prior to that time (Parent Ex. M at ¶ 39).

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist. v. C.M., 744 Fed Appx 7, 11 [2d Cir. Aug. 1, 2018]; R.B., 2011 WL 4375694, at *4, *6; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 986 [E.D. Tex. 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).[13]

During the social history interview on October 30, 2017, the district's social worker who conducted the interview wrote that "[d]ue process rights were reviewed" with the parent and the parent received a copy of the "Parent's Rights booklet" (Dist. Ex. 9 at p. 4). On a district form dated October 30, 2017, the parent provided signed consent for the district to evaluate the student and confirmed that she received a copy of the booklet "A Parent's Guide to Special Education for Children 3-21" and that her rights as a parent of a student with a disability were explained to her (Dist. Ex. 10). In its March 1, 2018 letter to the parent, notifying her of the March 2018 CSE's eligibility determination, the district noted that if the parent disagreed with the CSE's determination, she had "the right to request mediation or an impartial hearing" with further instruction on where to file for an impartial hearing (Dist. Ex. 12 at p. 1). Then, in its March 7, 2018 prior written notice, the district directed the parent to the district's website to obtain a copy of the procedural safeguards notice and provided contact information for someone who could

[13] The regulations of the Commissioner of Education allow a district to place a copy of the procedural safeguards notice on its website if such website exists (see 20 USC 1415[d][1][B]; 8 NYCRR 200.5[f][4]).

provide the parent with a copy, and further informed the parent of the right to request mediation or an impartial hearing and where to address such requests (Dist. Ex. 13 at pp. 1-2).

A second social history evaluation was conducted on June 18, 2020 in connection with the parent's referral to the CSE (Dist. Ex. 16 at pp. 18-20). According to the social history evaluation "[d]ue process rights: right to legal counsel, right to a copy of child's records and right to an independent evaluation and Parent Rights Guidebook and Procedural Safeguards booklets were given, explained, and discussed in the parent's preferred language" (id. at pp. 19-20). In a letter dated June 29, 2020, the district notified the parent of the June 2020 CSE's ineligibility determination and the parent's right to request mediation or an impartial hearing (Dist. Ex. 19 at p. 1). Further, in a June 30, 2020 prior written notice, the parent was again advised of her right to download or request a copy of the procedural safeguards notice and her right to request mediation or an impartial hearing (Dist. Ex. 21 at pp. 1-2). Although no timeframe was specified, one of the school psychologist's testified that the parent was provided a copy of the procedural safeguards notice (Tr. p. 261).

Based on the foregoing, the evidence in the hearing record leads me to conclude that the withholding of information exception does not apply to the parent's claims related to the student's 2017-18 school year and, therefore, the IHO was correct that the parent's claims were barred by the IDEA's two-year statute of limitations.

2. 2018-19 School Year

In connection with the 2018-19 school year, the IHO conducted a separate analysis because of then-Governor Cuomo's executive orders tolling the statute of limitations during the COVID-19 pandemic (IHO Decision at p. 11).[14]

The IHO found that the parent's claims related to the 2018-19 school year accrued in September 2018—the start of the school year—because the parent "was aware that [the student] was not receiving an IEP or special education program" at that time (IHO Decision at p. 11).

The parent contends that the IHO erred in finding that her claims pertaining to the 2018-19 school year accrued on September 5, 2018 (Req. for Rev. at p. 2). As with the 2017-18 school year, for the 2018-19 school year, the parent argues that the IHO did not separately consider accrual dates for each of her allegations.

Review of the parent's due process complaint notice shows that her allegations regarding the 2018-19 school year were that the district did not hold a CSE meeting or develop an IEP for the student, that the parent received a promotion in doubt letter in February 2019, and that the parent "reached out to TAG to see where [the student] was struggling and needed additional support" (Parent Ex. A at pp. 3, 4). As the parent did not make a referral for the 2018-19 school

[14] The New York State Supreme Court, Appellate Division Second Department, discussed the Governor's authority to alter or modify a statute by tolling the time limitations and found that the executive orders constituted a tolling of the statute of limitations, as opposed to a suspension of the statute of limitations (Brash v. Richards, 195 A.D.3d 582, 585 [2d Dep't 2021]). The Third Department recently applied the Covid-19 toll approach in a similar manner as in Brash (Roach v. Cornell Univ., 207 A.D.3d 931, 933 [3d Dept. 2022]).

year and the district did not conduct any evaluations of the student, the only one of the parent's more general allegations not attributed to any specific school year that could apply to the 2018-19 school year is the allegation that the district did not meet its child find obligations (id. at p. 8).

As asserted by the parent, the most troubling part of the IHO's determination as to the statute of limitations for the 2018-19 school year is that in finding that all of the parent's claims accrued prior to the start of the school year, the IHO failed to address events that may have occurred during the 2018-2019 school year. This is especially problematic for the parent's assertions of child find violations.

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

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094).[15] A district's child find duty is triggered when the district has "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660, quoting New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. Aug. 7, 2009]). To support a

[15] However, a student may be referred by a student's parent or person in parental relationship (see 34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent by failing to order testing,' or there must have been 'no rational justification for deciding not to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

In this instance, the parent made a general claim regarding child find and more specific allegations that she received a promotion in doubt letter in February 2019 and that she reached out to the school to see where the student was struggling. In fact, the IHO's findings for the next school year appear to place some weight on the promotion in doubt letter as a sign of the student's struggles (IHO Decision at pp. 6-7, 12).

Additionally, the hearing record included evidence of relevant events occurring after the student started the 2018-19 school year such as the October 2018 email correspondence between the parent and the student's teacher regarding the student's performance in math (Parent Ex. B). The parent questioned the teacher regarding a missing a grade on a math assessment and the teacher responded by informing the parent that the student was "not answering the questions in full" and that he had returned the student's test to her and asked her to complete the questions (Parent Ex. B at p. 3). He noted that the student's updated score was "73%" and suggested that if the student focused her attention in class and asked questions when she was confused her scores would increase (id.). The student's mother indicated that she had a "BIG" discussion with the student about asking questions in class if she was confused and that she would discuss the student's lack of focus with her (id. at p. 2). She opined that the student's "scores [were] inconsistent due to lack of focus and effort in acknowledging where she need[ed] help" (Parent Ex. B at p. 1). Although the document was not included in the hearing record, the parent provided direct testimony by affidavit, indicating that she received a "promotion in doubt" letter from the student's school in February 2019 that indicated the student was at risk of not being promoted to fifth grade (Parent Ex. M at ¶ 14). The parent testified she obtained private tutoring for the student in ELA and math between February 2019 and summer 2019, and she also paid for the student to attend a summer reading program (id. at ¶ 15). In addition, the parent, who was a general education and special education teacher, reported that she provided the student with daily support during the 2018-19 school year (id.). Consistent with the previously noted email correspondence, the parent testified that she reached out to the student's school to see where the student was struggling and if the student needed "additional support" (see Parent Ex. B; Parent Ex. M at ¶ 16). The parent further testified that with the supports she provided for the student (during the 2018-19 school year), the student's grades improved enough for her to be promoted to fifth grade, although she still appeared to struggle with reading, writing, attention, and executive functioning (Parent Ex. M at ¶ 17).

Further evidence shows that in March 2019, the parent reached out to the student's math teacher regarding the student's struggles with math, specifically the module exams (see Parent Ex. C). The math teacher stated that the student was having difficulty with some math concepts and requested that the mother "reinforce" the concepts with her daughter (id. at p. 1).

Here, the parent's child find allegation during the 2018-19 school year does not concern the conduct of a CSE meeting, the contents of an IEP, or the implementation of an IEP. Rather, the claim asserted by the parent relates to the district's failure to address events during the 2018-19 school year that could lead district personnel to suspect that the student might have had a

disability and that special education services might have been needed to address that disability. These "child find" claims were properly alleged in the parent's due process complaint notice (see Parent Ex. A). However, the IHO made no findings with respect to the district's child find obligations for the 2018-19 school year (see IHO Decision at pp. 10-11). The only IHO finding of some relevance to this point is when analyzing the parent's claims for the 2019-20 and 2020-21 school years, the IHO held that "[a]s far back as 2018, the [district] was aware that [] there were questions about attention and executive functioning and ongoing concerns raised by the [p]arent as well as the teachers" (IHO Decision at pp. 11-12). Yet the evidence in the hearing record also suggests that the parents were not the consistent and that her concerns grew with the passage of time. According to parent report in May 2020,

> [w]hen the [student] was four years old she received a 99/100 on standardized tests and was accepted to the desired school. When the [student] was in 3rd grade [2017-18 school year], she underwent an evaluation, on which she tested high with minimal processing speed difficulties. The [student's] mother reported that, in the same year, the [student] received extra help in school and was able to get all 4s (highest possible score) on her exams and evaluations

(Parent Ex. E at p. 2). As noted above, it was during fourth grade that the district allegedly issued a promotion in doubt letter. Accordingly, the matter is remanded to the IHO to determine the issue of statute of limitations consistent with this decision and based on sufficient evidence and a complete hearing record (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019] [remanding matter to IHO to supplement hearing record and to issue a pendency determination]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]). Upon remand, the IHO may allow the parties to present evidence on the issue of the statute of limitations, including the date which the parent knew or should have known of the claims for the 2018-19 school year.[16] Moreover, the district should present to the IHO the student's report cards for the 2018-19 school year and any letters sent to the parent regarding the student's performance, including the promotion in doubt letter referenced by the parent. If the IHO finds a child find violation (a district failure to refer the student to the CSE at some point during the 2018-19 school year), the IHO should then assess if the student met all of the criteria as a student with an other health impairment at that point in time.

C. FAPE 2019-20 and 2020-21 School Years

The IHO jointly addressed the parent's claims pertaining to the 2019-20 and 2020-21 school years (IHO Decision at pp. 11-12). At the outset, the IHO held "[i]t is clear from the record before me that the student was denied a FAPE for the 2019-2020 and 2020-2021 school years" (id. at p. 11). The IHO found that both the June 2020 and March 2021 CSEs considered the private neuropsychological evaluation which recommended that the student be classified as a student with a disability and receive special education programs and services and that the recommendations included in the evaluation were "disregarded" by the respective CSEs (id.). The IHO found the district "offered nothing to counter" the private neuropsychologist's recommendations other than

[16] According to the parent, any claims that accrued prior to October 10, 2018 are outside of the statute of limitations period as they would not fall within the two year statute of limitations period, even when accounting for the time during which the statute of limitations was tolled by executive order (see Req. for Rev. at p. 3).

to assert that "the student's high functioning precluded classification, despite the fact that her promotion was in doubt during the [2018-19] school year and the [district] put supports and interventions in place to assist [the student], including a 504 [p]lan that was never provided to the [p]arent, made part of the record herein or implemented" (id. at p. 12).[17] The IHO further held that the district was aware of all the "supports and interventions" the parent provided to the student (id.). Ultimately, the IHO determined that the evaluative information presented to the CSEs "formulated an uncontradicted consensus that [the student] was a student with a disability requiring classification" and the district's failure to find the student eligible for special education services denied her a FAPE for the 2019-20 and 2020-21 school years (id.).

Although the IHO looked at the two CSE meetings together, in reviewing the IHO's determinations, each of the June 2020 and March 2021 CSE meetings will be reviewed separately as the determinations of the CSE must be reviewed based on the information that was available to the CSE at the time the CSE made its determination (see J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature").

1. June 29, 2020 CSE Meeting

In her due process complaint notice, the parent argued that the private neuropsychologist attended the June 2020 CSE meeting and recommended an integrated co-teaching (ICT) classroom or SETSS to help the student with her executive functioning deficits (Parent Ex. A at p. 5). In addition, the parent alleged that neuropsychologist informed the CSE that the student was only able to maintain her "academic performance" because of the support the parent provided outside of school (id.). However, despite this information the June 2020 CSE failed to offer the student special education services (id.). In her post-hearing brief, the parent asserted that the private neuropsychological evaluation supported finding that the student should have been classified as a student with an other-health impairment (Parent Post-Hr'g Br. at pp. 17-18).

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; see 34 CFR 300.308[a][1]; 8 NYCRR 200.1[zz]).

Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education

[17] In the analysis section of her decision, the IHO appears to have mistakenly referenced the 2019-20 school year as when the student's promotion was in doubt, although the IHO correctly identified the 2018-19 school year in her factual recitation (IHO Decision at pp. 6-7, 12). The parent testified she received a promotion in doubt letter in February 2019 during the 2018-19 school year (see Parent Ex. M at p. 2).

within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22 [2d Cir. Apr. 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpreting the phrase "educational performance" and indicating that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices as defined under federal law, travel training, home instruction, and special [education] itinerant teacher[] [services] . . . ." (Educ. Law § 4401[1], [2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, occupational therapy, physical therapy, and speech-language therapy, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k]).

Beginning in December 2019, the student underwent a neuropsychological evaluation at the request of the parent "to assess what [wa]s underlying her difficulties in school, including reported problems with attention, forgetfulness, reading, and writing (Parent Ex. E at pp. 1-2).[18] The evaluation occurred over six sessions between December 9, 2019 and January 30, 2020 (id. at p. 1). Multiple formal measures, including standardized testing and behavior rating scales, along with an interview with the parent were used to assess the student (id.).[19] According to the May 1, 2020 neuropsychological evaluation report, cognitively, the student's overall functioning was generally average or better for her age across multiple domains of cognitive functioning (id. at pp. 9-10). While the student showed significant strengths in her verbal, visual processing, and fluid reasoning abilities, she displayed significant weakness in executive functions, including selective attention, sustained attention, and impulse control (id.). With regard to academic abilities, the report indicated that the student showed no difficulties "across reading, writing, and mathematics" and she generally performed in the average range in her academic functioning (id. at pp. 8, 10). With regard to the student's emotional and behavioral functioning, the report stated that, consistent with cognitive testing, the student had problems with maintaining necessary levels of control over her thinking (such as attention) and her behavior (such as hyperactivity) (id. at p. 10). In addition, she also had some difficulties maintaining control over her emotions which contributed to her experiencing some "emotional distress" (id.). The report indicated that diagnostically, the student met the criteria for moderate ADHD, combined presentation (id. at p. 11). Specifically, she exhibited "marked difficulty paying attention when distractions [were] present and sustaining her attention adequately for an extended period of time, struggl[ed] to follow through on instructions, and often struggl[ed] to complete tasks that requir[ed] attentional efforts" (id.). The private neuropsychologist opined that these areas interfered with the student's functioning, especially in school, but also at home (id.). The student also exhibited difficulty keeping control over her behavior, both related to difficulty sitting still and remaining calm, and had a tendency to act impulsively before thinking about consequences (id.). Additionally, the report indicated that the student met the criteria for other specified anxiety disorder as the neuropsychologist opined that the student experienced "marked worry and distress but [did] not meet full criteria for any other anxiety disorder" (id.). According to the neuropsychologist, the student's distress was in response to "keeping up in class and performing well in school" (id.). These circumstances caused the student anxiety which sometimes resulted in the student becoming overwhelmed or having thoughts of self-harm (id.).

[18] The hearing record contains duplicative exhibits. Specifically, there are two copies of the May 2020 neuropsychological evaluation (compare Parent Ex. E; with Dist. Ex. 29). For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[19] Formal evaluative measures included administration of the Bender Visual-Motor Gestalt Test, Second Edition (Bender-2); the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); the Wechsler Individual Achievement Test, Third Edition (WIAT-III); A Developmental Neuropsychological Assessment, Second Edition (NEPSY-II); the Delis-Kaplan Executive Function System, Trail Making Test (D-KEFS Trails); the Conners Continuous Performance Test, Third Edition (CPT-3); the Wisconsin Card Sorting Test, Computer Version Fourth Edition (WCST-IV); the Behavior Assessment System for Children, Third Edition (BASC-3) – Self-Report of Personality Child (SRP), Parent Rating Scale Child (PRS), Teacher Rating Scale Child (TRS); and the Comprehensive Executive Function Inventory (CEFI) parent report, and teacher report (Parent Ex. E at p. 1).

To address the student's ADHD and other specified anxiety disorder, the May 2020 neuropsychological evaluation report recommended she receive educational accommodations, appropriate testing accommodations, and specific interventions (Parent Ex. E at p. 11). More specifically, the report included educational accommodation recommendations for "flexible seating" away from distractions and close to the teacher in front of the classroom; consistent and regular breaks throughout the day to release "pent up" energy; breaking down assignments into numbered and sequential steps; and check-ins with the student to ensure comprehension of task demands (id.). The report also recommended additional classroom accommodations of providing the student with copies of notes during lessons to follow along and to supplement student notes; outlines to fill in and written daily schedules; offering additional verbal instructions, even when written instructions were clear; highlighting key points and words on worksheets and assignments underlined/bolded; using visual aids (e.g., story maps, formulas, etc.); and rewarding the student for "on-task, positive behaviors and being cognizant of not punishing, highlighting, or giving attention to minor disruptive behaviors, so as not to inadvertently reinforce undesired behaviors" (id. at p. 12). Next, the neuropsychological evaluation report stated that the student should receive the following testing accommodations on all standardized tests, in-class exams, and in-class assignments: extra time (time-and-a-half) on all examinations, both standardized and within the context of classes; breaks within exams (at least 10 minutes for every 30 minutes of work time); exams broken down with multi-step instructions to clear, step-by-step directions; highlighted/bolded key points and words on exams; checks for understanding of all the directions; and whenever possible on exams, allow the student multiple ways of answering questions (e.g., circling an answer or saying it aloud) and explain the format ahead of time so that the student is able to focus on the content (id.).

Concerning the student's anxiety-related symptoms, the May 2020 neuropsychological evaluation report included a recommendation for the student to seek therapy from a cognitive-behavioral therapist, learning specialist, or executive functioning coach to help the student "improve the organization and execution of academic work" (Parent Ex. E at p. 12). The neuropsychologist recommended CBT from a mental health professional to address the student's anxiety (id. at p. 13). In addition, a psychiatric consultation was recommended to discuss the results of the neuropsychological evaluation and to consider possible medication for ADHD and anxiety (id.).

The parent sent a letter, dated May 26, 2020, to a district school psychologist along with a copy of the May 2020 private neuropsychological evaluation report (Dist. Ex. 17). The mother noted in the letter that the student "requir[ed] lots of support at home in addition to the educational leaning environment" (id.).

The IHO had determined that the district was "aware of all of the supports and interventions that the Parent had put in place to assist the student" (IHO Decision at p. 12). With respect to the June 2020 CSE meeting, the parent testified that she had obtained private tutoring for the student in ELA and math starting in February of 2019 and continuing through the 2019 summer (Parent Ex. M at ¶15). Additionally, the parent testified that she obtained after school reading support for the student during the 2019-20 school year as the student was struggling in reading and math (id.at ¶¶10, 20).

According to the parent's testimony, in providing the district with the private neuropsychological evaluation report the parent was requesting that the district create an IEP for the student that would be consistent with the findings and recommendations contained in the neuropsychologist's evaluation report (Parent Ex. M at ¶ 22). The parent testified that the student continued to struggle academically and from a social-emotional perspective throughout the 2019-20 school year, and she failed to make "meaningful progress" (id. ¶ 23). According to the parent, the student's teachers consistently reported that the student struggled with areas such as "writing, attention, self-regulation, and areas of communication" (id.).

In a report dated June 5, 2020, the student's social studies teacher, estimated that the student was functioning at grade level (fifth grade) (Parent Ex. F at p. 1). The teacher reported that the student was very inquisitive, tended to ask clarifying questions, and seemed to know when she needed to ask questions (id.). However, the teacher also reported that when asking questions the student would pause, did not maintain eye contact, and was seemingly daydreaming into space; it typically took the student longer than the average student to ask a question (id. at p. 2). According to the social studies teacher, the student struggled to write without teacher guidance and needed to work on explaining how her evidence supported her claims (id. at p. 1). The student was unable to communicate her thoughts when speaking and would often trail off and not finish her thoughts or go off on tangents (id.). She did not seem to organize her thoughts before participating in discussion (id.). In addition, the teacher indicated the student often needed directions clarified and repeated for her to fully understand what was being said to her (id. at p. 2). Further, the teacher reported the student's written language was stronger than her oral language and her reading comprehension was stronger than her listening comprehension (id.). With respect to the student's learning style, the teacher noted that the student seemed to be a visual learner (id.). Her pace was slow to average, and she needed a reminder for directions and a reminder to be on task (id.). The teacher reported that although the student struggled with paying attention and sometimes finishing classwork, she seemed to try to pay attention, but would often fall into a "daydream like stare" (id.). When she was fully engaged, she participated in class, but when she was in this "daydream state" her participation declined (id.). The social studies teacher indicated that the student was performing at standards, but the teacher did not believe the student was meeting her potential (id.). The teacher reported that based on her interactions with the student, the student was not at grade level for social development as she struggled with self-regulation (Parent Ex. F at p. 2; Dist. Ex. 19 at p. 7). The student was unable to stop herself from acting out and would often not seem to think of the implications of her actions (Parent Ex. F at p. 2). According to the teacher, the student often fidgeted in class and often got up for no apparent reason (id. at p. 3). Still, the teacher reported that the student was respectful of adults and well-liked by her peers (id. at p. 2). The teacher suggested that the student would benefit from academic and social management assistance (id. at p. 3).

On June 18, 2020, a district social worker conducted a social history interview with the parent (Dist. Ex. 16 at pp. 18-20). The resultant social history report indicated that the parent expressed concerns that the student had difficulties in school with reading, writing, math, organization, and planning skills (id. at pp. 19-20).

On June 24, 2020, a CSE convened to determine whether the student was eligible for special education (see Dist. Ex. 19). In connection with the June 2020 CSE meeting, the CSE considered the May 2020 private neuropsychological evaluation report as well as teacher reports

(Dist. Ex. 19 at pp. 1-8). Participants in the June 2020 CSE meeting included a district school psychologist who also served as the district representative, the special education teacher at TAG, a general education teacher, a social worker, the parent, and the neuropsychologist who conducted the May 2020 neuropsychological evaluation (Dist. Ex. 20).

According to the district summary of the June 2020 CSE meeting, unspecified teachers reported that the student was "performing at grade level" and was performing "very well" during remote learning (Dist. Ex. 19 at p. 5). The teachers expressed concern regarding the student's return to in-person learning with "the higher rigor expected" at TAG (id.). The summary document indicated that according to teacher reports the student previously "struggled" to timely hand in assignments, and her writing was "often unsupported with evidence and include[d] grammatical errors" (id.). Consistent with the report of the student's social studies teacher the summary noted that the student would seek help but had difficulty paying attention and fell into a "daydream-like state" such that her class participation was affected (id.). The summary stated that although the student was "performing at grade standards," she struggled in meeting her "full potential" (id.). According to her teachers, the student 's learning pace was slow to average and the student required repetition and reminders for directions and staying on task (id. at pp. 5-6). The student's ELA teacher reported that the student "struggle[d] with independent, written work" (id. at p. 6).

During the June 2020 CSE meeting, the student's mother expressed concerns with respect to the student's lack of focus in completing tasks or schoolwork, the student's her poor organizational skills, and her inability to timely complete tasks (Dist. Ex. 19 at p. 6). The student's mother reported that during remote learning, when she had the student complete work on her own, the student would not submit her work and missed several exams because she was not paying attention (id.). The mother further noted that when the student did not receive support she received "2's on her report card" (id.). The mother opined that the student would "benefit from organization strategies in regard to time management, time breaks, asking for help when she needs it, and graphic organizers to stay on topic and within context" (id.).

As a result of the June 2020 CSE meeting, the CSE determined that the student did not need special education services because she did not present with any "academic deficits," and she could participate in the regular education curriculum (Dist. Ex. 19 at pp. 1, 8). However, because of concerns with "presenting symptoms associated with [the student's] ADHD diagnosis," the June 2020 CSE determined the student "would benefit from more consistent teacher check-ins and check-ins from the school's" special education teacher "while participating in remote learning to better keep pace with her peers" (id. at p. 8).[20] Consistent with recommendations included in the May 2020 neuropsychological evaluation report, the summary of the June 2020 CSE meeting identified management needs and strategies such as proximity seating near the teacher in order to be redirected as needed, consistent breaks as needed to release "pent-up" motor energy, breaking down assignments with multi-step instructions to clear, step-by-step directions, teacher check-ins to ensure comprehension of task demands, copies of notes and outlines to be filled in by student, written daily schedules, additional verbal instructions to ensure understanding, use of visual aids

[20] The summary of the June 2020 CSE states that the student would benefit from check-ins from the SETSS provider (Tr. p. 203; see Dist. Ex. 19 at p. 8). The TAG special education teacher testified at the impartial hearing that she was the only special education teacher at TAG and delivered "specially-designed instruction for students who are mandated to receive SETSS instruction" (Tr. pp. 182-83, 202).

and graphic organizers, highlighting, underlining, and/or bolding of key points and words on assignments, rewarding on-task, positive behaviors, and testing accommodations for extended time (time and a half), breaks, and revised test format (see Parent Ex. E at pp. 11-12; Dist. Ex. 19 at p. 8).

In a prior written notice, dated June 30, 2020, the district explained the CSE's determination that the student was not eligible for special education services (Dist. Ex. 21 at p. 1). According to the June 2020 prior written notice, the CSE considered related services only and SETSS for the student, but rejected those options as the student did not meet eligibility criteria and related services only within the school setting would not appropriately address the student's specific emotional and behavioral concerns (id.). The June 2020 prior written notice also indicated that during the June 2020 CSE meeting, an ICT class setting was discussed but "considered too restrictive of a learning environment for [the student]" (id. at p. 2).

On appeal the district acknowledges the student's diagnoses of ADHD and anxiety disorder; however, the district contends that the student's disability did not adversely affect her educational performance (Answer with Cross-Appeal at ¶13). The district's primary contention is that the student did not require special education because the student was functioning at grade level and for this position, the district cites to the student's scores on academic and cognitive testing as being in the average range and asserts that the student's teachers indicated the student "was performing at grade level, although she struggled with focusing at times" (id.). However, review of the hearing record shows that the district did not submit a copy of the student's report card for the 2019-20 school year into the hearing record and the only reference to the student's grades contained in the summary of the June 2020 CSE is a reference to the parent's concern that the student received "2's on her report card" when she was not supported (Dist. Ex. 19 at p. 6). The parent's concern was consistent with what she expressed to the neuropsychologist, that the student "receive[d] a lot of 2s (approaching standards) in school"

Even if the student's academic performance were as portrayed by the district, an adverse affect on educational performance in the case of a student that exhibits strong academic skills and is passing from grade to grade is not as apparent as it might be for a student who is failing or being retained in a course or grade. In assessing whether a student's disability affects the student's educational performance, courts have taken a slightly broader approach, taking into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broad as to encompass social/emotional needs that have not necessarily translated to academics (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *11-*13 [S.D.N.Y. Sept. 14, 2016]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255-57 [S.D.N.Y. 2014]; cf. W.A., 2016 WL 6915271, at *23 [in the child find context, distinguishing a narrow view of "academic success" (e.g., grades alone) from a broader view that included "feedback from teachers and standardized test scores as well"]). This interpretation of "educational performance" is in line with federal guidance from the Office of Special Education Programs (OSEP), discussing the eligibility of students with high cognition and providing an example of a student that sounds somewhat analogous to the student in the present case; to wit, "a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate" (Letter to Anonymous, 55 IDELR 172 [OSEP 2010]).

It is troubling for the district to point in general terms to the student's academic success leading up to the time that the June 2020 CSE meeting was held, and at the same time fail to produce actual evidence of the student's grades, such as report cards or specific testimony regarding subject areas aside from social studies.[21] In conclusion, considering the specific needs referenced in the May 2020 neuropsychological evaluation report, the acknowledged management needs of the student together with executive functioning and attention deficits, and the lack of evidence as to the student's performance in school during the 2019-20 school year, particularly as to the student's grades, under the circumstances of this case, the I do not find sufficient support in the hearing record to depart from the IHO's finding that the June 2020 CSE should have found the student eligible for special education as a student with an other health impairment.

2. March 26, 2021 CSE Meeting

The parent argued that at the March 2021 CSE meeting the private neuropsychologist "reiterated his professional opinion that [the student] needed special education services" (Parent Ex. A at p. 6). According to the parent, the private neuropsychologist pointed out that any accommodations provided to the student through a 504 plan "clearly did not work" (id.). The parent stated that even though everyone at the March 2021 CSE agreed that the student had "significant issues with her executive functioning and attention and that these issues [had] a direct impact on her grades" the district ignored the concerns of the parent and neuropsychologist and "denied [the student] an IEP" (id.).

The hearing record reflects that the student was promoted to sixth grade and remained at TAG for the 2020-21 school year (Parent Ex. M at ¶ 25). According to the parent, in the fall of 2020, the special education teacher at TAG began meeting with the student informally for brief 10 to 15 minutes sessions to help with the student's executive functioning and organizational skills (id. at ¶ 28). In addition, the parent enrolled the student in an after school math program for the 2020-21 school year (id. ¶ 29).

On January 8, 2021, the parent requested a CSE meeting to develop an IEP for the student (Parent Ex. M at ¶ 31; see Dist. Ex. 24). The parent indicated that she had not received a copy of the 504 plan and was unaware of any accommodations the student may be receiving (Dist. Ex. 24). The parent stated that, apart from the 504 plan, she understood that the student had met with the TAG special education teacher to help her with executive functioning and organizational skills (id.). Further, the parent stated that whatever supports had been provided through the 504 plan and from the special education teacher had not been "sufficient or appropriate" for the student (id.). She noted that the student received a 65 in both ELA and math for the first marking period and grades in the low 70s for Spanish, career studies, and art (see Parent Ex. G at p. 1; Dist. Ex. 24). The parent stated that as the student had an IQ in the high average range, these grades were

[21] In the May 2020 neuropsychological evaluation report indicated that the student's mother relayed to the evaluator that she was "feeling confused about why the client receives inconsistent grades in all of her subjects, as the [student's] grades fluctuate between 90, 20, 80, 30, etc." (Parent Ex. E at p 1), but the report is unclear if those were grades from individual assignments, report cards, and do not provide any indication of when and under what circumstances the student received those grades.

simply "incomprehensible" and "indicative" that the student required "the support of a special education program" (Dist. Ex. 24).

In a response dated January 12, 2021, the district acknowledged the parent's referral of the student to determine her eligibility for special education services and invited the parent to a meeting for the purpose of conducting a social history (Dist. Ex. 25 at p. 1). During the social history interview, the parent relayed that the student was experiencing difficulties in math, ELA, and writing, that she was not retaining learned information, and that she had poor organizational skills (Dist. Ex. 28 at p. 3).

On March 9, 2021, a district social worker conducted a virtual classroom observation of the student during remote social studies instruction (Dist. Ex. 26 at p. 1).[22] The social worker indicated that throughout the observation the student's camera was on and she was quiet and attentive (id. at p. 3). She noted, however, that the student at times appeared to be distracted or in deep thought (id.). The student did not participate in the class via chat or microphone, nor did most of the other students (id.). The social worker reported that, at the time of the observation, the social studies teacher reported that the student had not been submitting all assignments lately (id. at p. 2). The social studies teacher stated that during remote learning the student did well and asked questions for help when needed, most of the time (id.). The social studies teacher noted that she accepted late work from the student because she had a 504 plan (id.). The social studies teacher reported that the student's reading was a "2" based on her test and quizzes (id.). The student had a grade of 84 the first marking period but had an average of a 65 in the second marking period (id.). The social worker indicated that according to the social studies teacher, the student's peer relationships were difficult to assess because of remote learning but in the prior school year the student "appeared to have good peer relationships" (id.). The social studies teacher reported to the district's social worker that the student could benefit from SETSS as she needed help with organizational skills and staying on task (id.). She noted that the TAG special education teacher checked in with the student and helped her with refocusing (id.). Overall, the social studies teacher reported that the student was doing well but was "challenged with starting and managing the number of assignments given" (id.).

The district conducted a psychoeducational evaluation on February 25, 2021 "to review important evaluative and educational information" that would help decide whether the student required special education services (Dist. Ex. 27 at p. 1).[23] The school psychologist testified that because district staff were working from home during the pandemic, guidance from the supervisor of psychologists permitted her to perform a "comprehensive data-driven assessment" instead of a formal psychoeducational evaluation (Tr. pp. 254, 278). She explained that the comprehensive data-driven assessment contained information based on teacher observations in academics and social/emotional functioning (Tr. p. 255; Dist. Ex. 27 at p. 2). The school psychologist testified that, at the time of the evaluation, the parent reported that the student was receiving "a significant

[22] The virtual classroom observation report included a disclaimer that information gathered should be interpreted with caution, as it was "a novel learning environment" with multiple variables, (i.e., COVID-19, home environment, alternative learning format,) which affected the assessment (Dist. Ex. 26 at p. 1).

[23] The psychoeducational evaluation report indicated the evaluation occurred on February 25, 2021, but the report was dated March 16, 2021 (Dist. Ex. 27 at pp. 1, 8).

amount of support from her mother" with academics at home (Tr. pp. 283-84). The March 2021 psychoeducational evaluation report indicated that assessment methods included a teacher interview, review of records, administration of the Brown Executive Function/Attention Scales-Parent and Teacher Forms, and Student Pre-Assessment-Teacher Forms (Dist. Ex. 27 at p. 2).

The March 2021 psychoeducational evaluation report also contained results from the May 2020 private neuropsychological evaluation including the student's overall intellectual functioning, and diagnoses of ADHD and other specified anxiety disorder (see Parent Ex. E; Dist. Ex. 27 at pp. 2-7). The school psychologist testified that the comprehensive data assessment together with the information from the private neuropsychological evaluation provided sufficient information to make an eligibility determination (Tr. p. 255).

The March 2021 psychoeducational evaluation report summarized information provided by the student's ELA teacher, which indicated the student was performing at a sixth-grade level in reading, specifically in decoding and reading comprehension, and that sometimes she needed "adult support" with reading (Dist. Ex. 27 at p. 7). The ELA teacher noted that because of remote instruction there was not a lot of time to read aloud in class but in the previous year the student read slowly and "struggle[ed] with slightly more-advanced vocabulary" (id. pp. 4, 6-7). With regard to math, the evaluation report indicated that the student's math teacher estimated she was performing at a fifth-grade level, both in math calculation skills and applied math skills (i.e., word problems, applying strategies) (id.). The student's math teacher reported that she often required adult support in math and needed to work on her accuracy (id. at p. 4). Regarding writing, the student's writing skills were estimated at the fifth-grade level by two of her teachers, while one of her teachers estimated her to be performing at a sixth-grade level (id. at pp. 4, 6). However, her ELA teacher reported that it was difficult to assess the student's strengths and weaknesses in her written expression given the remote learning environment, as pencil and paper had not been used (id.). In connection with the student's "fluency/stamina, spelling skills, syntax and grammar skills" the student was rated by one teacher as comparable to her peers, but another teacher reported that the student was below her peers in writing (id. at pp. 4-5).

In connection with the student's social and emotional functioning, the student's mother and teacher completed the Brown Executive Function/Attention Scales (Dist. Ex. 27 at pp. 5-6). Specifically, results from this rating scale, as rated by the parent, indicated that the student demonstrated a "very significant problem in her overall executive function" (id. at pp. 6-7). On the other hand, her teacher's overall ratings indicated a "possibly significant problem" with executive functioning (id.). Additionally, the student's teachers reported that the student was observed to demonstrate the following social/emotional skills: "getting along with her peers, friendship, respecting boundaries with both peers and adults, responding to authority, coping strategies, self-esteem, accepting/applying constructive criticism, self-advocacy, and accepting responsibility" (id. at p. 5).

On March 25, 2021, the CSE convened to again determine whether the student was eligible for special education (see Dist. Ex. 31). The summary of the March 2021 CSE meeting recounted the results of the psychoeducational evaluation and private neuropsychological evaluation (Dist. Ex. 31 at pp. 3-7). It was noted that the parent requested the evaluation because of the student's low grades on her report card during the 2020-21 school year (id. at pp. 5-6). The school psychologist testified that the private neuropsychologist recommended ICT services for the student

at the March 2021 CSE meeting (Tr. pp. 290-91). She further recalled that the private neuropsychologist stated at the March 2021 CSE meeting that the 504 plan was not working and although she did not recall the basis for his belief, she suggested that it was because of a drop in the student's grades (Tr. p. 296). The school psychologist testified during cross-examination that at the time of the March 2021 CSE meeting the student's "grades were suffering" due to other factors, such as the student was not in the classroom (Tr. pp. 296-97).

The March 2021 CSE determined that the student was ineligible for special education (Dist. Ex. 31 at p. 7). Additionally, due to continued concerns with the student's "presenting symptoms" of ADHD, the March 2021 CSE determined she would benefit from more consistent teacher check-ins, classroom based interventions, and testing accommodations provided through a 504 plan (id. at pp. 7, 9). The student's mother disagreed with the CSE's determination and indicated that she felt the student would benefit from receiving SETSS (id. at p. 7).[24] The summary of the March 2021 CSE meeting included the same list of management needs recommended for the student in the May 2020 neuropsychological evaluation report and included in the summary of the June 2020 CSE meeting (compare Parent Ex. E at pp. 11-12, with Dist. Exs. 19 at p. 8; 31 at p. 8).

In a prior written notice, dated April 15, 2021, the district indicated that the March 2021 CSE considered "an [] ICT class setting" for the student but found it "too restrictive of a learning environment" (Tr. pp. 257-58, 294; Dist. Ex. 32 at p. 2). Although the special education teacher testified that TAG did not offer an ICT classroom, she further testified that if TAG did offer an ICT the student "could" be in an ICT as a regular education student (Tr. pp. 202, 245, 248). The TAG special education teacher testified that the student "would be one of those students based on her age and executive functioning" that would benefit from an ICT setting (Tr. pp. 247-48).

The TAG special education teacher testified that the student would benefit from academic intervention, but TAG did not offer such services (Tr. p. 233). However, the TAG special education teacher also testified that after the March 2021 CSE meeting the school set up 1:1 or small group daily support with the student's social studies teacher which served as academic intervention (Tr. p. 240). This was for a single period when the student did not have classes during remote learning (asynchronous time) (Tr. pp. 240-42). The TAG special education teacher testified that these services were provided at the parent's request as the student "was having difficulty with social studies assignments" (Tr. p. 243).

The parent made reference to the student's first quarter grades in her referral for special education services, specifically that the student had received a grade of 65 in both ELA and math and grades in the low 70s for Spanish, career studies, and art (Dist. Ex. 24). The student's report card for the 2020-21 school year reflected final grades of 65 in art, 69 in math, 72 in science, and 76 in social studies (Parent Ex. G). The student's final grades in Spanish, career studies, and ELA were all designated "NX" (id.). The student's teachers for art, Spanish, career studies, and ELA all commented that the student did not complete and submit class work or did not complete homework assignments (id.). According to the student's mother, the TAG "teachers were advised to grade more leniently and not to 'fail' students at the end of the 2020-[]21 school year (presumably

[24] The school psychologist testified that SETSS "do not deal with executive functioning" and are based on academics (Tr. p. 293).

because of the COVID-19 pandemic and issues with remote learning)" (Parent Exs. G at p. 1; M at p. 6). The parent opined that the student's final grades of "NX" "would likely have been failing grades if the [district] had not changed its grading policy" (Parent Ex. M at ¶ 36).

Similarly, as to the district's arguments regarding the June 2020 CSE meeting and determination, the district asserts that the March 2021 CSE's determination that the student was not eligible for special education was justified because the student's deficits did not adversely affect her educational performance (Answer with Cross-Appeal ¶ 14). However, review of the hearing record shows that the student's academic performance is more ambiguous than what is argued by the district. As discussed above, the student's teachers reported a mix, with one teacher reporting the student was on grade level (sixth grade) in writing, while two teachers reported the student was at a fifth grade level (Dist. Ex. 27 at pp. 4, 6). The student's math teacher also reported the student was functioning at a fifth grade level in math calculation skills and applied math skills and required support (id. at pp. 4-6). Additionally, although the student was achieving passing grades, her grades were little more than passing with a grade of 65 in math and ELA in her first marking period for the 2020-21 school year (Parent Ex. G) notwithstanding that she had average to high average cognitive skills. In terms of effect upon the student's educational performance, this case too unlike one in which a student who was determined ineligible for special education due in part to accessing the general curriculum with only section 504 plan accommodations and earning As, Bs, and Cs with them (see Legris v. Capistrano Unified Sch. Dist., 2021 WL 4843714, at *2 [9th Cir. 2021]). Finally, while the student was struggling at school, the hearing record also shows that she was receiving supports outside of school as well as support provided by the TAG special education teacher (see Tr. p. 240-43; Parent Ex. M at ¶¶ 28, 29).

Considering the mixed reports in the evidence above regarding the student's academic functioning, the district's argument that the student's academic performance was not adversely impacted by the student's deficits, particularly in the areas of attention and executive functioning, are not born out by the hearing record. Accordingly, there is insufficient basis to overturn the IHO's determination that the student was eligible for special education as of the March 2021 CSE meeting and the district's failure to find the student eligible was a denial of FAPE.

D. Relief

Having found that the IHO correctly determined that the parents' claims related to the 2017-18 school year were barred by the statute of limitations, no relief is appropriate for that school year. Furthermore, since that the parents' claims related to the 2018-19 and a portion of the 2019-20 school year must be remanded to the IHO for further analysis regarding claim accrual and, and having found insufficient basis to depart from the IHO's findings that the district denied the student a FAPE based on the June 2020 and March 2021 CSEs determinations that the student was not eligible for special education, I next turn to the parties' disputes as to the relief awarded by the IHO and what relief should be awarded for the denial of FAPE after the June 2020 CSE meeting.

1. Compensatory Educational Services

Without any discussion, the IHO awarded the parent 160 hours of individual tutoring instruction by an independent provider selected by the parent as compensatory education for the denial of FAPE for the 2019-20 and 2020-21 school years.

The parent argues that this award of 160 hours was arbitrary as the hearing record demonstrated that the student required "at least 500 hours" of individual instruction (Req. for Rev. at p. 6). In making this argument, the parent relies on the testimony of the director of EBL Coaching and the private neuropsychologist who testified at the hearing (id.). The parent contends that the district did not refute the testimony presented by the parent with respect to compensatory tutoring (id.). Lastly, the parent contends that the award of 160 hours is "nonsensical" as the IHO failed to provide any insight on how she arrived at the amount of 160 hours of compensatory tutoring (id.).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't

of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Here, the director of EBL Coaching submitted a letter, dated January 10, 2022, stating that she assessed the student on January 7, 2022 to determine her "instructional needs" (Parent Ex. H). In two paragraphs the letter merely referenced the director's own assessments and the May 2020 neuropsychological evaluation and February 2018 psychoeducational evaluation, but in the impartial hearing the director testified by affidavit that in addition to speaking with the student's mother, she reviewed a June 2021 progress report; an IEP eligibility determination report dated April 16, 2021; a progress report for the 2019-20 school year; an IEP eligibility determination report dated June 29, 2020; the May 2020 neuropsychological evaluation report; a January 2018 speech-language evaluation; and a February 2018 psychoeducational evaluation (Parent Ex. K at ¶ 9). Based on her review of the above documentation, the director of EBL Coaching testified that the student demonstrated "significant deficits with attention and executive functioning that impact[ed] her academic progress" (id. at ¶ 10). According to the letter, the director assessed the student's skills with the Wide Range Achievement Test (WRAT) and found that the student "tested at a low seventh grade level for spelling, a mid-seventh grade level for decoding, a low eighth grade level for mathematics, and a seventh grade level for reading comprehension, she tested at a low sixth grade level for writing" (Parent Ex. H).[25] The director of EBL Coaching referenced the private neuropsychologist's finding of "significant executive functioning weaknesses" as she herself did not conduct any executive functioning assessments (Tr. p. 355; Parent Ex. H). The director of EBL Coaching found that based upon her assessment, the private neuropsychological evaluation, and the February 1, 2018 psychoeducational evaluation, it was "clear" that the student was "in critical need of research-based, multi-sensory instruction to develop her writing and executive functioning skills" (Parent Exs. H; K at ¶ 12). She recommended that the student receive 500 hours of individual "research-based, multi-sensory tutoring to develop her writing and executive functioning skills" (Parent Ex. H). The director of EBL Coaching testified that the 500 hours was "designed to remediate her writing skills and to develop her executive functioning skills which [we]re very severely delayed" and to make up for the four years in which the student did

[25] At the time of the January 2022 assessment the student was in seventh grade (Tr. p. 350).

not receive special education services (Tr. p. 352). She did a "rough breakdown" of the 500 hours with 300 hours for executive functioning and 200 hours for writing (id.). Upon further questioning, the director of EBL Coaching testified that the selection of 500 hours was based on her assessment of the student, the review of past evaluative information, and working with other students with ADHD and executive functioning deficits, and the recommendation was "an average of five to seven hours per week over a two-year school time span" (Tr. pp. 353, 355, 357). Of note, the neuropsychologist that testified at the impartial hearing supported the recommendation for 500 hours and testified that it was "reasonable" to assist the student with her academic and executive functioning skills (Parent Ex. L at ¶ 11).

The district does not cross-appeal from the IHO's determination of compensatory education services but argues that the IHO properly denied an award of 500 hours. The district argues that the director of EBL Coaching did not conduct any assessments of the student pertaining to executive functioning and writing and solely relied on the May 2020 private neuropsychological evaluation without any input from the student's current teachers (Answer at ¶ 10).

As noted above, part of the compensatory education services sought by the parent are for claims that are barred by the statute of limitations and therefore are not recoverable. Additionally, another portion of the compensatory education relief was sought in relation to the 2018-19 school year, that is for whatever portion of that school year that is not barred by the statute of limitations and for which relief is appropriate, and those issues should be addressed in the first instance by the IHO upon remand. As for the remaining period, under the circumstances, the award of 160 hours is reasonable for the denial of FAPE from the date of the June 2020 CSE meeting, when the district should have found the student eligible for special education, continuing through the 2020-21 school year. This approximates essentially one hour per day of compensatory education in the form of tutoring for the one-year denial of FAPE.

As a final note, the parent requests compensatory education services based on the results of a neuropsychological IEE and an OT IEE ordered by the IHO. However, such a request appears to be a request that a hearing officer delegate the authority for determining an appropriate award of compensatory education to a third party (see Application of a Student with a Disability, Appeal No. 20-149). As has been noted in prior State level review decisions, reticence in calculating a compensatory education award without IEEs is understandable, as they might offer some insight into what position the student would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services the student should have received (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]; see Newington, 546 F.3d at 123). However, in this instance, as discussed above, the hearing record included sufficient information—including a private May 2020 neuropsychological evaluation—in order to make a determination as to an appropriate compensatory award.[26] Here, rather than utilizing an evaluation

[26] If the IHO had determined that additional evaluative information were necessary, the IHO could have either required the parties to submit additional evidence to support the request for compensatory education or ordered interim IEEs and advised the parties that they were free to request that the case remain open until the IEEs were completed, allowing additional time to reach a conclusion on compensatory education services on the merits (see Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 [D.D.C. 2017] ["A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft

to be conducted in the future in order to determine an award for a denial of FAPE that has now occurred over one year ago, it is more appropriate for the evaluations to be used in developing the student's educational program going forward and the CSE is directed to reconvene upon completion of the IEE's to develop an appropriate program for the student.

2. IEEs

In its cross-appeal, the district asserts that the "IHO's order of funding a comprehensive neurological and OT IEE must be annulled" (Answer at ¶ 15). However, other than asserting that the hearing record "fails to support the Parent's request for these evaluations," the district offers no reasoning for why the IHO's award of an IEE was in error.

The IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]; see 8 NYCRR 200.1[z]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense that was sought for additional information]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

Review of the hearing record shows that the parent first requested an IEE from the district in her June 2021 due process complaint notice (Parent Ex. A at pp. 9-10). The parent disagreed with the March 2021 district psychoeducational evaluation and asserted that the district failed to assess the student's needs in OT (id.). The parent requested an IEE at public expense consisting of a comprehensive independent neuropsychological evaluation and an independent OT evaluation (id. at p. 10).

The parent testified by affidavit that she was not provided with a copy of the March 2021 psychoeducational evaluation report but was "later told" by the school psychologist that the evaluation "consisted merely of teacher reports and involved no objective testing of [the student's] cognitive or academic abilities" (Parent Ex. M at ¶ 33). The parent testified that she disagreed with the psychoeducational evaluation and continues to disagree with the evaluation "as it does not thoroughly assess [the student] in all areas of her suspected disability" (id.).

---

an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination"]).

Here, there is some evidence that the parent disagreed with the March 16, 2021 evaluation, but there are no arguments from the district opposing the IEEs other than the vague statement that that award of IEEs shall be annulled. It is not the responsibility of an SRO to research and construct the appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [holding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

In past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094). This is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), and, in most instances it is likely that a parent would be in a better position to elicit an agreement from the district to fund an IEE if the IEE was requested outside of the more formal context of an impartial hearing.[27] However, here, as noted above, after the parent requested an IEE in the due process complaint notice and the IHO awarded the parent an IEE at district expense, it was incumbent on the district to present an argument in defense of its evaluation of the student.

During the impartial hearing, the neuropsychologist who the parent identified to perform the neuropsychological evaluation testified that she charged the amount of $7,000 which was "well within the normal market rate in New York City" (Parent Ex. L at ¶ 13). The district did not argue that the cost was excessive or that the rate exceeded the district's cost containment criteria, and it did not offer into evidence its policy regarding reimbursement rates for IEEs or its maximum rates for specific tests. Nor did the district offer any evidence that the rates sought by the parent were excessive, such as evidence of rates charged by other evaluators for similar assessments. Thus there is no evidence of the district's IEE rate in this case, and that is not the type of fact of which one may take judicial notice, especially when the parent must be given the opportunity to challenge cost containment policies as applicable to IEEs of a particular child.

Accordingly, the parent will be granted one neuropsychological IEE in the amount of $7,000 and one OT IEE at district expense.

3. Unilateral Services - Tutoring

The parent contends that the IHO failed to address her request for reimbursement of the parent's out-of-pocket tutoring expenses incurred over the school years at issue (Req. for Rev. at

[27] Although I will not reverse course from recent SRO decisions at this juncture, the practice of a parental "due process compliant IEE request" is increasing in frequency in this jurisdiction and I am no longer completely convinced it is permissible for a parent to commence an impartial hearing to seek an IEE at public expense and communicate their disagreement with a district evaluation for the first time therein.

p. 5). According to the parent, as a result of the student's "struggles" that were not addressed by the district over the four school years, she paid approximately $5,000 for the student to receive tutoring outside of school (Req. for Rev. at p. 5; Parent Ex. M at ¶ 38).

The issue in this matter is whether the tutoring obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

As for the substantive standard for assessing the services that are unilaterally obtained by a parent, 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 (Carter, 510 U.S. 7; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show

that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Accordingly, the parent's request for tutoring must be assessed under this framework as well; namely, having found that the district failed to offer or provide appropriate services, the issue is whether the tutoring unilaterally obtained by the parent constituted appropriate services for the student such that the cost of the tutoring is reimbursable to the parent upon presentation of proof that the parent has paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parent is legally obligated to pay but do not have adequate funds to do so. However, upon review of the documentation and testimony presented by the parent during the hearing, it appears that, there is insufficient evidence to show that the tutoring was appropriate to address the student's special education needs and that the costs of same are reimbursable to the parent.

The only information concerning the nature of the tutoring services in the hearing record is testimony by the parent (see Parent Ex. M). The parent testified that during the 2017-18 school year she paid for "after school reading support" and tutoring during the summer 2018 "to build skills in reading fundamentals, fluency, and comprehension" (Parent Ex. M at ¶ 10). Then, in

February 2019 and continuing through the summer 2019 the parent paid for tutoring services for the student (id. at ¶ 15). Additionally, during the 2018-19 school year the parent herself provided daily support for "executive functioning, planning, and organization support" (id. at ¶ 16). During the summer 2020 the parent testified that the student attended a summer reading program (id. at ¶ 24). The parent also testified that during the 2020-21 school year the student was enrolled in an after-school math program (id. at ¶ 29). In her request for review, the parent claims that a "significant portion of the tutoring expenses" were incurred during the 2019-20 and 2020-21 school years (Req. for Rev. at p. 6). However, there is no evidence in the hearing record concerning the content of the tutoring provided or whether the tutoring was appropriate to meet the student's educational needs. As a result, there is no basis in the hearing record to support the parent's request for reimbursement of tutoring costs.

4. Prospective Placement

Going forward, the IHO ordered the district to develop an IEP for the student including recommendations for a minimum of five hours per week of 1:1 SETSS and a minimum of one hour per week of individual counseling (IHO Decision at p. 12). The parent does not appeal the IHO's order for SETSS but seeks modification of the IHO's order to provide for CBT, as recommended by the private neuropsychologist, instead of school counseling (Req. for Rev. at pp. 6-7). On the other hand, the district cross-appeals from the IHO's order asserting that the decision as to the student's programming should be reserved for a future CSE and by making this order the IHO "improperly stepped into the role of the CSE" (Answer at ¶ 15).

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

While prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018). The parent cannot return to due process and fault the district for providing the very remedy sought by the parent and ordered by the IHO.

Nevertheless, as the district in this case has failed to find the student eligible for special education at successive CSE meetings—June 2020 and March 2021, the parent's concerns as to the immediacy of requiring the district to place the student in an educational program are justified. Accordingly, the district's cross-appeal seeking to overturn the IHO's award of a prospective educational placement is denied and I will address the contours of what type of program the student should be receive until a CSE can convene to review the IEE's granted at public expense and recommend a placement.

Turning to the IHO's award of individual SETSS going forward, the hearing record, including the May 2020 neuropsychological evaluation, does not indicate that the student required a program consisting of 1:1 special education instruction. For example, in addition to classroom and testing accommodations, the neuropsychological evaluation report recommended that the student receive support from a behavioral therapist, learning specialist, or executive functioning coach "to help her improve the organization and execution of academic work" (Parent Ex. E at p. 12). According to the report, this service would help with providing strategies for breaking down directions and following through with them, providing strategies for organization, practicing with articulating what generalizations can be made from specific learning situations, and teaching mnemonic devices to help with the student's delayed memory (id. at p. 13).

Considering the above, a more tailored approach would have been a recommendation for resource room services (see 8 NYCRR 200.6[f]). A resource room program is defined by State regulation as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). State policy guidance further clarifies that resource room services are for the purpose of "supplementing" instruction ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 9 [emphasis in the original]). State guidance describes examples of supplementary instruction that might be provided in a resource room, such as "organization skills, reading, the use of an assistive technology device, the use of Braille or the use of a compensatory strategy" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 10-11). Therefore, rather than directing that the student receive SETSS, it is directed that the student be provided with a resource room program (individual or group) for at least five hours per week.[28]

[28] If the parties can agree upon the use of and a definition SETSS for that includes a frequency, duration, and student to staff ratio rather than the regulatory definition of resource room, I will allow room for such an agreement. SETSS are not defined in the State continuum of special education services (see 8 NYCRR 200.6), and it went largely undefined in the hearing record in this case (see, e.g. Tr. pp. 182-83; 224-26, 228). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

As for counseling, there is evidence in the hearing record that the student required counseling. The TAG special education teacher testified that the March 2021 CSE discussed the neuropsychologist's recommendation for CBT and, after noting that CBT was not something the district provided in a school setting, the CSE discussed providing counseling for the student as counseling could be provided through a 504 plan (Tr. pp. 230-31).[29] However, according to the testimony of the TAG special education teacher the parent was not interested in counseling as recommended by the March 2021 CSE (Tr. p. 231).[30]

The private neuropsychologist diagnosed the student with an other specified anxiety disorder based upon her "marked worry and distress" with respect to stressors involving "keeping up in class and performing well in school" (Parent Ex. E at p. 11). The private neuropsychologist also stated that the student's anxiety overwhelmed the student, and she has had "thoughts of hurting herself" (id. at pp. 10-11). It was further noted that the student's "emotional distress" caused difficulty for the student in socializing with peers and "at times isolating herself and avoiding others" (id. at p. 10).

The private neuropsychologist recommended CBT to address the student's anxiety, the neuropsychologist recommended CBT to help the student identify "negative emotional states," challenge her "automatic, maladaptive thoughts of worry," develop strategies to deal with her anxiety, improve her self-esteem, and develop techniques for coping with her distress (Parent Ex. E at p. 13).

Although I agree that the evidence in the hearing record demonstrates that the student requires school-based counseling as a related service, the specific method of providing counseling services should be left to the discretion of the school's provider.[31] Accordingly, the hearing record supports the IHO's directive that the student be provided with counseling at a minimum of one hour per week and it will not be modified on appeal.

Since the student requires special education services as described above, the newly developed IEP shall remain in effect until the completion of the IEEs and the CSE reconvenes to consider all evaluative information in developing the student's IEP.

---

[29] Although every student who needs counseling services would not qualify as a student eligible for special education because the student would have to fall within one of the disability categories, if a student is found to have one of the qualifying disabilities a need for counseling services alone would appear to meet the "needs special education or related services" part of the eligibility analysis as the broad definition of special education within New York's Education Law includes related services such as counseling (see Educ. Law § 4401[2][k]).

[30] The school psychologist recalled a discussion at the March 2021 CSE meeting about counseling and the recommendation by the private neuropsychologist for CBT, but the district did not provide the level of CBT in school (Tr. pp. 262-63, 299-00).

[31] The precise teaching methodology to be used by a student's teacher or provider is usually a matter to be left to the teacher's or provider's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257).

VII. Conclusion

Consistent with the findings set forth herein the IHO's determinations that the parent's claims for the 2017-18 school year are barred by the statute of limitations and that the district denied the student a FAPE by finding the student was not eligible for special education at the June 2020 and March 2021 CSE meetings are upheld. However, the finding by the IHO dismissing the parent's claims for the 2018-19 school year must be reversed and the matter remanded for a determination regarding the parent's child-find claims for the 2018-19 and 2019-20 school years up to the June 2020 CSE meeting. Further, and consistent with the IHO's findings, I find that the parent is entitled to 160 hours of compensatory tutoring, a comprehensive neuropsychological IEE at a cost not to exceed $7,000, and an OT IEE at a reasonable market rate. Finally, the district is directed to deliver special education and related services consistent with the findings set forth herein to the student and to reconvene the CSE after completion of the IEEs to develop an educational program for the student.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 11, 2022, is modified by reversing the IHO's findings that the parent's claims for the 2018-19 school year were time barred by the applicable statute of limitations and this matter is remanded for further proceedings consistent with this decision;

IT IS FURTHER ORDERED that the IHO's decision, dated July 11, 2022, is modified such that the ordered independent neuropsychological evaluation shall not exceed the cost of $7,000;

IT IS FURTHER ORDERED that the IHO's decision, dated July 11, 2022, is modified to direct the CSE to develop an IEP classifying the student as a student with an other-health impairment, and directing the district to provide the student with five 60-minute sessions per week of a resource room program, unless the parties shall otherwise agree, and at a minimum one hour per week of counseling until such time as the CSE reconvenes to review and consider the ordered IEEs.

Dated: **Albany, New York**
October 3, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER