



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-148

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

#### **Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Cuddy Law Firm, PLLC, attorneys for respondents, by Joseph Sulpizio, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to provide a free and appropriate education (FAPE) to the respondents' (the parents') son for the 2019-20, 2020-21, and 2021-22 school years and ordered it to fund an independent education evaluation (IEE) and compensatory education. The parents cross-appeal from those aspects of the IHO's decision which found certain recommendations made by the district's Committee on Special Education (CSE) were appropriate. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter must be remanded to the IHO for further administrative proceedings.

#### **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 presents with average to low average cognitive skills and average to borderline academic skills (Joint Ex. VII; Dist. Ex. 11 at p. 3). Additionally, the student has difficulty with dynamic receptive and expressive language, social communication, pragmatic language, social and activities of daily living (ADL) skills (Dist. Exs. 11 at p. 3; 22 at p. 6; 38 at pp. 2-4).<sup>1</sup> He has

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<sup>1</sup> The student's performance on formal testing of his receptive and expressive language skills was in the average

received the diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (Dist. Exs. 17 at p. 2; 18). As a younger child, the student received related services through the Early Intervention Program and the Committee on Preschool Special Education (CPSE) (Dist. Ex. 17 at p. 2; Joint Ex. VII at p. 1).

CSEs convened on May 9, 2017 and April 23, 2018 to conduct the student's initial and annual reviews, respectively, and to develop IEPs for the 2017-18 (kindergarten) and 2018-19 (first grade) school years (Dist. Exs. 5 at p. 1; 7 at p. 1).<sup>23</sup> The CSEs found the student eligible for special education as a student with autism (Dist. Exs. 5 at p. 1; 7 at p. 1).<sup>4</sup> The CSEs recommended a daily 8:1+2 special class with two 30-minute classes of adapted physical education per week, along with related services of individual speech-language therapy, individual occupational therapy (OT), and parent counseling and training, and supplementary aids and services/program modifications/accommodations (Dist. Exs. 5 at pp. 7-8; 7 at pp. 10-11). The April 2018 CSE found the student eligible for 12-month school year services (Dist. Ex. 7 at pp. 11-12).<sup>5</sup>

A January 11, 2019 speech-language annual review report indicated that the student needed to "continue to improve all areas of speech and language" (Dist. Ex. 8 at pp. 1-2). The student demonstrated difficulty with syntax and grammar and needed to work on using pronouns appropriately (id. at p. 2).<sup>6</sup>

A February 14, 2019 psychological evaluation report indicated that the student was being considered for a referral to OPWDD (Dist. Ex. 11 at pp. 1-2).<sup>7</sup> The report indicated that the student

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range, but according to "dynamic testing" results, his communication functioning was in the low average range (Dist. Ex. 22 at p. 6).

<sup>2</sup> The May 2017 CSE conducted the student's initial review, representing his transition from the CPSE to the CSE (Dist. Ex. 5 at p. 1).<sup>3</sup> Notwithstanding that several of the meetings that took place for the school years at issue were identified as subcommittees on special education rather than committees (see Dist. Exs. 7 at p. 1; 15 at p. 1; 37 at p. 1; Joint Ex. II at p. 1), for ease of reference, this decision will refer to the subcommittees as CSEs unless otherwise relevant.

<sup>3</sup> Notwithstanding that several of the meetings that took place for the school years at issue were identified as subcommittees on special education rather than committees (see Dist. Exs. 7 at p. 1; 15 at p. 1; 37 at p. 1; Joint Ex. II at p. 1), for ease of reference, this decision will refer to the subcommittees as CSEs unless otherwise relevant.

<sup>4</sup> The student's eligibility for special education as a student with autism for the school years at issue is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> The 12-month services were scheduled from July 9, 2018 to August 17, 2019 and included an 8:1+2 special class, an 8:1+2 adapted physical education class, speech-language therapy once per week, and OT once per week (Dist. Ex. 7 at p. 11).

<sup>6</sup> There is an undated OT annual report in the hearing record (see Dist. Ex. 9). Based on a review of the OT report, it was likely created in January or February 2019 in conjunction with the other reports developed at that time because the present levels of performance for OT listed in the April 2019 IEP are very similar to the information included in this report (compare Dist. Ex. 9 at pp. 1-2, with Dist. Ex. 15 at pp. 4-10).

<sup>7</sup> Although not specified in the report, OPWDD stands for the Office for People with Developmental Disabilities.

attained a full scale IQ of 86 which placed his overall cognitive functioning within the low average range (id. at p. 2). The report provided additional scores for verbal and nonverbal subtests and the student's daily living skills were assessed (id. at pp. 2-3). The evaluator indicated that recommendations were "deferred pending the results of the other evaluations and the team conference" (id. at p. 3). A February 20, 2019 psychosocial evaluation report also indicated the student should be referred to OPWDD (see Dist. Ex. 12).

The student's first grade report card for the "2019" school year indicated that the student received "NE" (not evaluated at this time) for all subjects except physical education, English as a new language (ENL), work habits, and social development (see Dist. Ex. 13). In ENL and social development, the student received a variety of scores (id. at pp. 2-3). The report card included teacher comments for the second, third, and fourth marking periods (id. at p. 4).<sup>8</sup>

A CSE convened for an annual review on April 8, 2019 to develop the student's IEP for the 2019-20 school year (second grade) (see Dist. Ex. 15).<sup>9</sup> The CSE recommended a daily 12:1+2 special class and a 30-minute 12:1+1 adapted physical education class twice per six day cycle (id. at p. 7). Additionally, for related services, the CSE recommended one 30-minute session of small group counseling services per week, two 30-minute sessions of small group speech-language therapy per week, one 30-minute session of individual speech-language therapy per week, and four 30-minute sessions of parent counseling and training per year (id.). The CSE also indicated that the student would "participate in an adapted physical education class with modified curriculum and small student to teacher ratio to meet his attention and language needs and participate in a regular physical education program one time per week" (id. at p. 9). The CSE recommended 12-month services, which included a daily 8:1+2 special class, a twice weekly 8:1+2 adapted physical education class, two 30-minute sessions of speech-language therapy per week, and one 30-minute session of OT per week (id. at p. 8).

A private educational evaluation, dated May 7, 2019, indicated that the student was referred in order to "make an appropriate assessment of his current academic functional level" and to develop recommendations for the student (Dist. Ex. 16 at p. 1). The evaluator indicated that the student's performance in the average and low average ranges did "not reflect his current challenges" (id. at p. 3).

A private speech-language evaluation, dated August 20, 2019, reflected that the purpose of the evaluation was to assess the student's current level of functioning, and provide diagnostic clarification and recommendations (Dist. Ex. 17 at p. 1). According to the evaluation, the parent reported concerns with the student's academics, attention, activity levels, and general behavior (id.). The evaluator found that the student presented with a mixed receptive-expressive language disorder with social communication weaknesses and a speech-sound disorder (id. at p. 18). The evaluator recommended that the student receive three sessions per week of individual speech-language therapy and one to two sessions per week of small group therapy for social thinking in

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<sup>8</sup> A first grade mastery tracking sheet was entered into the hearing record (see Dist. Ex. 14).

<sup>9</sup> The hearing record includes two copies of the April 2019 IEP (Parent Ex. B; Dist. Ex. 15). As Parent Exhibit B is not as clear and legible as District Exhibit 15, for the purposes of this decision, District Exhibit 15 will be cited.

order to address deficits in auditory processing, language formulation, discourse, narrative production, social communication and articulation (id.).<sup>10</sup>

Private evaluators also administered the Autism Diagnostic and Observation Schedule, the results of which were set forth in a report dated January 6, 2020 (Dist. Ex. 18 at pp. 1, 2).<sup>11</sup> The evaluators found that the student met the criteria for a diagnosis of autism spectrum disorder and indicated that he would benefit from a social curriculum and ongoing speech-language therapy (id. at p. 4).

An annual review report for adapted physical education, dated February 28, 2020, stated that physical development information about the student could be found in an OT report (Dist. Ex. 19). The adapted physical education report indicated that the student was progressing satisfactorily towards achieving his then-current annual goal and proposed a new annual goal for the next year (id.).

The district provided the parents with a prior written notice and proposed reevaluation request for consent, dated March 3, 2020 (Dist. Ex. 20 at p. 1). The district requested authorization to conduct a bilingual psychoeducational evaluation, social history update, bilingual speech evaluation, OT evaluation, and adapted physical educational evaluation (id.). The parent provided consent for all requested evaluations on March 4, 2020 (id. at p. 4).

A district speech-language evaluation, dated March 13, 2020, assessed the student's language using the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) (Dist. Ex. 22 at pp. 1, 3). The summary of the report indicated that the student demonstrated average receptive and expressive language skills on formal testing, and low average communication skills with weaknesses in social communication noted (id. at p. 6).

School building closures took place in March 2020 as a result of efforts to combat the spread of infection during the COVID-19 pandemic.

An April 9, 2020 annual review educational report for counseling services indicated that the student was in group counseling to promote positive social interactions and would continue to benefit from group counseling (Joint Ex. III at p. 1).<sup>12</sup> An April 17, 2020 annual review educational report for speech-language therapy indicated that the student was receiving three sessions of speech-language therapy per week (Joint Ex. IV at p. 1). The report indicated that the student continued to need improvement in all areas of speech and language skills, including syntax and grammar forms, and social and pragmatic skills (id. at p. 2).

A CSE convened on April 29, 2020 to conduct the student's annual review and develop

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<sup>10</sup> The evaluator provided a list of goals that could be addressed through speech-language therapy (Dist. Ex. 17 at pp. 18-19).

<sup>11</sup> In the report, the evaluator references administration of both the ADOS-2, and the ADOS, Module III/3 (see Dist. Ex. 18 at pp. 1, 2, 4).

<sup>12</sup> This exhibit included two pages in Spanish (Joint Ex. III at pp. 2-3).

an IEP for the 2020-21 school year (third grade) (Joint Ex. II at p. 1).<sup>13</sup> At the April 2020 CSE meeting, the parent agreed that the student's re-evaluation "could be conducted when the school buildings re-open" (*id.*). The CSE recommended a 12:1+2 special class daily and two sessions of adapted physical education per six day cycle (*id.* at p. 10). Further, the CSE recommended one 30-minute session of small group counseling per week, one 30-minute session of individual speech-language therapy per week, one 30-minute session of small group speech-language therapy per week, and one 30-minute session of small group parent counseling and training per quarter (*id.*).<sup>14</sup> The April 2020 CSE added recommendations for supplementary aids and services/program modifications/accommodations consisting of "check[s] for understanding" during introduction of new information and "refocusing and redirection" whenever needed (*id.*).

The CSE amended the student's IEP without a meeting on May 29, 2020 (Joint Ex. II at p. 1).<sup>15</sup> The IEP indicated that the student would receive 12-month services through synchronous learning during school closures related to the COVID-19 pandemic consisting of two hours per day of direct instruction in a 12:1+1 special class with one 30-minute session of "push in" speech-language therapy per week in a small group (*id.* at pp. 1, 11).

The student's second grade report card indicated that the student was not evaluated for all subjects except ENL, physical education, media, work habits, and social development (*see* Dist. Ex. 27). The report card included teacher comments for the first and second marking period (*id.* at p. 4).<sup>16</sup> Additionally, an IEP annual goals and objectives progress report dated June 10, 2020, reflected that the student achieved two and was progressing gradually toward one of his reading goals, achieved one and was progressing satisfactorily toward two math goals, was progressing gradually toward one speaking/listening goal, achieved one and was progressing satisfactorily toward two speech-language goals, achieved one social/emotional goal, and was progressing satisfactorily toward one of two motor goals (*see* Dist. Ex. 29).

The student attended the district elementary school in a 12:1+2 special class during the 2020-21 school year (*see* Dist. Ex. 32 at p. 1).<sup>17</sup> A December 4, 2020 adapted physical education

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<sup>13</sup> The IEP generated at the April 29, 2020 CSE meeting was not included in the hearing record; however, the May 29, 2020 IEP included the information from the April 29, 2020 CSE meeting (Joint Ex. II at pp. 1-2). Also, an April 29, 2020 prior written notice indicated that the CSE continued to recommend a 12:1+2 special class, adapted physical education, related services, and 12-month services (Dist. Ex. 25 at p. 1).

<sup>14</sup> The recommendations mirrored those of the April 2019 IEP except for the change from two sessions of small group speech-language therapy to one (*compare* Joint Ex. II at pp. 10, 12, *with* Dist. Ex. 15 at pp. 7, 9).

<sup>15</sup> The district amended the IEP in May 2020 because, at the April 2020 CSE meeting, it was unsure, given the closure of school buildings during the COVID-19 pandemic, if there would be a 12-month school year program (*see* Tr. p. 115). Shortly thereafter, the district decided to provide a 12-month school year program to eligible students through synchronous learning (Joint Ex. II at pp. 1, 11). Though a 12-month school year program was recommended to the student, the student attend the Boys and Girls Group during summer 2020 (*see* Tr. p. 658).

<sup>16</sup> The hearing record included a "student contact log" dated from March 2020 to June 2020 (*see* Dist. Ex. 28).

<sup>17</sup> The district indicated that school initially began with remote instruction but "soon switched to a hybrid model"

re-evaluation report indicated that the evaluator assessed the student using the Test of Gross Motor Development-2 (TGMD-2) (Joint Ex. V at p. 1). The results showed that the student was developmentally behind his peers and was at an age equivalent of 6 years in locomotor skills (16th percentile) and five years six months in object control skills (2nd percentile) (id. at p. 1). The evaluator recommended that the student continue with adapted physical education twice per six day cycle (id.).

A February 18, 2021 annual educational report indicated that the student was "an ungraded student classified with Autism" and that he had progressed academically, socially, and behaviorally (Dist. Ex. 32 at p. 1). Further, the report indicated that the student's cognitive delays "inhibit[ed] him from participation in a general education curriculum" (id. at p. 3).

An adapted physical education annual review report dated February 21, 2021 indicated that the student received OT services and referred the reader to the OT report (Dist. Ex. 35). A speech-language annual review report dated February 22, 2021 indicated that the student was making "good progress" toward his goals and that sessions addressed improving his pragmatic and overall language skills, vocabulary, and grammar (see Dist. Ex. 33). A February 22, 2021 annual report for counseling services indicated that the student was receiving group counseling in-person and remotely "to promote positive social interactions and on-task behaviors" (Joint Ex. VI). The school social worker opined that the student would continue to benefit from group counseling and 12-month services to avoid regression (id.).

The district conducted a March 2, 2021 bilingual psychoeducational evaluation as part of the student's "mandated bilingual re-evaluation" (Joint Ex. VII at p. 1). The report indicated that the evaluator conducted a record review and administered the Differential Ability Scales-II (DAS-II) and the Weschler Individual Achievement Test, Fourth Edition (WIAT-IV) (id. at p. 2). The bilingual school psychologist recommended several supports to address the student's writing and indicated that the CSE would make services recommendations (id. at p. 8).

A CSE convened on March 4, 2021 for an annual review and developed an IEP for the 2021-22 school year (fourth grade) (Dist. Ex. 38 at p. 1).<sup>18</sup> The CSE recommended a daily 15:1 special class with one 30-minute session of small group counseling per week, one 30-minute session of individual speech-language therapy per week, one 30-minute session of small group speech-language therapy per week, and one 30-minute session of parent counseling and training per quarter (id. at p. 8). The CSE also recommended supplementary aids and services/program modifications/accommodations, testing accommodations, and 12-month services (id. at pp. 8-

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in which the student attended school in person four days per week and received remote instruction one day per week (Dist. Post-Hr'g Br. At p. 4).

<sup>18</sup> Two IEPs were created from the March 4, 2021 meeting (see Dist. Exs. 37; 38). The first IEP was listed as a "[r]evaluation review" and specified a projected start date of April 12, 2021 and a projected end date of June 25, 2021 (Dist. Ex. 37 at p. 1). The IEP for the remainder of the 2020-21 school year indicated that the parent expressed that the student's behaviors were a major concern at home (id.). The IEP also indicated that the student would receive instruction in a 12:1+2 special class daily with two sessions of adapted physical education per six day cycle as well as counseling services once per week, individual speech-language therapy once per week, and small group speech-language therapy once per week (id. at p. 10).

10).<sup>19</sup> The IEP also stated that the student would "participate in an adapted physical education class with modified curriculum and small student to teacher ratio to meet his attention and language needs and participate in a regular physical education program one time per week" (id. at p. 10).

In email dated March 17, 2021, the district informed the parent that the student's counseling services were "currently on hold" because the student's provider was "out" (Parent Ex. DD at p. 1).<sup>20</sup> The email also indicated that the district was documenting how many sessions the student missed, in order to have those services made up at a later date (id. at pp. 1-2).

The parent's attorney made a request for educational records on March 19, 2021 (see Parent Ex. M).

The student's third grade report card for the "2021" school year marked that the student was not evaluated for all subjects except ENL and social development, the first quarter for physical education, and the last three quarters for work and study habits (see Dist. Ex. 40). The teacher provided comments for all four marking periods (id. at p. 4). Additionally, five-week interim progress reports dated May 25, 2021 provided ratings of the student's classroom behavior and learning behaviors/skills (see Dist. Ex. 39). The IEP annual goals and objectives progress report for the 2020-21 school year dated June 22, 2021 reflected that the student had achieved one and was progressing satisfactorily toward one reading goal, achieved one and was progressing satisfactorily toward one writing goal, achieved one and was progressing satisfactorily toward two math goals, was progressing satisfactorily toward three speech-language goals, and achieved his motor goal (see Dist. Ex. 41). The progress report noted that "[c]ounseling resumed on June 1" and the student "continue[d] to work on social emotional goals" (id. at p. 7).

In a letter to the district, dated August 24, 2021, the parent indicated that she disagreed with the district evaluations of the student and requested an IEE at public expense (Dist. Ex. 42).<sup>21</sup> Specifically, the parent sought an IEE consisting of a bilingual neuropsychological evaluation, a bilingual speech-language evaluation, an OT evaluation, a physical therapy (PT) evaluation, and a bilingual applied behavior analysis (ABA) skills assessment (id.). The parents indicated who they wished to perform the IEE for each requested assessment and the projected cost (id.).

A summary of related services session notes from July 6, 2015 to August 24, 2021 was included in the hearing record (see Dist. Ex. 43).

An independent assessment by EBL Coaching dated August 26, 2021 indicated that the student was assessed to determine academic areas of strength and weaknesses (Parent Ex. L). The

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<sup>19</sup> The CSE recommended 12-month services of a daily 12:1+2 special class with one 30-minute session of small group speech-language therapy per week (Dist. Ex. 38 at p. 9).

<sup>20</sup> A subsequent letter dated March 22, 2021 also indicated that the student's counseling services were unavailable "due to unforeseen circumstances" and a provider would begin services as soon as possible (Parent Ex. N).

<sup>21</sup> The hearing record includes two copies of the parent's August 24, 2021 letter (see Parent Ex. O; Dist. Ex. 42). For purposes of this decision, the district exhibit will be cited.



evaluator opined that the student was in "critical need of one-to-one multisensory instruction" and "highly" recommended 600 hours of intensive 1:1 tutoring (id.).

### **A. Due Process Complaint Notices**

By due process complaint notice dated September 28, 2021, the district asserted that it "sufficiently evaluated the Student in all suspected areas of disability and provided an appropriate program and related services to address the Student's needs" (Dist. Ex. 1 at pp. 2-3).<sup>22</sup> The district argued that the IEE requested by the parents was not justified and that the parents "failed to provide any justification as to why it was necessary to challenge the District's evaluation" of the student (id. at p. 3). The district requested an order finding it had "fully and properly evaluated" the student and a denial of the parents' request for an IEE that did not comply with the district's "reasonable criteria" for IEEs (id.).<sup>23</sup>

The parents filed a due process complaint notice dated October 6, 2021 and requested that it be consolidated with the district's September 28, 2021 due process complaint notice (see Joint Ex. I at pp. 2-3). Initially, as relevant to the district's due process complaint notice, the parents argued that the district failed to appropriately respond to their request for an IEE (id. at pp. 7-8). The parents asserted that the district acted with "unnecessary delay" as it did not respond to their request for over a month before filing its due process complaint notice (id. at p. 8). Due to the district's delay, the parents contended that they had to file their own due process complaint notice in order to obtain the requested IEEs (id. at p. 8).

The parents alleged that the district failed to provide the student a FAPE during the 2019-20, 2020-21, and 2021-22 school years (Joint Ex. I at pp. 2, 7).<sup>24</sup> The parents contended that throughout these years, the district "failed to comprehensively evaluate [the student] to understand his needs and abilities and failed to develop appropriate programs that allowed for meaningful progress" (id. at p. 3).

For all the school years in in dispute, the parents argued that they were denied the right to meaningfully participate in the CSE process because the district failed to appropriately evaluate the student, denied them access to educational records, and failed to address their concerns about the student (Joint Ex. I at p. 7).<sup>25</sup> Further, the parents contended that they were denied the ability to meaningfully participate due to the district's failure to provide them with documents translated into Spanish, their native and primary language, despite repeated requests (id.). Also, the parents

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The district's due process complaint notice bears the date September 28, 2020 in the section where the district's attorney signed the document (Dist. Ex. 1 at p. 3). However, the correct date is September 28, 2021 as set forth in the initial information on the form due process complaint notice (id. at p. 2). Further, the facts alleged by the district indicate that the correct year should have been 2021 (see id. at pp. 2-3).

<sup>23</sup> The parents responded to the district's due process complaint notice on October 8, 2021 (Dist. Ex. 3).

<sup>24</sup> The district filed a response to the parents' due process complaint notice on November 2, 2021 (Dist. Ex. 4).

<sup>25</sup> Regarding evaluations, the parents asserted that the district failed to conduct timely and comprehensive evaluations as the district failed to conduct a speech-language evaluation, a PT evaluation, an OT evaluation and failed to ascertain whether the student required an ABA program (Joint Ex. I at pp. 7, 9).

alleged that the district failed to provide Spanish interpretation services at CSE meetings as the interpreter who attended only provided minimal translation and did not translate the district's back and forth dialogue at CSE meetings (*id.*). The parents asserted that the district failed to convene properly composed CSE meetings as related services professionals did not participate in the meetings (*id.* at p. 8). Moreover, the parents contended that the May 2020 IEP was amended by the CSE without holding a meeting with the parents (*id.*).

As for evaluations, the parents alleged that the district's reevaluation of the student conducted between December 2020 and March 2021 was insufficiently comprehensive in that it failed to include evaluations of the student's speech-language, PT, or OT needs or assess the student's social/emotional or behavioral needs utilizing ABA principles (Joint Ex. I at pp. 8-9).

Turning to the IEPs, the parents asserted that the CSEs failed develop appropriate present levels of performance and annual goals (Joint Ex. I at p. 8). Specifically, the parents alleged that the annual goals were vague and unmeasurable and not appropriate to allow the student to make educational progress (*id.*). Further, the parents argued that the CSEs repeated annual goals from one year to the next year, which demonstrated that they failed to develop appropriate goals and failed to allow the student to make progress (*id.*). Moreover, the parents contended that the present levels of performance did not provide an "appropriate and detailed description" of the student's needs and abilities and failed to provide a baseline from which progress could be measured (*id.*). Without appropriate present levels of performance and goals, the parents argued that the district was not able to measure progress and develop appropriate educational programs (*id.*).

Next, the parents contended that the district failed to recommend and provide appropriate related services (Joint Ex. I at p. 9). The parents alleged that the CSEs failed to recommend OT services despite the student's struggles in the area, failed to even discuss PT services, and continued to recommend the same amount of counseling services despite reports of the student's social/emotional delays (*id.*).<sup>26</sup> Moreover, the parents asserted that year after year the CSEs reduced the student's speech-language therapy even though he continued to have deficits in that area (*id.*). The parents also argued that the CSEs failed to recommend an appropriate educational placement for student as he was struggling in the recommended larger classroom settings and needed more individualized attention (*id.* at p. 10).<sup>27</sup> The parents also contended that the district failed to recommend appropriate 12-month school year services for summer 2020 (*id.*). Lastly, the parents asserted that the district failed to implement the student's IEPs as all of the mandated related services were not received (*id.*).

For relief, the parents requested a finding that the student was not offered a FAPE for the 2019-20, 2020-21 and 2021-22 school years and an order granting the requested IEE at public expense (Joint Ex. I at p. 11). In particular, the parents requested a bilingual neuropsychological evaluation, a bilingual speech-language evaluation, an OT evaluation, a PT evaluation, and a

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<sup>26</sup> In addition to not recommending appropriate counseling services, the parents contended that the district failed to appropriately address the student's inattention, behavioral, or social/emotional needs (Joint Ex. I at pp. 9-10).

<sup>27</sup> The parents also argued that the district failed to recommend appropriate "research-based methodologies, multi-sensory instruction, and small group and/or 1:1 instruction" (Joint Ex. I at p. 10).

bilingual ABA skills assessment (id.).<sup>28</sup> Additionally, the parents requested an order requiring the district to translate all documents to Spanish and that all translated documents be provided to the parents at least five days prior to a CSE meeting (id.). The parents requested an order for a Spanish speaking interpreter, who would not be a CSE participant, at future CSE meetings (id.). The parents also requested compensatory education services to remedy the district's failure to provide the student with appropriate educational programs that would allow him to make meaningful educational progress (id. at p. 12).

## **B. Impartial Hearing Officer Decision**

The IHO was appointed to hear both matters and, on November 23, 2021, ordered that the matters be consolidated (Nov. 23, 2021 Interim IHO Decision at p. 1).<sup>29</sup> An impartial hearing convened on February 1, 2022 and concluded on May 31, 2022 after nine days of proceedings (Tr. pp. 1-1081).<sup>30</sup>

In a decision dated September 30, 2022, the IHO found that the district failed to provide a FAPE for the 2019-20, 2020-21 and 2021-22 school years (IHO Decision at p. 29). Specifically, the IHO found that the district failed to provide translation services to the parent; failed to include all the necessary members for the IEP meeting; failed to conduct appropriate evaluations in the areas of speech-language, OT, PT and failed to conduct a neuropsychological evaluation; failed to provide the student with "IEP-mandated related services"; denied the parent an opportunity to participate fully in the IEP meeting; and that the CSE recommended and provided services to the student during the 2019-20, 2020-21 and 2021-22 school years which provided the student with the opportunity to make educational progress (see IHO Decision at pp. 14, 17-18, 20, 26, 29-30).

Regarding the IEE, the IHO first addressed the parents' allegation that the district responded in an untimely manner to their August 25, 2021 request for an IEE by failing to respond within 10 days and not filing a due process complaint notice until September 28, 2021 (IHO Decision at pp. 9-10). The IHO noted that, while the parents placed a ten-day requirement for response in their August 2021 request for an IEE, "this time restriction [wa]s ineffectual as no timeline is proscribed in the regulations" (id. at p. 10). The IHO found that the one month it took for the district to respond was not an unreasonable delay (id.).

Next, the IHO addressed the appropriateness of the district's evaluation of the student (see IHO Decision at pp. 10-17). The IHO noted that "when a parent properly asserts a disagreement with the evaluation as a whole . . . the law does not restrain the scope of the IEE they may seek at

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<sup>28</sup> The parents requested an order that the CSE reconvene within fifteen days of receiving the IEEs and for the district to locate an appropriate out-of-district placement for the student (Joint Ex. I at p. 11). The parents requested that, if no appropriate out-of-district placement was identified, the district be required to fund a nonpublic school of the parents' choosing (id.).

<sup>29</sup> During the course of the impartial hearing the parents obtained an independent neuropsychological evaluation dated January 23, 2022 (Parent Ex. X).

<sup>30</sup> The IHO issued a second consolidation order, dated April 27, 2022, within which the IHO declined to consolidate a new matter initiated by the parents with the impartial hearing already in progress in the present matter (see generally April 21, 2022 Interim IHO Decision).

district expense" (id. at pp. 12-13). The IHO noted that the parents' disagreement with the district's evaluation of the student was based on the March 2021 psychoeducational evaluation, which did not include a parent interview, parent or school staff rating scales, and social/emotional testing (id. at pp. 13-14).

The IHO also found that the district failed to conduct an appropriate speech-language evaluation, an appropriate OT evaluation, and an appropriate evaluation conducted by a physical therapist (see IHO Decision at pp. 14-17). For the March 2020 speech and language evaluation, the IHO found that the district bilingual speech-language pathologist based her decision about what standardized tests to administer on her review of "outdated documents" and only conducted some subtests of the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) and omitted subtests that assess the student's documented areas of need (id. at pp. 14-15).

Regarding an OT evaluation, the IHO noted that, based on evidence in the hearing record, the student's "[a]reas of concern included possible executive functioning, visual perceptual, visual processing, sensory processing, auditory processing, object control skills, and locomotor deficits, all of which f[e]ll within the scope of an occupational therapist" (IHO Decision at pp. 15-16). Based on this finding, the IHO found that an OT report or evaluation should have been conducted to assess the student's areas of concern (id.). For PT, the IHO noted that the district failed to conduct an evaluation by a physical therapist to determine why the student struggled with gross motor skills and failed to determine what, if any, PT supports the student required to benefit from his special education (id. at pp. 16-17).

Regarding the parent's request for a bilingual IEE, the IHO found that, although the student was English dominant and further testing or evaluation using "bilingual tools" might not be required, "parent intake and parent interview w[ould] require bilingual understanding" (IHO Decision at p. 17). Based on the foregoing, the IHO ordered an IEE to include neuropsychological, speech-language, OT, and PT evaluations (id.).

The IHO also addressed the parents' claim that the district failed to provide the student with related services that were mandated in the IEPs for the 2019-20 and 2020-21 school years (IHO Decision at pp. 18-19). The IHO determined that the district's purported policy to not provide make-up services when the student was absent or when it was a school holiday was unavailing as it related to school holidays (id. at p. 18). The IHO determined that a school holiday was a foreseeable occurrence that the district should be required to accommodate long before the beginning of the school year (id.). The IHO found that, based on the student's related service logs for the 2019-20 and 2020-21 school years, the district failed to provide the student a total of 13.5 hours of counseling services and 15.5 hours of speech-language therapy services (id. at p. 19). Accordingly, the IHO ordered the district to provide the student with compensatory services to make up for these services (id.).

Next, the IHO addressed the procedural violations alleged by the parents (IHO Decision at pp. 20-25). First, the IHO found that any delay in the annual reviews conducted by the CSEs during the school years at issue did not give rise to a denial of FAPE (id. at p. 20). As to the composition of the CSEs, the IHO noted that the district bilingual speech-language pathologist who generated a March 2020 evaluation that contained no recommendations did not appear for the subsequent CSE meeting (id.). The IHO further noted that, by considering an evaluation without

recommendations, the district was "ill-equipped" to review the report and then generate recommendations derived from that evaluation (id.). The IHO found that this resulted in a denial of FAPE, particularly considering the parents' right of participation (id.).

Lastly, the IHO found that the district failed to provide the parents an opportunity to participate fully in the CSE meetings by failing to provide translation services to the parents (IHO Decision at p. 25). The IHO found that the meetings held with the parents to discuss evaluation reports were not a "substitute for translated documents" and that, although the district provided an interpreter at CSE meetings, it did not translate the documents considered or the IEPs (id. at p. 23). The IHO further opined that placing the burden on the parents to request translation of documents when the district knew that the parents required translation services was improper and inconsistent with the regulations that require the district to take "reasonable steps to ensure parental participation at the development process of an IEP" (id. at pp. 24-25). Based on this, the IHO found that the district denied the parents an opportunity to fully participate in the CSE process (id. at p. 25). The IHO indicated that an appropriate remedy for this violation would be to require the district to adhere to statutory obligations (id.).

The IHO found that violation of the parents' right to participate "clearly resulted in a denial of FAPE" and that the IEPs were inherently flawed because of the violations of the parents' right to participate (IHO Decision at p. 26). Under the circumstances, the IHO found it "impracticable" to find the IEPs appropriate (id.).

Turning to the question of relief to remedy the denial of a FAPE, the IHO ultimately found that the CSE recommended and provided services to the student during the 2019-20, 2020-21 and 2021-22 school years that provided the student with the opportunity to make educational progress (IHO Decision at p. 26). For the 2019-20 school year, the IHO found that the student progressed academically and socially noting that the teacher saw no evidence of regression during this school year (id. at p. 27). For the 2020-21 school year, the IHO noted that, due to the student's progress in the prior school year, the CSE maintained the same placement recommendations and the student continued to do well (id.). For the 2021-22 school year, the IHO noted that the CSE reached a new determination for the student to be placed in a 15:1 class to access the general education curriculum and socially appropriate peers which was the "next logical step" for the student (id. at pp 27-28). The IHO also noted that in the four years the student attended the district's programs "he progressed from a student that had no functional language, speaking in jargon, gestures and 1-2 word utterances, to a student that was highly verbal and social, communicating in multiple, compound and complex sentences and his reading and math skills improved dramatically" (id. at pp. 26-27). The IHO further noted that the student's measurable progress was clear from the hearing record (id. at p. 28). Based on the foregoing, the IHO found that the student was not entitled to compensatory education as relief to remedy the denial of a FAPE arising from the district's failure to ensure the parents' right to meaningfully participate in the CSE process (id.).

The IHO ordered the district to fund an IEE to be conducted by evaluators of the parents' choosing for specified maximum rates to include: a speech-language evaluation; an OT evaluation; and a PT evaluation; and for the district to fund the independent neuropsychological evaluation conducted in January 2022 (IHO Decision at pp 30-31). The IHO ordered that the evaluations be bilingual to the extent required and, in the discretion of the evaluators, to ensure parental participation and involvement and to better gauge the student's deficits in school based on their

bilingual home environment (id. at p. 30). The IHO further ordered that the parents receive a Spanish translation of the evaluation reports (id. at p. 31). The IHO ordered the district to convene a CSE meeting in accordance with the IDEA to discuss the outcome of all the evaluations and to specifically consider the student's need for an assistive technology evaluation or a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) and what placement is best suited for the student (i.e., within the district or out-of-district) (id. at p 31-32). The IHO also held that, if the CSE determined that an out-of-district placement was needed but such placement was not secured within 60 days of the CSE's determination, the district would be required to fund an out-of-district placement identified by the parents (id.).

For the district's failure to ensure the parents' ability to participate in the CSE process, the IHO ordered the district to provide the parents all meeting invitations, IEPs, evaluation reports, progress reports, notices, and educational documents that would be reviewed at any CSE meeting, in her primary language of Spanish (IHO Decision at pp. 29-30). The IHO further ordered that the district provide a certified Spanish-speaking interpreter who was not otherwise participating at the CSE meeting(s) to provide interpretation services to the parents during CSE meetings (id. at p. 30).

Lastly, for the district's failure to provide the student with related services that were mandated in the IEPs for the 2019-20 and 2020-21 school years, the IHO awarded counseling in the amount of 13.5 hours and speech-language therapy in the amount of 15.5 hours (IHO Decision at p. 32). The IHO declined to award the remainder of compensatory education sought by the parents, including 600 hours of academic tutoring, 138 hours of psychotherapy, 36 hours of family therapy, 72 hours of parent training and counseling, and 276 hours of speech and language therapy (see id. at pp. 28, 32).

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

The district appeals, initially arguing that the IHO erred in determining that the parents were denied the right of meaningful participation because the evaluations and CSE discussions were translated orally rather than in writing. More specifically, the district asserts that the IHO offered no legal authority for his "sweeping conclusion of law" when he found that "by failing to provide translation services to the [p]arent for evaluations and the final IEP, [the district] denied the [p]arent an opportunity to participate fully in the IEP meeting." The district further asserts that the IHO determined that as a matter of law the IEPs had to be provided in writing in the parents' native language and argues that regulations do not require a district to translate the documents in writing. Further, the district argues that it satisfied its obligation when it provided the parents with an interpreter and orally translated the evaluations for the parents prior to the CSE meeting and translated the discussions at the CSE meeting into the parents' native language. Finally, the district asserts that the IHO misapplied the law in determining that the failure to translate the final IEP documents in writing was a denial of FAPE.

The district also argues that the IHO erred in determining that the district failed to offer a FAPE for the 2019-20, 2020-21 and 2021-22 school years.<sup>31</sup> The district asserts that the IHO erred

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<sup>31</sup> It appears that the school years identified in the "second issue" portion of the district's November 2022 request for review does not include the 2021-22 school year. This is presumed to be a typographical error.

in determining that the student was denied a FAPE in light of his determination that the student made consistent progress during his time in the district. The district argues that this ruling was inconsistent with the IHO's conclusion that the IEPs at issue offered appropriate services to the student and that the student made progress under the IEPs. The district further argues that by finding that the IEPs at issue offered appropriate services and that the student made consistent progress during the years at issue, it was improper for the IHO to find that the IEPs were necessarily flawed and denied the student a FAPE.

Next, the district argues that the IHO erred in determining that the district was required to make up related services missed due to holidays and school vacations. The district asserts that the IHO improperly interpreted the law and imposed a requirement that school districts make up related services when a service is scheduled on a day when schools are closed due to holidays or weather closures. The district argues that the IHO's ruling "opens the door to claims that school districts make up instruction in special class as well" and further argues that, if the district is required to make up related services it could also be required to make up instruction in special classes missed due to holidays and weather delays.

The district argues that the IHO erred in determining that the speech-language therapist was a mandatory member of the CSE and that the absence of a speech-language therapist at the meeting was a denial of FAPE. The district further argues that, even if the participation of the speech-language therapist was mandatory, it was an error for the IHO to conclude that this was a denial of FAPE as there was no evidence that the lack of a speech-language therapist at the meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process or caused a deprivation of educational benefits. The district also asserts that the CSE chairperson was a school psychologist who could legally interpret evaluation reports and make recommendations and that the IHO offered no explanation or legal authority indicating why an experienced school psychologist could not interpret a speech-language report and make recommendations.

Lastly, the district argues that the IHO improperly determined that the parents were entitled to district funding of an IEE. The district asserts that the IHO misapplied the law and failed to consider the sufficiency of the district's evaluations in rendering his decision. The district further asserts that the IHO correctly determined that the district conducted bilingual evaluations, but incorrectly determined that "IEEs are a matter of right rather than a matter of discretion." The district argues that the IHO's determination that the district's psychoeducational evaluation was inadequate because it did not include parent interviews, behavior ratings scales, or social/emotional testing was erroneous and that the IHO ignored the testimony of the teacher that there were no behaviors in the classroom setting warranting an evaluation. The district further asserts that the IHO improperly determined that the speech-language evaluation was inadequate because it failed to include recommendations and argues that evaluations conducted in a school setting are not required to include recommendations because the programs and services must be determined by the CSE as a whole and not predetermined by the evaluator prior to the meeting. The district contends that the IHO failed to consider the reports of the classroom teacher and adapted physical education teacher that the student did not have concerns with handwriting, and in fact was a talented artist, and that he did not exhibit sensory needs in the classroom. The district also asserts that the IHO's determination that the district failed to conduct a PT evaluation "to determine why the student struggled" with locomotor and object control skills was misplaced.

The district requests that the IHO's decision be reversed in its entirety because he should have found that the district provided the student for the 2019-20, 2020-21 and 2021-22 school years.<sup>32</sup>

The parents submit an answer with cross-appeal. In the answer, the parents generally deny the material allegations contained within the district's request for review. The parents seek to uphold the IHO's findings that the district denied the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, the district denied the parents meaningful participation in the student's education, the district is required to make up IEP-mandated services that the district failed to provide to the student, the district failed to include all necessary members at the CSE meetings, and the district's evaluation process of the student was inappropriate, and asserts that the IHO correctly ordered an IEE at public expense to consist of neuropsychological, speech-language, OT, And PT evaluations.

As for a cross-appeal, the parents allege that the IHO erred in finding that the district's recommended programs "allowed the [s]tudent with the opportunity to make educational progress" and that "[t]he [s]tudent made consistent progress during the [school] years at issue" and rejecting the parents' request for compensatory education services as a result.

The parents also argue that the IHO failed to assess whether the district offered an appropriate program and services in the areas of (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4) managerial or behavioral needs.

The parents also cross-appeal from the IHO's determination that the district's recommended programs consisting of a 12:1+1 and 15:1 special classes with adapted physical education, speech-language therapy, and counseling were appropriate and argues that, because the IHO found that the IEPs were developed based on data from inappropriate evaluations, or no evaluations at all, the IHO inappropriately concluded the supports offered in the IEP were sufficient. The parents also argue that they provided sufficient evidence to support a finding that the student is entitled to compensatory education service due to the district's failure to recommend an appropriate educational placement, program, and services.

As relief, the parents request that the IHO's finding be upheld regarding the denial of FAPE for the 2019-20, 2020-21, and 2021-22 school years and the ordered relief, and to dismiss the district's appeal in its entirety. Additionally, the parents seek the following additional compensatory education services to make up for the district's alleged failure to provide the student a FAPE, to be provided by independent providers of the parents' choosing at specified rates and be available to the student for at least two years: (1) 600 hours of academic tutoring; (2) 138 hours of psychotherapy and 36 hours of family therapy, all by a licensed psychologist or social worker

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<sup>32</sup> It appears that the request for relief in the request for review is a typographical error. The request states "WHEREFORE, the petitioner respectfully requests that the SRO annul the decision of the Impartial Hearing Officer and enter an Order finding that the District offered the Student a FAPE for the 2020-21 and 2021-22 school years, finding that the Windward program was not appropriate and denying the Parents request for relief in its entirety." It is clear from the hearing record that neither party requested a finding of whether the Windward program was appropriate for the student.



trained in cognitive behavior therapy; (3) 72 hours of parents counseling and training; and (4) 276 hours of speech-language therapy in addition to the 15.5 hours ordered by the IHO.

Finally, in an answer to the parents' answer with cross-appeal, the district argues to uphold the IHO's findings that district's recommended programs allowed the student the opportunity to make educational progress and the IHO's determination that the student made consistent progress during the school years at issue. The district also argues that the IHO considered progress in all areas when he determined that the student made significant progress and that "[p]rogress within the [district's] program is not necessarily disputed among the parent witnesses." The district further argues that compensatory educational services are not warranted in this matter.

## 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]).<sup>33</sup>

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

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<sup>33</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. CSE Processes**

#### **1. CSE Composition**

On appeal, the district asserts that the IHO erred in finding that the speech-language pathologist was a necessary member of the CSE and that the district's failure to include all necessary members of the CSE was a denial of FAPE. In finding that the CSE(s) were not properly constituted, the IHO did not specify in his decision which CSE he was referencing (see IHO Decision at p. 20). The IHO did, however, make more specific findings about the lack of a speech-language pathologist at a 2020 CSE meeting, presumably the April 2020 meeting that occurred shortly after the evaluation was complete (id.). For completeness, the composition of all the CSEs at issue will be examined.

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative;<sup>34</sup> an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student, "including related services personnel as appropriate"; and if appropriate, the student (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).<sup>35</sup>

The April 2019 IEP indicated the following people were present during the CSE meeting: a district supervisor of special education who also served as the CSE chairperson, a district regular education teacher, a district special education teacher, a school psychologist from the student's elementary school (elementary school psychologist), and both parents (Tr. pp. 444-45; Dist. Ex. 15 at p. 1). The mother testified that she was present but that the district "forgot" to bring an interpreter to this meeting (Tr. p. 613).

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<sup>34</sup> State regulation provides that the district representative shall serve as the chairperson of the committee (8 NYCRR 200.3[a][1][v]).

<sup>35</sup> To the extent CSE subcommittees convened to engage in educational planning for the student, a CSE subcommittee need only include a school psychologist as a member if a new psychological evaluation is being reviewed or a change to a more restrictive program option is being considered (Educ. Law § 4402[b][1][d]; 8 NYCRR 200.3[c]). Here, a school psychologist attended all of the meetings at issue, so the distinction is not determinative (see Dist. Exs. 15 at p. 1; 37 at p. 1; Joint Ex. II at p. 1).

The April 2020 IEP indicated that the following people were present during the CSE meeting: a district supervisor of special education who also served as the CSE chairperson, a district regular education teacher, a district special education teacher, a district school psychologist, an interpreter, and the parents (Tr. pp. 103, 463; Joint Ex II at p. 1). The meeting was held virtually (Tr. pp. 466-67, 649). The elementary school psychologist testified that the April 2020 CSE changed the meeting from a reevaluation review meeting to an annual review since the planned reevaluations had not been completed due to delays related to the COVID-19 pandemic (Tr. p. 462). The elementary school psychologist indicated that all the individuals listed on the April 2020 IEP would not have attended the annual review meeting (id.). She recalled that attendees included herself, the special education teacher, a regular education teacher, and the parent (Tr. p. 463). The elementary school psychologist confirmed that no related service providers attended the meeting, but an interpreter was present (Tr. pp. 494-95). The district bilingual speech-language pathologist who evaluated the student in March 2020 confirmed she was not present at the CSE meeting (Tr. pp. 354, 362-63; see Dist. Ex. 22). Likewise, the student's speech-language pathologist who delivered services to the student indicated she did not attend the CSE meeting (Tr. pp. 546-47).

Two IEP documents were developed as a result of the March 2021 CSE meeting (Dist. Exs. 37; 38). Both IEPs listed a school psychologist, a special education teacher, a regular education teacher, an interpreter, and one or both of the parents; the IEP developed for the remainder of the 2020-21 school year additionally listed the supervisor of special education as an attendee (compare Dist. Ex. 37 at p. 1, with Dist. Ex. 38 at p. 1).<sup>36</sup> The elementary school psychologist, who attended the March 2021 CSE meeting, testified that the two IEPs created had two different lists of participants due to a clerical error (Tr. p. 480). The elementary school psychologist clarified that the following individuals participated in the March 2021 CSE meeting: the district supervisor of special education who also served as the CSE chairperson, herself as the school psychologist, a district speech-language pathologist, a special education teacher, a regular education teacher, and the mother (Tr. p. 481). The mother testified that the student's speech-language pathologist did not attend the March 2021 CSE meeting (Tr. p. 674). The speech-language pathologist who delivered services to the student testified she did not attend the March 2021 CSE meeting but then clarified that could not recall but that speech-language providers "generally d[id] not attend annual review meetings" (Tr. pp. 559-60). The mother confirmed there was an interpreter in attendance at the March 2021 CSE meeting (Tr. p. 673).

Consistent with the IDEA and regulations cited above, the evidence in the hearing record supports a finding that the CSEs at issue were properly composed. Specifically, the CSEs consisted minimally of at least one of the parents,<sup>37</sup> the student's special education teacher, a regular education teacher, a school psychologist, and a CSE chairperson (either the school

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<sup>36</sup> The IEP for the remainder of the 2020-21 school year indicated that the supervisor of special education served as the CSE chairperson whereas the IEP for the 2021-22 school year indicated that the elementary school psychologist served as the CSE chairperson (compare Dist. Ex. 37 at p. 1, with Dist. Ex. 38 at p. 1).

<sup>37</sup> Although both parents were listed on some of the IEPs (see Dist. Exs. 15 at p. 1; 38 at p. 1; Joint Ex. II at p. 1), the mother testified that the father never attended the CSE meetings (Tr. p. 650). There is no dispute that the mother attended each meeting.

psychologist or the district supervisor of special education) (see Tr. pp. 103, 354, 463, 481, 650; Dist. Ex. 15 at p. 1; Joint Ex II at p. 1).<sup>38</sup>

With respect to the parents' main contention about the lack of attendance by a provider of related services, as set forth above, the IDEA and its implementing regulations make the attendance of related services providers discretionary (20 U.S.C. § 1414[d][1][B][vi]; see 34 CFR 300.321[a][6]; 8 NYCRR 200.3[a][1][ix]).<sup>39</sup> A determination as to whether an individual "with specific professional knowledge or qualifications" should attend a CSE meeting should be made "on a case-by-case basis in light of the needs of a particular child" but such individuals should not be required for all CSE meetings (IEP Team, 71 Fed. Reg. 46, 669 [Aug. 14, 2006]). There is no evidence that the parents requested the attendance of related services providers at any of the CSE meetings at issue.

The parents contend that a related services provider was mandated to attend as an individual who could interpret the instructional implications of evaluation results (20 U.S.C. § 1414[d][1][B][v]; see 34 CFR 300.321[a][5]; 8 NYCRR 200.3[a][1][vi]; Parent Mem. of Law at p. 11).<sup>40</sup> Along these lines, the IHO found that a speech-language pathologist was a required member at a subsequent CSE meeting given that the district had conducted a speech-language evaluation of the student in March 2020 (see Dist. Ex. 22; IHO Decision at p. 20). However, the district argues that the elementary school psychologist who attended the CSE meetings could interpret the evaluation results (see Dist. Mem. of Law at pp. 16-17). State law and regulation provide that the member of the committee who can interpret instructional implications of evaluation results may serve in another role on the committee (i.e., the special education teacher or provider, the regular education teacher, the school psychologist, the district representative, or such other discretionary individual with knowledge or special expertise) "where such individual[] [is] determined by the school district to have the knowledge and expertise" to fulfill this role (Educ. Law § 4402[b]; 8 NYCRR 200.3[a][1][vi]; see 20 U.S.C. § 1414[d][1][B][v]; 34 CFR

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<sup>38</sup> An interpreter was at the April 2020 and March 2021 CSE meetings but there is evidence in the hearing record that an interpreter was not present at the April 2019 CSE meeting (see Dist. Ex. 15). The lack of an interpreter will be discussed further below.

<sup>39</sup> Additionally, a "special education provider" may, where appropriate, attend instead of a special education teacher (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). State regulation defines "[s]pecial education provider as "an individual . . . who is providing [or may provide] related services . . . to the student" (8 NYCRR 200.1[xx]).

<sup>40</sup> The parents also point to the provisions that that a mandated member may be excused only if the parents and the district agree that the member's area of curriculum or related services is not being modified or discussed (20 U.S.C. § 1414[d][1][C][i]; see 34 CFR 300.321[e][1]; 8 NYCRR 200.3[f][1]; Parent Mem. of Law at pp. 11-12). Here, as a related services provider was not a mandated member, it was not necessary to excuse such member.

300.321[a][5]). There is no basis in the hearing record for a finding that the school psychologist was not able to fulfill the role of the member able to interpret evaluation results.<sup>41, 42</sup>

Based on the foregoing, while the district's recordkeeping of the attendees at the various meetings leaves something to be desired, the evidence in the hearing record indicates that the CSEs at issue included all of the mandated members. Beyond the absence of a speech-language pathologist to review the March 2020 speech-language evaluation, neither the parent nor the IHO has articulated, with any particularity, how the CSEs were invalidly composed (see IHO Decision at p. 20). As a related service provider is not a mandatory member of the CSE as discussed above and the elementary school psychologist attended and was able to interpret evaluation results, the lack of a speech-language pathologist at the meetings did not amount to a denial of a FAPE. Further, even assuming for the sake of argument that the district committed a procedural violation by failing to invite the student's related services providers to the CSE meeting, the IHO did not grapple with the other committee members' ability to review the speech-language report and generate recommendations or consider whether the speech-language therapy recommendations were appropriate notwithstanding the lack of a speech-language pathologist as a member of the committee (see id.). As such, the district correctly argues that the IHO erred by finding that the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student for the 2019-20, 2020-21 and 2021-22 school years (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).

## 2. Parent Participation

With respect to parent participation at the CSE meetings, the IHO's determination focused on the district's failure to provide documents translated into the parents' native language and appropriate interpretation services at the CSE meetings (see IHO Decision at pp. 23-25). The IHO

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<sup>41</sup> In finding that a speech-language pathologist was a required member of the CSE, the IHO noted that the March 2020 speech-language evaluation report did not include any recommendations (IHO Decision at p. 20). However, State regulations state that it is not the job of the evaluator to make a recommendation; rather, it is the evaluator's role to describe the student's characteristics (see 8 NYCRR 200.1[bb]). It is the CSE's role to interpret the data from the evaluation, drawing on information from a variety of sources (not just one assessment or "evaluation"), in developing recommendations for the IEP.

<sup>42</sup> There is a factual question as to whether the April 2020 CSE reviewed the March 2020 speech-language evaluation, particularly in light of the district's decision to delay completion of the remaining components of the district's triennial evaluation of the student during the period of school closures related to the COVID-19 pandemic (see Tr. pp. 341-42; 363-65; Joint Ex. II at p. 3 [referencing an April 2017 speech-language evaluation]); instead, it appears that the March 2021 CSE, which had the rest of the district triennial evaluation of the student before it, reviewed the March 2020 speech-language evaluation report (see Tr. p. 128; Dist. Ex. 37 at pp. 2, 3). Review of the parent's due process complaint notice does not reveal a separate allegation that the district committed a procedural violation by failing to consider the speech-language evaluation at the April 2020 CSE meeting (see Joint Ex. I); however, to the extent the question relates to the sufficiency of the evaluative information before the CSE or the appropriateness of the April 2020 CSE's speech-language therapy recommendations, the IHO may want to consider the question on remand.

found that the district committed procedural violations that excluded the parents from fully participating in the IEP development process and amounted to a denial of a FAPE.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136).<sup>43</sup>

With respect to the translation of documents, both federal and State regulations require that a district ensure that consent and procedural notices are provided in the parents' native language, and provide an interpreter at all times during the impartial hearing process (see, e.g., 20 U.S.C. § 1415[b][4], [d][2]; 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 154-1.3[b], 200.1[7][1], 200.4[a][9][ii]; [g][2][ii], 200.5[a][4], [f][2], [j][3][vi]). There is no IDEA requirement for translating evaluations into a parent's native language; however, State regulations specify that a district must ensure that "the results of [an] evaluation are provided to the parents in their native language or mode of communication, unless it is clearly not feasible to do so" (8 NYCRR 200.4[b][6][xii]). Neither the IDEA nor federal or State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that while "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated," districts are required to provide parents with full information, in their native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.9[a], 300.320; 8 NYCRR 200.1[7][1], 200.4[d][2]).<sup>44</sup>

In this case, it is undisputed that the native language of the student's mother, the parent who participated in the CSE meetings, is Spanish, and that she cannot read or write in English and understands very little spoken English (see Tr. p. 613). The evidence in the hearing record indicates that an interpreter did not attend the April 2019 CSE meeting but that there was an interpreter in attendance at the April 2020 and March 2021 CSE meetings (see Tr. p. 613; Dist.

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<sup>43</sup> Although the IDEA defines "native language" for an individual of limited English proficiency who is not a student as "the language normally used by that individual" (20 U.S.C. § 1401[20]; 34 CFR 300.29[a]; 8 NYCRR 200.1[ff][1]), the pertinent laws and regulations defining "limited English proficiency" only apply to students (see 20 U.S.C. § 9101[25]; 34 CFR 300.27; 8 NYCRR 200.1[iii]). The United States Department of Education's Office of Civil Rights has issued guidance indicating that a parent with limited English proficiency is one "whose primary language is other than English and who ha[s] limited English proficiency in one of the four domains of language proficiency (speaking, listening, reading, or writing)" (Dear Colleague Letter: English Learner Students and Limited English Proficient Parents, 115 LRP 524 [OCR 2015]).

<sup>44</sup> Although it is not statutorily required to provide parents with a copy of an IEP in their native language, doing so would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of their child's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]).

Exs. 15 at p. 1; 38 at p. 1; Joint Ex II at p. 1).<sup>45</sup> Moreover, the district did not translate any of the documents relied upon by the any of the CSE meetings at issue into Spanish (see Tr. pp. 623-24, 749-50, 764-66).<sup>46</sup> The district assistant superintendent for pupil personnel services testified that, generally the district did not translate evaluations but that it did "communicate those exams to parents in their language" (Tr. pp. 764-65). The testimony at the impartial hearing does indicate that the district met with the parents before CSE meetings and reviewed evaluations and progress reports in Spanish (see Tr. pp. 121, 126-27, 546-47, 671-72). The district also did not translate the IEPs for parents although the mother testified that she requested it (Tr. pp. 163-64, 615, 624, 678, 709-10; see Tr. pp. 183, 508, 748-49).<sup>47</sup> The mother stated that district responded to her requests for the IEPs to be translated by stating "they were going to do it" but never followed through (Tr. pp. 710-11).

In this context, to the extent the district's failure to provide interpreter services at the April 2019 CSE meeting and failure to provide the parents with documents translated into their native language constituted procedural violations, it must be determined whether such procedural inadequacies significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at \*11 [S.D.N.Y. Mar. 29, 2018] [finding that the district's failure to translate all documents considered or issued by the CSEs did not deprive the student of a FAPE where the parent had the opportunity to participate in the development of the IEPs]; Y.A. v. New York City Dep't of Educ., 2016 WL 5811843, at \*14 [S.D.N.Y. Sept. 21, 2016] [finding the district's "unresponsiveness to [the parent's] language barrier" deprived the parent of the opportunity to participate in the decision-making process]).

Here, the IHO did not examine whether, despite the lack of interpreter or translation of documents, the parent nevertheless had an opportunity to participate in the CSE meetings (IHO Decision at pp. 24-25). The lack of an interpreter at the April 2019 CSE meeting would be the district's largest hurdle to overcome in establishing that the parents had such opportunity particularly as the April 2019 IEP does not reflect any parent input or concerns (see Parent Ex. 15). The degree to which the parents were potentially impeded in their ability to participate in the April 2020 and March 2021 CSE meetings by not receiving all documents translated into their native language is less clear, given evidence of the earlier meetings at which the district shared evaluations and progress reports with a bilingual teaching assistant present (see Tr. pp. 121, 126-27, 546-47, 671-72) and evidence that the parents expressed their concerns, asked questions, and stated agreement with the April 2020 and March 2021 CSEs' recommendations (see, e.g., Tr. p.

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<sup>45</sup> While the mother testified to difficulty understanding the discussion at the March 2021 CSE meeting, she attributes this to the technical difficulties associated with the videoconferencing and telephonic mediums used and not to the lack of interpretation (Tr. pp. 673-77, 702).

<sup>46</sup> The evidence in the hearing record that was translated into Spanish are: the emails to the parents regarding the student which were translated by the teaching assistant assigned to the student's class who is fluent in Spanish; a blank copy of the student's behavior log; and the April 2020 social development counseling provider annual review (see Parent Exs. T; Y; CC; Dist. Exs. 30; 49; Joint Ex. III).

<sup>47</sup> The special education teacher testified that, to her knowledge, the parents did not request a translation of the IEP until approximately May 2021 (Tr. pp. 197-98).



104, 515-16, 672; Dist. Ex. 37 at pp. 1-2; Joint Ex. II at p. 2). In any event, as the IHO alluded to, it is unlikely that this procedural violation, even if it significantly impeded the parents' opportunity to participate in the decision-making process, would support an award of compensatory education without a finding of a substantive deficiency with either the content of the IEPs or in the delivery of the mandated services (IHO Decision at p. 25; see J.N. v. Jefferson County Bd. of Educ., 12 F.4th 1355, 1366 [11th Cir. 2021] [finding that a right to compensatory education as relief turns on whether a procedural violation resulted in a loss of educational opportunity for the student]; Maine Sch. Admin. Dist. No. 35 v. Mr. R., 321 F.3d 9, 19 [1st Cir. 2003] [recognizing "that compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA"]). However, the IHO then failed to address the alleged substantive claims related to the IEPs and implementation thereof, and, therefore, even if the IHO did not err in finding that the district significantly impeded the parents' opportunity to participate in the decision-making process, the matter must be remanded as discussed below.

## **B. Implementation of Related Services**

The district argues that the IHO improperly interpreted the law when he imposed the requirement that the district make up related services when a service is scheduled on a day when schools are closed due to holidays or weather closures. The parents argue that the district failed to "materially implement" the student's related services and the IHO correctly calculated the number of related service sessions the student missed during the 2019-20 and 2020-21 school years.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The IHO found that the district failed to provide the student with IEP-mandated related services during the 2019-20 and 2020-21 school years (IHO Decision at pp. 18-19). As a result, the IHO awarded the student compensatory educational services consisting of "Counseling" in the

amount of 13.5 hours and speech-language therapy in the amount of 15.5 hours (*id.* at pp. 18-19, 32). The IHO found that the district's argument that it was its policy to provide make-up services only when a provider was absent, and that school holidays and student absences were not subject to make-up sessions was unavailing at least as it related to school holidays (*id.* at p. 18). Specifically, the IHO held that "[t]he fact that a scheduled [related service] may fall on a school holiday is a foreseeable issue that should be accommodated long before the beginning of the school year" (*id.*).

As compensatory education to make-up for missed related services, the IHO calculated an hour-for-hour compensatory education award based on evidence regarding the number of services missed (*see* Dist. Ex. 41; IHO Decision at p. 19).

In this instance, leaving aside the specifics of whether the district was obligated to provide make-up related services missed due to holidays or if its obligation was limited to the days school was actually in session, the IHO did not examine in the first instance whether the missed related service sessions claimed by the parents to have occurred during the 2019-20 and 2020-21 school years constituted a material failure to implement the student's IEPs (*see Van Duyn*, 502 F.3d at 822; *Catalan*, 478 F. Supp. 2d at 75-76). Further, beyond this narrow consideration, the IHO did not clearly address the parents' broader allegations that the district failed to implement the student's related services during all school years at issue (*see* Joint Ex. I at p. 10). The IHO limited his determinations to the 2019-20 and 2020-21 school year and did not make any findings regarding the 2021-22 school year (*see* IHO Decision at pp. 18-19). In addition, the IHO seemingly found that the speech-language pathologist only provided the student with speech-language therapy twice weekly during the 2019-20 school year despite the IEP mandate of three times weekly; however, the IHO does not award compensatory education for this failure, and it is not clear if this was based on a finding that the implementation failure was de minimus, that compensatory education was not warranted given the student's progress, or if it was an oversight (*id.*).<sup>48</sup> Further, while acknowledging that the COVID-19 pandemic "offered unforeseen complications in the provisioning of services," the IHO did not specify whether he found the implementation failures in this instance to be related to the pandemic (*id.* at p. 19 n.3). On remand, if determined that the district failed to implement services due to the conditions surrounding school closures during the pandemic, the IHO may want to inquire whether, consistent with federal and State guidance, a CSE has convened to "make [an] individualized decision[] about [the] child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" and, if not, whether the parents' claims arising from the

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<sup>48</sup> In the decision, the IHO declined to award additional compensatory education in light of the student's progress during the years in dispute (IHO Decision at p. 26). Such an analysis may continue to be appropriate upon remand; however, as discussed in further detail below, a full review of the parent's substantive claims must be undertaken before any determination regarding what award of compensatory education, if any, would make the student whole (*see E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 451 [2d Cir. 2014]; *Newington*, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; *see also E. Lyme*, 790 F.3d at 456; *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]).

pandemic are premature (see "Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3, Office of Special Educ. Mem. [June 2021], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf>; see, e.g., Application of a Student with a Disability, Appeal No. 22-121).

Based on the foregoing, the IHO did not address in its entirety the parents' allegation that the district failed to implement the student's related services during the 2019-20, 2020-21, and 2021-22 school years, and the IHO should consider the allegations anew upon remand.

### **C. Remand**

As alluded to above, the IHO did not reach the parents' substantive allegations underlying their claim that the district denied the student a FAPE for the 2019-20, 2020-21 and 2021-22 school years. Instead, the IHO rested on the procedural violations he identified. However, as noted above, the IHO erred in his determination related to the composition of the CSEs at issue. Further, as to the parents' ability to participate, even if the IHO did not err in this finding, the IHO did err by failing to go on to consider the parents' allegations directed at the IEPs. The IHO opined that the deficiency related to the parents' inability to participate made review of the IEPs speculative and impracticable given that it was impossible to know what contribution the parents would have offered to the development of the IEPs had they been given the appropriate opportunity (IHO Decision at p. 26). However, in their due process complaint notice, the parents have asserted a variety of specific claims related to their overarching allegation that the IEPs as developed were inappropriate (see Joint Ex. I). While their arguments in this regard may be after-the-fact impressions of the IEPs, the allegations are ripe for review, and to avoid consideration of the claims on the ground that the parents were denied participation runs the risk of twice depriving the parents of the opportunity to be heard.

The IHO's subsequent analysis finding that no compensatory education would be warranted even if deficiencies were identified in the IEPs given the student's progress during the relevant school years puts the proverbial cart before the horse insofar as, if the IHO were to find that the district substantively denied the student a FAPE, he could also find that the student would have been in a different position 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"]).

Thus, it remains to be determined whether there is merit to the allegations raised by the parents in their due process complaint notice. Specifically, the IHO did not address the parent's claims that the district failed to: (1) develop appropriate IEP annual goals and appropriate present levels of educational performance; (2) recommend and provide appropriate related services; (3) appropriately address the student's behavioral/attention and social/emotional needs; (4) provide the student with an appropriate placement; (5) appropriately address the student's academic needs; (6) recommend and provide an appropriate 12-month school year program; and (7) develop an appropriate educational program for the student that allowed meaningful educational progress in global areas of need (Joint Ex. I at pp. 7-12). Regarding the appropriate educational program, the parents also alleged the district failed to develop and provide an appropriate remote learning program, such as related services and academic instruction, during the COVID-19 pandemic school closure (*id.* at p. 12). In addition, as discussed above, for those issues the IHO did address, he failed to complete his analysis. For example, with respect to his findings regarding an interpreter during CSE meetings and translation of documents, the IHO did not examine whether the parents nevertheless were able to participate in the development of the IEPs. Further, with respect to implementation of related services, the IHO's analysis was incomplete in that it did not address all aspects of the allegation and did not go on to consider whether any implementation lapses were substantial or material. In addition, although the IHO found the district's evaluations insufficient, he only did so in regard to the parents' request for IEEs, did not address earlier evaluations, and did not go on to examine whether, even if the evaluations conducted in 2021 were insufficient for purposes of the IEE analysis, this also constituted a procedural inadequacy that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student for the relevant school year(s) (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkleman, 550 U.S. at 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; *see* Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 n.4 [S.D.N.Y. Nov. 27, 2012]; *see also* D.N. v. New York City Dep't of Educ., 2013 WL 245780, at \*3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO's decision regarding the district's provision of FAPE to the student for the 2019-20, 2020-21 and 2021-22 school years must be vacated, and the matter remanded to the IHO to address the remainder of the parent's claims as set forth in the October 6, 2021 due process complaint notice as laid out above and based thereon, to render a determination regarding whether the district offered the student a FAPE for the 2019-20, 2020-21 and 2021-22 school years and what relief, if any, is warranted. It is left to the sound discretion of the IHO on remand to ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parent's claims listed in the due process complaint notice and requested relief including the type of evidence the parties should submit should the IHO reach the issue crafting equitable relief. Additionally, the IHO may find it appropriate to schedule a prehearing conference

with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

#### **D. Independent Educational Evaluation**

Separate and apart from the above discussion of the IHO's findings regarding the district's provision of a FAPE, is the parents' request for an IEE. The district argues that the IHO erred in his determination that the parents were entitled to an IEE. Specifically, the IHO determined that the March 2021 psychoeducational evaluation of the student was inadequate because it did not include social/emotional assessment, the psychologist did not administer any rating scales, and he did not interview the parents (IHO Decision at pp. 13-14). The district asserts that the IHO ignored evidence that the student did not exhibit behaviors in the classroom setting that warranted an evaluation. Further, the district argues that the IHO improperly: determined that the speech-language evaluation was inadequate because it failed to include recommendations, failed to consider reports that staff did not have concerns regarding the student's handwriting and that he did not exhibit sensory needs such that he required an OT evaluation, and determined that the district was required to conduct a PT evaluation to determine why the student struggled with locomotor and object control skills.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).<sup>49, 50</sup>

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<sup>49</sup> Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

<sup>50</sup> The Second Circuit has made it clear a parent must disagree with a district evaluation as of the time it is conducted, and that subsequent changes in circumstances will not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171 [2d Cir. 2020] citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at \*2 [D. Minn. Nov. 28, 2018] ["Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parents are entitled to request one per year—not an IEE at public expense. If the parent disagrees with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). Additionally, although the district "may ask for the parent's reason why he or she objects to the public evaluation," an explanation by the parent "may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint notice to request a hearing to defend the public evaluation" (8 NYCRR 200.5[g][1][iii]; see 34 CFR 300.502[b][4]).

If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation, "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (Trumbull, 975 F.3d at 170).

In a letter dated August 24, 2021, the parents notified the district that they disagreed with the most recent evaluations completed by the district between December 2020 and March 2021, and requested independent bilingual neuropsychological, speech-language, OT, and PT evaluations, and a bilingual ABA skills assessment (Parent Ex. O). Review of the hearing record indicates that the evaluations completed during that period included a December adapted physical education re-evaluation and the March 2021 bilingual psychoeducational evaluation, which was the most recent evaluation completed and was as part of a mandated bilingual re-evaluation (Joint Exs. V at p. 1; VII at p. 1).<sup>51</sup>

The December 2020 adapted physical education re-evaluation report reflected results from the administration of the TGMD-2 that assessed the student's locomotor (i.e., walking, running, skipping, hopping) and object control skills (i.e., kicking, throwing, catching), which showed that he was "developmentally behind his peers" (Joint Ex. V at p. 1). The student attained an age equivalent of 6 years 0 months (16th percentile) for locomotor skills and 5 years 6 months (2nd percentile) for object control skills (id.). The evaluator reported that the student's strongest object control skill was striking a ball off a tee with a bat and his strongest locomotor skills was running (id.). The evaluator recommended the student "continue to receive [a]dapted [p]hysical [e]ducation services twice per six-day cycle to improve these fundamental movement skills" (id.).

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<sup>51</sup> A speech-language reevaluation was completed in March 2020 as part of the student's triennial evaluation and was available to the March 2021 CSE (Tr. pp. 312-13, 462-65, 481-82; Dist. Ex. 22). The hearing record indicates that the triennial reevaluation process was started in March 2020; however, several evaluations were postponed after the school building closures due to COVID-19 (Tr. pp. 464-65; Dist. Ex. 22). Further, during the April 2020 CSE meeting, the parents agreed to conducting the testing when the school buildings reopened (Joint Ex. II at p. 1).

The March 2021 bilingual psychoeducational evaluation report contained the findings of a review of records and the results of an administration of the DAS-II and the WIAT-IV (Joint Ex. VII at p. 2). The district bilingual school psychologist (bilingual school psychologist) who administered the evaluation testified that he was unable to report scores because the student was considered bilingual and explained that test batteries are normed for monolingual students, so results are looked at qualitatively instead of giving standard scores (Tr. pp. 239, 248-49, 282-83). The bilingual school psychologist further indicated that the student presented as English dominant and did not make any additional gains when provided with information in Spanish (Tr. p. 248; Joint Ex. VII at p. 2). In the report, the bilingual school psychologist described the student as "polite, cooperative, and engaged" and noted that he went into the testing room "willing and enthusiastically as he appeared to enjoy the one-to-one attention" (Joint Ex. VII at p. 2). He reported that the student engaged in appropriate eye contact, was related, and remained attentive and motivated to complete tasks; however, when tasks became more challenging for him, he was observed to rock back and forth and "sought out frequent validation from the examiner" (id.). The bilingual school psychologist noted that the student "did not demonstrate any significant behavioral difficulties" in the one-to-one setting (id.).

The results of the DAS-II indicated that the student's overall General Conceptual Ability (GCA) composite score was within the average range of intellectual functioning (Joint Ex. VII at pp. 3-4). Specifically, the student's performance was within the average range in the nonverbal reasoning, spatial, verbal, working memory and processing speed domains (id. at pp. 4-5). The bilingual school psychologist indicated that the student's nonverbal reasoning skills appeared to be a relative strength (id. at p. 4).

With regard to academics, the March 2021 bilingual psychoeducational report indicated that the student "scored within the [a]verage to [b]orderline range in comparison to same-grade peers" on the WIAT-IV (Joint Ex. VII at p. 5). Specifically, in reading the student scored with the average to low average range and was noted to read grade level text fluidly and with accuracy and would refer back to the text when answering follow-up comprehension questions (id.). The student was able to read basic sight words, consonant-vowel-consonant words, words that contained silent letters, and multi-syllabic words (id.). During the oral reading fluency subtest, the student was able to read grade level text fluidly and with accuracy, and he made few word additions, transpositions and substitution errors while reading (id. at p. 6). In the area of pseudoword decoding, the student's ability to read a list of nonsense words with accuracy was in the average range and he scored in the lower end of the average range in phonemic proficiency, as he was able to eliminate sounds from words (say "football, but don't say "ball"), and substitute/manipulate sounds in words (say "can" but instead of saying the /c/ sound use the /f/ sound "fan"), but had greater difficulty saying words backwards (id. at pp. 5-6). The bilingual school psychologist concluded that "[o]verall, [the student's] abilities in the area of reading appear[ed] to be a relative strength as he scored just as well as same-grade peers" (id. at p. 6).

In mathematics, the student scored within the average to low average range in comparison to same-grade peers (Joint Ex. VII at p. 6). Specifically, he scored in the average range on math fluency addition, in the low average range on math fluency subtraction/multiplication and math problem solving, and in the lower end of average range in numerical operations (id.). According to the bilingual school psychologist, the student's "performance on tasks that utilize[d] his math skills appear[ed] to be adequate as he scored just as well as same-grade peers" (id.).

In written expressions, the student's scores fell within the average to borderline range in comparison to same-grade peers (Joint Ex. VII at p. 6). Specifically, the student scored in the average range in the areas of spelling and sentence combining, in the low average range in sentence building and alphabet writing fluency, and in the borderline range in sentence writing fluency (id. at pp. 6-7). The student only attempted three items in the sentence writing fluency subtest and was unable to meet the minimum word requirement when asked to write an essay about his favorite game, which prevented calculation of a composite score for this subtest (id. at p. 7). The bilingual school psychologist indicated that the student's "essay lacked organization, elaboration, and contained capitalization, punctuation, and spelling errors" (id.). The bilingual school psychologist further noted that the student was observed to rock back and forth during this subtest (id.). The bilingual school psychologist recommended the following strategies to support the student's writing needs: use graphic organizers to help him sequence information for effective communication; provide extra time to complete writing assignments; model brainstorming for generation of ideas; use short speed drills that emphasize output over grammar, spelling and punctuation, spend at least 30 minutes daily on writing activities, and have the student consider the purpose, his point of view and the audience of his writing before beginning to write (id. at p. 8).

In preparation for the evaluation, the bilingual school psychologist stated that he "touch[ed] base" with the student's elementary school psychologist and "briefly" spoke to the student's teacher, who indicated that "generally" the student was making "some academic progress" (Tr. pp. 244-46). He further noted that during their conversation, the special education teacher did not express to him that the student was having any social/emotional issues or behavioral concerns in the classroom (Tr. pp. 266-67). The bilingual school psychologist testified that he only met with the student to conduct the evaluation and that he contacted the parents to verify where he would meet with the student to conduct the evaluation (see Tr. pp. 244-46). He further testified that he did not conduct a parent interview as part of the evaluation; however, he later testified that he could not recall if he had a conversation with the parents (Tr. pp. 269, 284). The bilingual school psychologist reported that he only assessed the student's cognitive and academic skills, which did not include the student's social/emotional skills, specifically indicating that he "was not told to do so" and that social/emotional testing was not part of the initial consent to conduct reevaluations (Tr. p. 266). The bilingual school psychologist clarified that if social/emotional assessment was needed, a specific request would have been included on the parental consent form (Tr. pp. 270-71). Additionally, he testified that he did not have consent to conduct the rating scales; therefore, they were not completed (Tr. p. 285).<sup>52</sup> The bilingual school psychologist testified that the student "did not demonstrate any significant behavioral difficulties in this one-to-one setting" and that signs of social difficulties were not "so significant to indicate that he was under emotional distress" (Tr. pp. 273, 277).

However, when asked if the student's rocking back and forth during the evaluation was a sign of potential emotional difficulties, the bilingual school psychologist responded, "I did not

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<sup>52</sup> The March 2020 prior written notice and consent form requesting the parents' consent for the triennial evaluation indicated that the proposed reevaluation would include a bilingual psychoeducational evaluation, a social history update, a bilingual speech evaluation, an OT reevaluation, and an adapted physical education evaluation (Dist. Ex. 20 at pp. 1, 3-4). The form did not specify that the psychoeducational evaluation should be limited in any regard (id.).



conduct any social-emotional evaluation, so I can't quite speak on it" (Tr. pp. 273-74). Further, according to the special education teacher, the parent had expressed concerns about the student's behavior at home although he did not exhibit those behaviors in school (Tr. pp. 73, 86). Additionally, the special education teacher testified that the student expressed thoughts of self-harm to her during remote instruction, and she referred the incident to the elementary school psychologist (Tr. pp. 154, 444-45).

The evidence in the hearing record described above indicates that the student had expressed thoughts of self-harm during remote instruction, the parents had expressed concerns regarding concerning behaviors at home, and the student demonstrated behaviors during the bilingual psychoeducational evaluation that indicated some possible concerns related to social/emotional functioning. Additionally, the March 2021 bilingual psychoeducational report indicated that the bilingual school psychologist conducted a records review, and while the report does not specify which records he reviewed, the hearing record contains evidence that the student had been receiving counseling as a related service during the 2019-20 and 2020-21 school years, and the April 2020 annual review counseling provider report indicated that the student was working on social/emotional skills including identifying feelings/emotions, coping skills, making friends, and self-control (Tr. pp. 73, 76; Dist. Exs. 15 at pp. 1, 7; Joint Exs. II at pp. 1, 10; III; VII at p. 2). Finally, the March 2021 bilingual psychoeducational report indicated that the reevaluation was being conducted "in order to determine if his current educational program [wa]s meeting his academic, social, emotional, and behavioral needs," yet the bilingual school psychologist did not conduct any social/emotional assessment or rating scales, nor did he conduct a parent interview; therefore the report does not contain information related to the student's social/emotional or behavioral needs (see Joint Ex. VII).

Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). Here, the triennial evaluation did not include any assessment of the student's social/emotional or behavioral needs. Further, there is no merit to the bilingual psychologist's rationale underlying his determination to not conduct testing to assess the student's social/emotional or behavioral needs. State regulation provides that a psychologist may use "to the extent deemed necessary for purposes of educational planning, a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics" (8 NYCRR 200.1[bb]).

Based on the foregoing, the evidence in the hearing record demonstrates that the March 2021 psychoeducational evaluation, along with the results of the additional district testing conducted during the 2020-21 school year, was insufficient to determine the student's strengths and deficits. Having found the triennial evaluation failed to assess the student's social/emotional and behavioral needs, it is unnecessary to review the IHO's remaining determinations regarding the sufficiency of the district evaluation and its assessment of the student's speech-language, OT, or PT needs. The parents are entitled to receive the requested IEE inclusive of all assessments requested (see Trumbull Bd. of Educ., 975 F.3d at 165 ["If a parent disagrees with an evaluation and requests an IEE at public expense, the regulations do not circumscribe the scope of that IEE"]; Jones-Herrion v. Dist. of Columbia, 2019 WL 5086693, at \*4 [D.D.C. Oct. 10, 2019] [noting that

because assessments are only the building blocks to an evaluation, the IDEA therefore entitles the student to all the independent assessments necessary to formulate that evaluation]).<sup>53</sup> Therefore, in this instance, I decline to disturb the IHO's award as it relates to the awarded IEE to be funded at the district's expense.

## **VII. Conclusion**

Based on the forgoing, the IHO's decision regarding the 2019-20, 2020-21, and 2021-22 school years are vacated, and the matter is remanded to the IHO to make a determination on the claims raised in the parent's due process complaint notice, and, if necessary, whether any relief is warranted relating thereto. However, there is insufficient basis to disturb the IHO's award of an IEE at district expense.

**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 September 30, 2022 is modified by vacating that portion which found that the district failed to offer the student a FAPE for the 2019-20, 2020-21 and 2021-22 school years, and which ordered relief in the form of a directive to the district to provide the parents with interpreter and translation services and an award of compensatory education counseling and speech-language therapy;

**IT IS FURTHER ORDERED** that the matter is remanded to the IHO to issue a determination regarding whether the district offered the student a FAPE for the 2019-20, 2020-21 and 2021-22 school years based on the claims raised by the parents in the due process complaint notice and, if not, whether compensatory education is warranted.

**Dated: Albany, New York  
December 8, 2022**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**

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<sup>53</sup> The Second Circuit recently discussed the IDEA's use of the term "evaluation" and "reevaluation" as meaning a "comprehensive" set of assessments (Trumbull Bd. of Educ., 975 F.3d at 162; see also Jones-Harrison, 2019 WL 5086693, at \* 3).