



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-152

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

The Law Offices of Martin Marks, attorneys for respondent, by Martin Marks, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2020-21 school year. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

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

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

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

The student had met "all his developmental milestones" and attended kindergarten and first grade in a general education classroom before beginning to have seizures when he was six and a half years old (Tr. pp. 128-29; Dist. Ex. 2 at p. 1). The student received home instruction for the majority of second grade due to his medical needs and then attended a district school for three years with a paraprofessional and a nurse (Tr. p. 127; Dist. Ex. 2 at p. 1). The student was then placed by the district at an approved nonpublic school (Dist. Ex. 2 at p. 1). The student repeated fourth grade at the nonpublic school "at a [second] grade level" and continued to attend the nonpublic school until he completed eighth grade during the 2018-19 school year (id.).

The student was reevaluated in spring 2019 because he had "made no progress so the school [wa]s seeking a different placement" (Dist. Ex. 2 at p. 1; see Dist. Ex. 3). At the time of the reevaluation, the student was classified as "[o]ther [h]ealth [i]mpairment due to his diagnosis of epilepsy," received instruction in a special class together with speech-language therapy and occupational therapy (OT), and had "a full time health para, due to the fact that he frequently ha[d] seizures" (Dist. Ex. 3 at p. 1). The parent enrolled the student in the Rebecca School for the 2019-20 school year (Tr. pp. 146-47).

The CSE convened on May 21, 2020 to determine the student's needs and developed an IEP with an implementation date of June 4, 2020 (see Dist. Ex. 1). According to a prior written notice dated June 18, 2020, the May 2021 CSE reviewed the student's April 29, 2019 psychoeducational report, May 6, 2019 social history, and May 21, 2020 teacher report (Dist. Ex. 4 at p. 2).<sup>1,2</sup> Participants in the May 2020 CSE meeting were the district's related service provider/special education teacher, the parent, the school psychologist who also served as district representative, a teacher from the Rebecca School, and a Rebecca School social worker (Dist. Ex. 1 at p. 23).<sup>3</sup> The CSE determined that the student was eligible for special education as a student with an other health-impairment and recommended a 6:1+1 special class placement at a district specialized school (id. at p. 15). The CSE recommended that the student receive two 40-minute sessions per week of individual counseling services, two 40-minute sessions per week of individual OT and one 40-minute session per week of OT in a group, and three 40-minute sessions per week of individual speech-language therapy and one 40-minute session per week of speech-language therapy in a group (id.). The CSE also recommended one 60-minute session per month of parent counseling and training (id.). With respect to the student's health needs, the CSE recommended full-time individual paraprofessional services for the student to aid with his health and seizure disorder (id. at p. 16).

The district sent the parent a prior written notice dated June 18, 2020, summarizing the recommendations from the May 2020 CSE meeting, and a school location letter, bearing the same date, advising the parents of the public school building to which the district assigned the student to attend for the 2020-21 school year (Dist. Ex. 4 at pp. 1, 5). In a letter dated June 18, 2020, the parent's educational advocate notified the district of the parent's intent to unilaterally place the student at the Rebecca School for the 2020-21 school year and seek public funding for that placement (Parent Ex. D at p. 1). On June 23, 2020, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2020-21 school year (Parent Ex. O at p. 4).

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<sup>1</sup> The IEP states that "[a] copy of [the student's] December 2019 Rebecca School progress report was reviewed and included in the development of this IEP"; however, the progress report was not included in the hearing record (Dist. Ex. 1 at p. 1).

<sup>2</sup> The prior written notice states that the date of the psychoeducational evaluation of the student was May 6, 2019; however, the psychoeducational evaluation report was dated April 29, 2019 (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 3 at p. 1).

<sup>3</sup> All the CSE members participated in the meeting remotely due to the COVID-19 protocols in place at that time (Tr. p. 45).

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

By due process complaint notice dated February 2, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. A at p. 1). The parent generally asserted that the district failed to develop an appropriate IEP, failed to recommend a placement that could implement the IEP, failed to provide a FAPE in the least restrictive environment (LRE), and that the May 2020 IEP was procedurally and substantively defective (id. at pp. 2-3).

Specifically, the parent argued that the evaluations used to create the IEP were inadequate and that the IEP team failed to properly evaluate the student (Parent Ex. A at p. 3). The parent asserted that the IEP did not accurately reflect the student's present levels of performance or needs and failed to contain sufficiently measurable goals for the student (id.). The parent alleged that the goals included in the IEP were not discussed with the parent during the CSE meeting, therefore, for this reason and others, the parent was denied meaningful opportunity to participate in the development of the IEP (id.). The parent argued that the recommended class placement was too large (id.). The parent also alleged that the IEP failed to address the student's individual needs, including his need for "direct individual support and assistance" (id.). The parent further contended that the district was unable to implement the IEP appropriately (id.).

The parent argued that the "Rebecca School offered a program that appropriately addressed [the student's] needs and enabled him to make academic and social progress and avoid regression" (Parent Ex. A at p. 3). As relief, the parent requested direct funding or tuition reimbursement for the cost of the student's attendance at the Rebecca School (id.).

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

After a prehearing conference was held on February 11, 2022, an impartial hearing convened on March 25, 2022, and concluded on September 30, 2022, after a total of eight days of proceedings (Tr. pp. 1-232).

In a decision dated October 11, 2022, the IHO found that the May 2020 IEP did not offer the student a FAPE for the 2020-21 school year and that the parent met her burden of demonstrating that the unilateral placement at the Rebecca School was appropriate for the student (IHO Decision at p. 16). In doing so, the IHO focused in part on the April 2019 psychoeducational evaluation report used by the CSE to create the IEP at issue (id. at p. 6). The IHO stated that "[i]t must be emphasized that the psychoeducation evaluation reported that the evaluation may not be a valid and reliable assessment of the [s]tudent's current level of cognitive and academic abilities" and determined that "[t]he record amply demonstrate[d] that the [s]tudent's current level of cognitive and academic abilities were not reliably assessed, prior to the May 2020 CSE meeting" (id. at p. 8).

The IHO went through the present levels of performance section of the IEP and noted that the student could write related words but was unable to independently construct words together into a sentence (IHO Decision at p. 7). The IHO noted that the IEP's present levels of performance reported that the student relied on teacher support to communicate through writing and that the student's teachers would often repeat the student's thoughts or scribe his thoughts for him (id. at p.

8). With respect to the speech/language portion of the present levels of performance that addressed the student's stutter, the IHO noted that the IEP reported that sometimes it was "unclear if the [s]tudent [wa]s receptively understanding communication" and that "the [s]tudent's communication [wa]s impacted by seizure activity" (id.).

The IHO discussed the testimony of the district witness, who served dual functions on the CSE, appearing as both the district representative and the school psychologist (IHO Decision at pp. 7-8). The IHO described the district school psychologist's testimony as "limited generic testimony" in relation to the development of the IEP (id.). According to the IHO, the school psychologist testified that "the basis of the IEP recommendations stemmed from the CSE team reviewing progress reports, an evaluation that was completed by a CSE school psychologist, and discussions at the CSE meeting" (id. at p. 7).

Regarding the evaluative data used to develop the student's IEP, the IHO concluded "the record d[id] not support the [district's] claims that it had sufficient evaluative information based upon the [s]tudent's progress notes, psychoeducational evaluation, and parental input in order to make an appropriate recommendation for the student" (IHO Decision at p. 9). Furthermore, the IHO determined that the "IEP was not developed based upon valid and reliable evaluations to plan for the [s]tudent's sensory regulation, emotional regulation, seizure activity, and the student's stutter, which impact[ed] his learning and communication" (id.).

The IHO then addressed the statements made by the district witness who was the principal of the public school the district assigned the student to attend for the 2020-21 school year and who testified with respect to the district's ability to implement the IEP in July of 2020 (IHO Decision at pp. 9-10). The IHO described the school principal's testimony as "limited generic testimony" that failed to "provide any detailed testimony as it relate[d] to the school placement and the unique needs of this [s]tudent, such as his seizure issues, administering his seizure medication, a bus lift because the [s]tudent c[ould] not ambulate steps, and an adaptive chair the [s]tudent may use during a seizure" (id. at p. 9). The IHO discussed the principal's testimony that the district placement would have been fully remote and noted that the student's May 2020 IEP failed to address remote instruction (id. at pp. 9-10).

The IHO gave greater credit to the testimony given by the program director of the Rebecca School, who testified that while attending the Rebecca School for the 2020-21 school year, the student met his educational goals and his specific health and safety needs were addressed (IHO Decision at p. 12). The IHO noted that the Rebecca School was staffed by personnel who were trained to respond appropriately to students with active seizure disorders, such as the student, and that the school had two full-time nurses that directly provided services to the student (id. at p. 13). The IHO noted that the staffing of the Rebecca School enabled them to safely and properly address the student's active seizure disorder while progressing in his educational studies (id. at pp. 12-13). The IHO stated that the record "amply demonstrate[d]" that the Rebecca School was a proper placement for the student for the 2020-21 school year (id. at p. 11).

The IHO found that although the student's stuttering was intensifying and he continued to have seizures, the district did not provide a "cogent and responsive explanation" as to how their recommended placement would have addressed those areas of the student's needs (IHO Decision at p. 10). The IHO therefore determined that "the [s]tudent was denied a FAPE for the 2020-2021

school year, which is the first prong of the three Burlington/Carter criteria for public funding tuition related to unilateral placement" (id.).

The IHO concluded, "[o]verall, the record demonstrates the [Rebecca School] was an appropriate unilateral placement" because it provided the student "with educational instruction that was specifically designed to meet the [s]tudent's unique special education needs and services to permit [him] to benefit from educational instruction" (IHO Decision at p. 14). The IHO noted that there was no evidence in the hearing record that challenged the parent's assertion that the Rebecca School was an appropriate placement for the student for the 2020-21 school year and that the parent therefore "met its second prong of the three Burlington/Carter criteria" (id.).

Turning to the IHO's findings regarding equitable considerations, the IHO concluded that the hearing record contained ample evidence that the parent "acted reasonably with the [d]istrict" (IHO Decision at p. 15). The IHO commented on the parent's contractual obligation to pay the Rebecca School tuition for the student and that the parent had proven that it would be a hardship for her to pay the tuition directly (id.). Based on this evidence, the IHO determined that equitable considerations supported the parent's claim for district funding of the student's tuition at the Rebecca School for the 2020-21 school year (id.). As relief, the IHO directed the district to reimburse the parent for \$5,000.00 paid to the Rebecca School for the student's tuition and directly fund the student's tuition at the Rebecca School in the amount of \$142,200.00 for tuition and in the amount of \$25,200.00 for related services (id. at p. 16).

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

The district appeals the IHO's determination that it failed to offer the student a FAPE for the 2020-21 school year. The district asserts that the CSE had sufficient evaluative information to determine the student's strengths and needs for the 2020-21 school year and that the program recommended by the district was reasonably calculated to enable the student to receive an educational benefit. The district asserts that the CSE relied on the psychoeducational evaluation report, a social history update, and extensive discussion during the CSE meeting which included two Rebecca School staff members and the parent. The district argues that the IHO erred in finding that the district's witness provided insufficient testimony regarding the evaluations used in the development of the IEP.

The district contends that the psychoeducational evaluation should not have been rejected by the IHO based on the evaluator's comment that the evaluation may not have been a reliable assessment of the student's abilities. The district argues that the evaluator's statement did not invalidate the usefulness of the psychoeducational evaluation, entirely, and that the evaluation contained information concerning the student's academic achievement, adaptive skills, and current abilities that was helpful to the development of the IEP. The district further asserts that given the useful information concerning the student's educational strengths and weaknesses, it was proper for the CSE to consider and utilize the psychoeducational evaluation report as part of the evaluative information it had before it when developing the student's IEP for the 2020-21 school year.

The district also alleges that the IHO erred by dismissing certain district witness testimony as generic and limited. The district contends that the content of the district witness's testimony was bolstered by the parent's testimony and the IEP itself, which incorporated the input of the

parent and providers from the Rebecca School who worked directly with the student. The district also notes that the IHO accepted the IEP's present levels of performance as accurate because the IHO referred to them when describing the needs of the student and this contradicts his finding that the evaluative information used to create the present levels of performance was insufficient.

The district also asserts that the IHO erred by finding that the IEP did not reflect sufficient information concerning the student's sensory regulation, emotional regulation, seizure activity and stutter. The district argues that when the IHO determined that the hearing record did not support the CSE's recommendation in the IEP for a specialized class for the student because of his seizures and stutter, the IHO was addressing issues that were not raised in the parent's due process complaint notice. Further, the district contends that the hearing record contains ample evidence that, in any event, the IEP addressed the student's sensory regulation, emotional regulation, needs related to his seizure disorder, and stutter. According to the district, the IEP's program recommendation was based on the student's needs and was proper and would have provided the student with a FAPE had it been implemented. Specifically, the district avers that a 6:1+1 special class placement was appropriate for the student given his highly intensive needs, seizure history, stutter, and academic deficits, and the IEP as a whole recommended the small teacher student teacher ratio, related services, paraprofessional services, management needs, and annual goal—all of which were appropriate for the student.

With respect to the assigned public school site, the district alleges that the IHO erred in determining that the district presented insufficient evidence that the recommended school building could implement the student's IEP, specifically, that the district needed to prove that it was able to provide the student with a bus lift, an adaptive chair, and staff to administer the student's seizure medication and address his seizures. The district claims that because those issues were not raised in the parent's due process complaint notice, the IHO exceeded her jurisdiction by ruling on them. The district also asserts that the hearing record reflects that the district demonstrated that it could implement the IEP at the assigned district public school.

In her answer, the parent argues that the IHO correctly determined: that the district did not provide the student with a FAPE because it failed to utilize sufficient evaluative information in the development of the IEP; that the district's testimony in support of the use of the psychoeducational evaluation in the creation of the IEP and its recommendations was insufficient; and that the district failed to produce evidence proving that it was able to implement the IEP at the district public school. The parent specifically alleges that the district failed to specify whether the student's educational program would be in-person or remote and that the district was uncertain as to whether the student required adult support on a full-time or part-time basis. The parent references the IHO's determination that the May 2020 IEP failed to discuss the implementation of remote instruction even though the district was solely remote at the time the IEP was created. For these reasons, the parent asserts that the IHO correctly found that the parent's unilateral placement at the Rebecca School was appropriate and that equitable considerations favor full tuition reimbursement for the 2020-21 school year.

## **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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

It is first necessary to address the district's assertion that because the parent failed to raise specific allegations in her due process complaint notice regarding the student's seizures, stutter,

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

sensory regulation, and emotional regulation, or related to the assigned school's ability to implement or address the student's seizures, issue his medication, or provide a bus lift or adaptive chair, the IHO erred in determining that the student was denied a FAPE on these grounds.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59[2d Cir. June 18, 2014]).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, review of the due process complaint notice demonstrates that the parent alleged that the CSE used insufficient evaluative information in its development of the IEP. Although the parent does not specifically identify the student's seizures, stutter, or regulatory needs in the due process complaint notice as needs the CSE failed to address in his IEP, the parent does generally allege that the CSE lacked the evaluative data necessary to determine the student's academic functioning, multiple learning delays, physical needs, and social/emotional needs (Parent Ex. A). While these broader categories of need did not specifically refer to some of the student's underlying health challenges, diagnoses or educational deficits, the parent's overall claim that the district lacked sufficient evaluative data to identify and address the student's major areas of need was adequate to put the district on notice concerning the parent's claims that the lack of sufficient evaluative information prevented the district from programming for the full range of the student's special education needs. Additionally, with respect to implementation, the due process complaint notice included an allegation that the district did not propose a district school that "would appropriately implement the IEP" (Parent Ex. A). Based on that allegation, the district was on notice that it was required to show that the assigned public school site could implement the student's program as recommended in the student's IEP.

If the district was unsure as to the extent of the issues presented on appeal, or wanted to seek clarification of those issues, the district could have made such a request at the prehearing conference in this proceeding. One of the purposes of the prehearing conference is to simplify and clarify the issues to be resolved at the impartial hearing, and, as such, would be an opportunity to identify the type of relief sought by the parents, discuss the types of evidence that the IHO requires in order to make a determination, and inquire about the district's position, if any, about the parents' request (see 8 NYCRR 200.5[j][3][xi][a]). However, the district failed to appear for the February 11, 2022 prehearing conference (Tr. pp. 1-6).

Accordingly, although the claims raised by the parent in the due process complaint notice were broader than what would have been ideal for the district to present its case in this matter, the general allegations were sufficient to incorporate the more specific allegations addressed by the IHO in her decision, and there is insufficient basis to find that the IHO erred in considering the claims as they related to the student's seizures, stutter, sensory regulation, and emotional regulation or the specific challenges related to the implementation of the May 2020 IEP.

### **B. Sufficiency of Evaluative Information**

On appeal, the district argues that the IHO erred in finding that the district denied the student a FAPE, in part because the May 2020 CSE lacked sufficient evaluative information to create the IEP. Specifically, the district asserts that the IHO erred in determining that the psychoeducational evaluation the CSE used to develop the May 2020 IEP was not valid, reliable or technically sound, because the evaluator suggested that it may not be a reliable assessment of the student's abilities. The district argues that the evaluator's statement "did not render the evaluation utterly useless," as it was the CSE's responsibility to analyze the evaluative data, in conjunction with other sources of information. Additionally, the district argues that the IHO erred in finding that the IEP was not based on sufficient information to plan for the student's "sensory regulation, emotional regulation, seizure activity, and stutter." Further, the district asserts that the IHO "seemingly dismissed" the other sources of evaluative information upon which the CSE based its recommendations.

Pursuant to the IDEA and federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic

information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

According to the June 18, 2020, prior written notice and testimony from the school psychologist, who also served as the district representative at the May 2020 CSE meeting, the May 2020 CSE considered the April 29, 2019 psychoeducational evaluation report, the May 6, 2019 social history, and a "Teacher Report" dated May 21, 2020 (Tr. pp. 39, 45-46, 85; Dist. Ex. 4 at p. 2).<sup>5</sup> Additionally, the May 2020 IEP specified that a "copy of [the student's] December 2019 school progress report was reviewed and included in the development of this IEP" (Dist. Ex. 1 at p. 1; see Tr. pp. 46, 146).<sup>6</sup>

The report reflects that a district school psychologist conducted a psychoeducational evaluation of the student in April 2019 because a reevaluation was requested so that the student could be placed in a different educational setting based on his medical needs (Dist. Ex. 3 at p. 1). During the evaluation, which was conducted at his former school, his "aides told the examiner that [the student] ha[d] a lot of knowledge and likely could have answered more questions had they been presented in a different way," although the report also indicated that when the student "was focused and understood instructions, he was able to answer questions" (id.). The evaluator noted that the student was cooperative, and "moved through testing slowly, due to his slow processing speed, and distractibility" (id.). By report, the student "did not interact much" with the evaluator, and "would frequently go off on tangents, or say things that did not relate to the question" (id.). The evaluator stated in the psychoeducational report that "based on the above stated behaviors, all indications suggest[ed] this may not be a valid and reliable assessment of [the student's] current level of cognitive and academic abilities" (id. at p. 2).

With respect to the student's performance on formal assessment measures, the evaluator administered the Weschler Intelligence Scale for Children – Fifth Edition (WISC-V) to the student but was unable to calculate the student's full-scale IQ (FSIQ) because he "did not complete all indices," and he "was only able to comprehend a few subtests" (Dist. Ex. 3 at pp. 2-3). However,

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<sup>5</sup> The hearing record does not include a written teacher report dated May 21, 2020 and it is unclear from the prior written notice and testimony if this reference was to a written progress report or a verbal report provided by the Rebecca School staff in attendance at the CSE meeting (see Tr. pp. 45-46, 85; Dist. Ex. 4 at p. 2). Participants at the May 2020 CSE meeting included a social worker from the Rebecca School and the student's teacher at the Rebecca School for the 2019-20 school year (Dist. Ex. 1 at p. 23; Tr. p. 142).

<sup>6</sup> The December 2019 Rebecca School progress report was not included in the hearing record.

according to the evaluator, "describing [the student's] domain-specific performance allow[ed] for a more thorough understanding of his functioning in distinct areas" than the FSIQ, and the evaluator opined that it was "better to examine each individual area separately" (*id.* at p. 2). The student's performance on the verbal comprehension index was in the extremely low range (45, < 0.1 percentile) and he performed equally on the similarities and vocabulary subtests "suggesting that his word knowledge [was] similarly developed to his abstract reasoning at th[at] time" (*id.*). According to the report, the student "did not understand the directions on [s]imilarities and was only able to name pictures for [v]ocabulary" (*id.*). The student's performance on the visual spatial index was in the extremely low range (53, 0.1 percentile), and the evaluator noted that the student worked slowly and completed questions that were below his age level (*id.*). With respect to fluid reasoning, the student's performance "was extremely low for his age" (45, <0.1 percentile), and as he performed similarly on the matrix reasoning and figure weights subtests, the evaluator suggested that the student's quantitative reasoning skills were similarly developed to his perceptual reasoning skills, while noting that he did not understand the direction on the figure weights subtest (*id.*). According to the April 2019 psychoeducational evaluation report, the student's working memory skills were in the extremely low range (45, <0.1 percentile), and the evaluator stated that the student was "unable to answer any questions on [d]igit [s]pan, and very few on [p]icture [s]pan" subtests (*id.* at pp. 2-3).

The April 2019 psychoeducational evaluation reflected the results of the Kaufman Test of Educational Achievement – Third Edition (KTEA-3), which assessed the student's academic abilities (Dist. Ex. 3 at pp. 3-4). The student's reading skills were assessed at the "basic and applied skill level" and he achieved an overall reading composite score in the low range (58, 0.3 percentile rank) with scores in the low range with respect to letter and word recognition (64, 1st percentile), and reading comprehension (57, 0.2 percentile) (*id.*). The evaluator reported that the student was able to match pictures to words, and read and followed commands, but was unable to answer questions about passages (*id.*). The student's mathematics score was also in the low range (57, 0.2 percentile) with scores on the math concepts and application subtest in the very low range (47, <0.1 percentile), as, by report, the student struggled with identifying a person's place in line, number order, and reading a chart (*id.*). The student obtained a score of 69 (2nd percentile) on the math computations subtest, which fell in the low range and he struggled with higher level questions (*id.*). With respect to writing, the student scored in the extremely low range (40, < 0.1 percentile) on the written expression subtest; by report, he was only able to write his first name but could write words and a basic sentence (*id.*).

According to the April 2019 psychoeducational evaluation report, the middle school director at the approved nonpublic school the student was attending at the time and the parent completed a measure of the student's adaptive skills (Dist. Ex. 3 at p. 4). The student's adaptive skills both at school and at home were in the extremely low range (45, <0.1 percentile at school; 55, <1 percentile at home) and, according to the evaluator, his slightly higher skills at home were presumably due to the familiarity of the home setting (*id.*). At school, the student achieved domain scores in the areas of communication skills (52, <1 percentile), daily living skills (41, <1 percentile), and socialization skills (44, <1 percentile) (*id.*). At home, the student achieved domain scores in the areas of communication skills (55, <1 percentile), daily living skills (51, <1 percentile), and socialization skills (50, <1 percentile) (*id.*).

Although the IHO appeared to focus on the school psychologist's statement that based on the student's behaviors, the psychoeducational evaluation may not have been a valid and reliable assessment of the student's then-current cognitive and academic abilities, as described above, the evaluation report did describe the student's performance on cognitive, academic, and adaptive behavior tasks on that particular day (Dist. Ex. 3), and I note that the parent testified that because of the student's seizure disorder "he c[ould] be on one – one level one day and he c[ould] be on a completely [different] level the next day. So it [was] not like you [were] building from square one and building up. [The student] [was] like up, down, all over the place" (Tr. p. 140). Further, the April 2019 psychoeducational evaluation was not the only source of information available to the May 2020 CSE.

As discussed below, the May 2020 CSE also had evaluative information about the student provided by the parent and Rebecca School Staff, including information provided by the student's Rebecca School classroom teacher at the meeting and a Rebecca School progress report. A district may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dep't of Educ., 2011 WL 609880, at \*9-\*10 [S.D.N.Y. Feb. 16, 2011]); and may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*23 [S.D.N.Y. March 29, 2013], aff'd, 554 Fed. App'x 56 [2d Cir. 2014]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]; see also C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 230 [S.D.N.Y. 2014] [holding that additional evaluations were not required when the CSE relied on a detailed Rebecca School progress report, conducted shortly before the CSE meeting, that "provide[d] a holistic assessment of the Student's needs across a wide variety of academic, social, and behavioral functions," and the student's parents and teacher participated in the CSE meeting]). Accordingly, rather than focusing on the limitation contained in the April 2019 psychoeducational evaluation, the parties and the IHO should have focused on whether the May 2020 CSE had sufficient evaluative information available from a variety of sources to develop the student's IEP for the 2020-21 school year (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]).

In this instance, the IHO found that the May 2020 CSE did not have sufficient information available to it regarding the student's "sensory regulation, emotional regulation, seizure activity, and stutter" (IHO Decision at p. 9).

The May 6, 2019, social history documented—as previously stated—the student's seizure history, educational history, and noted that at that time the student had not shown progress upon the completion of eighth grade (see Dist. Ex. 2).

The parent testified that she participated in the May 2020 CSE meeting along with two people from the Rebecca School who were familiar with the student, including his classroom teacher, who provided information about his current performance at the Rebecca School during the meeting (see Tr. pp. 142-46). Specifically, the parent testified that the May 2020 CSE discussed the student's physical limitations, how the student was performing in class, including his mathematics, reading, and writing performance, "all areas of his education," and what the parent and Rebecca School staff believed the student needed in an educational program (Tr. pp. 143-46).

The school psychologist, who served as the district representative at the May 2020 CSE meeting, testified that although the student's Rebecca School related service providers did not participate in the meeting, she "believe[d] the Rebecca School's progress report incorporate[d] reports from all related service providers" (Tr. pp. 41, 86). She testified that the present levels of performance in the May 2020 IEP were derived from a review of the progress report or the April 2019 psychoeducational evaluation report but it "also largely c[ame] from the discussion within the meeting" and that it was her job as district representative to ask questions of the teacher and parent about the student's then-current academic, social, and functional skills, and any medical concerns so that "a lot of the information that is in the [present levels of performance] [wa]s also taken directly from discussion in the meeting with the parties who [were] most familiar with [the student]" (Tr. pp. 47-48). The school psychologist stated that at the CSE meeting she was "typing into the IEP" and adding the input of everyone who was participating (Tr. pp. 55-56). Additionally, the school psychologist further testified that she did not believe that the CSE needed any other information or evaluations in order to make recommendations for the student, because the CSE "had a lot of information about the skills that [the student] had, but also the areas in which [the student] needed support" . . . "that picture was very clearly painted for us, so we did not feel that we needed any additional information at that time to make a recommendation" (Tr. p. 48).

With regard to the district's assertion that the IHO erred in finding that the CSE lacked evaluative information about the student's seizure activity, stutter, and sensory/emotional regulation, review of the IEP shows that it included information concerning the student's seizure disorder and how the district planned to address that need. Specifically, the IEP indicated that the student had received a diagnosis of refractory epilepsy and experienced frequent seizures which were inconsistent and unpredictable (Dist. Ex. 1 at p. 3). According to the IEP, there were no known antecedent conditions to the seizures and following a seizure the student required a period of time (one to two hours) to recover, which precluded him from engaging in academic activities causing the student to miss class and sometimes get behind in his school work (*id.*). As a result of his seizures the student had "setbacks" that required reteaching of previously acquired academic skills (*id.*). The IEP reflected parent report that the student's moods fluctuated after a seizure, as did the time he needed to recover after having a seizure (*id.*). Further, the IEP indicated that emergency medication was kept at school and could be administered if needed, and that the student took medications three times each day (*id.*). The IEP also indicated that the student had a health paraprofessional and he used an adaptive chair at school, which was also taken on community trips in case it was needed (*id.*). According to the IEP, the student's seizure disorder was "of the utmost concern" to the parent and teachers (*id.*).

To address the student's needs arising from the seizure disorder, the May 2020 IEP developed a number of management strategies to support the student in the classroom including: providing: a classroom environment that was calm, consistent, and structured; opportunities for breaks; access to quiet space for breaks; increased processing time; procedures to recover after a seizure; presence of a nurse in the school building to support the student during or after seizures; and repetition and review of previous learning instructions and concepts (Dist. Ex. 1 at p. 4). In addressing the student's health management concerns the May 2020 CSE recommended that the student receive individual health paraprofessional services on a daily/full time basis for his health and seizure disorder, and the IEP included an annual goal for the paraprofessional to monitor the length of the student's seizures and document the information in a log (*id.* at pp. 14, 16). Accordingly, review of the hearing record shows that the May 2020 had sufficient information

available to formulate a plan to address the student's seizure disorder and without a more particular allegation as to what was missing from the student's programming related to the seizure disorder this was not a basis for finding that the district did not offer the student a FAPE.

However, review of the evidence included in the hearing record supports the IHO's conclusion that the district lacked evaluative information regarding the student's stutter and sensory and emotional regulation.<sup>7</sup> Review of the May 2019 social history and the April 2019 psychoeducational evaluation report do not reflect mention of the student's stutter or sensory and emotional regulation needs (see Dist. Exs. 2; 3). Regarding the student's speech, the IEP stated that the student "ha[d] a stutter which may become exacerbated in a noisy or unstructured environment," and that he "benefits from access to a quiet space and taking a break if the environment becomes overwhelming" (Dist. Ex. 1 at p. 2). The IEP also reflected parent report that the student's "stutter ha[d] only occurred in the last three years," and that teachers supported his communication with peers, "particularly when his speech fluency [wa]s hindered" (*id.*). While the May 2020 CSE recommended that the student receive speech-language therapy, review of the annual goals shows that none of the student's goals addressed stuttering, and it is otherwise unclear from the evidence in the hearing record to what extent, if any, the CSE needed to address the student's stutter beyond offering him a "quiet space" to "take a break" (Dist. Ex. 1 at pp. 4, 11-13, 15). Similarly, review of the documentation the CSE relied on in developing the May 2020 IEP and the IEP itself does not reflect evaluative information about the student's sensory and emotional regulation, beyond the notations in the IEP that he had "become more willing to express his feelings or emotions throughout the school year" and he "love[d] to participate in gross motor movement groups," as well as management needs that included a calm, consistent, structured classroom, and the opportunity for and quiet space for breaks (*id.* at pp. 2, 4). Additionally, although the May 2020 CSE recommended that the student receive OT, the annual goals for OT appeared unrelated to any sensory regulation needs the student may have been exhibiting (see *id.* at pp. 10, 11, 15). The May 2020 CSE recommended that the student receive counseling, and review of the IEP annual goals shows that some were designed to improve the student's ability to participate in a group activity/play with peers, increase pragmatic skills, and build positive self-esteem; however, it is difficult to ascertain whether those goals appropriately addressed the student's emotional regulation skills and needs, if any, without further evaluative information as to what the student's needs in those areas were at the time of the CSE meeting (*id.* at pp. 11-13, 15).

Based on the above, there is insufficient information available in the hearing record to overturn the IHO's determinations that the May 2020 CSE lacked sufficient information regarding the student's sensory and emotional regulation or related to his stutter. Pertinently, while it is entirely possible that this information was available to the CSE as a part of the December 2019 Rebecca School progress report, which the May 2020 IEP indicated was "reviewed and included in the development of this IEP," the December 2019 Rebecca School progress report was not included in the hearing record for review and the district did not make an attempt to submit it as additional evidence with its request for review. As there is insufficient evaluative information

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<sup>7</sup> The school psychologist testified that while the Rebecca School related service providers did not attend the May 2020 CSE meeting, she believed that the December 2019 Rebecca School progress report, which as indicated above was not included in the hearing record, "incorporate[d] reports from all related service providers" and may have provided additional information regarding the student's stutter, and sensory and emotional regulation (Tr. p. 86; see Dist. Ex. 1 at p. 1).



included in the hearing record to overturn the IHO's conclusion that the district lacked sufficient evaluative information regarding the student's social and emotional regulation and his stutter to create an IEP for the student, the IHO's determination that the district denied the student a FAPE for the 2020-21 school year must be upheld.

### **C. Assigned Public School Site**

The district also appeals from the IHO's finding that it failed to prove that it assigned the student to a public school that could implement the May 2020 IEP (Parent Ex. A at p. 3). In particular, the IHO found that the generic testimony of the principal of the assigned school did not address the student's seizure issues, medication, a bus lift, or an adaptive chair for the student (IHO Decision at p. 9). In addition, the IHO determined that the only public school placement available to the student in July 2020 provided remote instruction and that the IEP failed to provide a plan for remote instruction for the student (*id.* at pp. 9-10).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (*R.E.*, 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (*R.E.*, 694 F.3d at 195; see *E.H. v. New York City Dep't of Educ.*, 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009]; *R.B.*, 589 Fed. App'x at 576). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (*M.O.*, 793 F.3d at 244; *R.E.*, 694 F.3d at 191-92; *T.Y.*, 584 F.3d at 419-20; see *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (*M.O.*, 793 F.3d at 245; see *Y.F. v. New York City Dep't of Educ.*, 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; *J.C. v. New York City Dep't of Educ.*, 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; *B.P. v. New York City Dep't of Educ.*, 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see *Y.F.*, 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (*M.O.*, 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see *M.E. v. New York City Dep't of Educ.*, 2018 WL 582601, at \*12 [S.D.N.Y. Jan. 26, 2018]; *Z.C. v. New York City Dep't of Educ.*, 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; *L.B. v. New York City Dept. of Educ.*, 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; *G.S. v. New York City Dep't of Educ.*, 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; *M.T. v. New York City Dep't of Educ.*, 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based

on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).

The CSE met virtually in May 2020 due to the COVID-19 pandemic (Dist. Ex. 1 at p. 23). As noted by the IHO, the May 2020 IEP does not address how remote or virtual instruction could or would have been implemented for the student during the 2020-21 school year (IHO Decision at pp. 9-10; see Dist. Ex. 1). The school psychologist stated that she was "not familiar" with the specialized public school site that the district assigned the student to attend for the 2020-21 school year (Tr. at p. 87).

The principal of the assigned school testified that staff would have been able to implement the 6:1+1 special class recommendation in July 2020 (Tr. p. 109). Upon cross-examination, the principal testified that the time in question, July 2020, "was at the height of the pandemic" and therefore only remote instruction was being provided (Tr. pp. 109-10). Regarding the CSE's recommendation for 1:1 full-time paraprofessional services to address the student's health and seizure disorder, the principal testified, generally, that "all of our teachers and our classes that had students that needed a paraprofessional, they were able to assist the students remotely" (id.). However, she did not provide a specific explanation as to how this service could have been provided for this student remotely during the 2020-21 school year.

Overall, the evidence in the hearing record is uncontested that the student needed the services of a 1:1 paraprofessional due to health and safety concerns because the student frequently had seizures during the school day (Dist. Ex. 1 at pp. 3, 16). The May 2020 CSE recommended 1:1 full-time health paraprofessional services to accommodate the student's seizure disorder and health needs (id. at p. 16). The IEP indicated that the paraprofessional would monitor and document the student's seizures (id. at p. 14). Additionally, a review of the hearing record shows that the parent paid for a paraprofessional at the Rebecca School because the student "require[d] a paraprofessional" (Parent Ex. O at pp. 7, 8).

The school psychologist testified that the CSE discussed that the student's needs were "very very high" and what supports the student needed in the classroom (Tr. p. 61). The CSE recommended a 1:1 health paraprofessional which, according to the school psychologist, was intended to provide the student with 1:1 health support which was a "huge concern for parents and teachers" (Tr. pp. 62-63). She testified that in addition to the recommended small class size, the individual paraprofessional "was with [the student] all day, every day, monitoring the health concerns" so he would have the "medical piece covered individually throughout the whole day" (Tr. p. 63). The school psychologist stated that the student had significant medical concerns resulting in concerns about his safety which also factored into the recommendation for full time health paraprofessional services (Tr. p. 67).

In this instance, the district's appeal from the IHO's decision regarding implementation of the May 2020 IEP, merely indicates that the principal of the assigned school testified that the school could implement the IEP (Req. for Rev. ¶18). However, as determined by the IHO, the hearing record does not indicate how the district would have provided remote instruction to the

student during the 2020-21 school year, which for this student should have included an explanation as to how the May 2020 IEP recommendation for 1:1 support to address the student's health and seizure disorder would have been implemented (Dist. Ex. 1 at p. 16).<sup>8</sup>

During the 2020-21 school year, State and local officials were tasked with making decisions regarding the delivery of instruction to all students, taking into account the safety of the local school community, and one of the options for safely delivering instruction, including special education and related services, was remote/distance instruction (see, e.g., "Questions and Answers on Implementation of IDEA Part B Provision of Services," at p. 1, OSEP QA 20-01 [Sept. 2020], available at <https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf>). Of note, while the guidance, at the time, indicated that "the health and safety of children, families, and the school community is most important" and addressed concerns that prevented students from appearing for in-person instruction, the guidance did not address how the health and safety concerns for students who needed in-person instruction might be met during a period of remote instruction (id.). Generally, it is not clear if the district's planning for a remote option was designed to take into account students whose IEPs indicated that they had health and safety concerns that required individual attention. Nevertheless, in this instance, there was no explanation as to how the full-time 1:1 paraprofessional services recommended to address the student's health and seizure disorder could have been provided remotely, this leaves a gap as to how the student's health and safety needs would have been met by the district during the 2020-21 school year. Based on the above, the district has not presented a sufficient argument to depart from the IHO's determination that the district failed to provide the student with a FAPE for the 2020-21 school year.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the conclusion that the district failed to offer the student a FAPE for the 2020-21 school year, the IHO's determination must be upheld, and the appeal dismissed. As the district did not appeal the IHO's determination that the Rebecca School was an appropriate unilateral placement, or whether equitable considerations weighed in favor of the parent's request for relief, the parent's requested relief for tuition reimbursement for the Rebecca School for the 2020-21 school year is hereby granted.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations herein.

### **THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
January 13, 2023

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**

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<sup>8</sup> It is possible that the student's health concerns related to his seizure disorder could have been met through the provision of paraprofessional services remotely, as that appears to have been what was recommended by the Rebecca School during a period of remote instruction (see Parent Ex. H at p. 1).