The University of the State of New York

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

No. 23-024

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

Appearances:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Benjamin M. Kopp, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational programs respondent (the district) recommended for her daughter for the 2019-20, 2020-21, and 2021-22 school years were appropriate and denied her request for compensatory education. The appeal must be sustained in part.

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 has received diagnoses of "mild ASD [autism spectrum disorder]" and attention deficit hyperactivity disorder-combined type, and received special education and related services through the Early Intervention Program (EIP) and Committee on Preschool Special Education (CPSE) (Parent Ex. Q at p. 3; Dist. Ex. 1 at pp. 2, 4-5).

The district completed a psychoeducational evaluation of the student in January 2018, while she was attending a pre-kindergarten program and receiving speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Ex. W). The evaluator administered cognitive testing in English and attempted to administer academic assessment in Spanish, but the

student was unable to proceed in Spanish and the evaluator determined that the student presented with greater English language skills and administered an achievement test in English (id. at p. 3).

An initial CSE meeting convened on April 25, 2018, to determine the student's eligibility and develop her IEP for the 2018-19 school year (kindergarten) (Parent Ex. I). Finding that the student was eligible for special education as a student with autism, the April 2018 CSE recommended a 12:1+1 special class placement in a district specialized school, and related services of OT, PT, and speech-language therapy (id. at pp. 1, 6-7, 10).[1] All instruction and services were recommended to be delivered in English (id. at pp. 6-7). In June 2018, the parent completed a Home Language Identification Survey that identified English as the student's dominant language (Dist. Ex. 1 at p. 5).

The student attended the 12:1+1 special class placement at a district specialized school during the 2018-19 school year (Tr. pp. 30, 33). In a letter, dated February 5, 2019, sent to the principal of the student's school, the parent voiced disagreement with the district's January 2018 evaluation of the student's academic, social/emotional, and behavioral abilities (Parent Ex. BB at p. 3). The parent asserted that the district conducted the evaluation "mainly in English, despite Spanish being listed on the face of the evaluation report as the language of assessment and despite multiple, clear records that [the student] [was] a Spanish-dominant student" (id.). The parent requested independent evaluations of the student including an independent bilingual neuropsychological evaluation, an independent bilingual functional behavioral assessment (FBA), and, if warranted by the FBA, a behavioral intervention plan (BIP) with a Spanish translation prepared by a board-certified behavior analyst (BCBA) (id. at pp. 3-4).

The district completed its own reevaluations of the student in April 2019 which included a social history update, a classroom observation, a bilingual speech-language evaluation, an OT evaluation, and a PT evaluation (Parent Exs. S; T; U; V; Dist. Ex. 1). The district also completed an FBA on May 6, 2019 (Parent Ex. R).

The student continued to attend the same special class placement in the district's specialized school for the 2019-20 school year (first grade) (Tr. pp. 30-33). In a final decision issued on February 2, 2020, resulting from a prior proceeding regarding allegations of a denial of FAPE for the 2017-18 and 2018-19 school years, an IHO ordered the district to fund an independent educational evaluation (IEE), including an independent bilingual neuropsychological evaluation, an independent bilingual FBA conducted by a BCBA, an independent PT evaluation, and an independent bilingual speech-language therapy evaluation of the student (Parent Ex. C at pp. 3, 5-6).[2]

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] While the IHO's decision was dated February 2, 2020, according to the parent, the district did not transmit the decision to the parent until June 26, 2020 (Parent Exs. B at p. 3; X at ¶ 7). The parent subsequently filed a State complaint with the New York State Education Department on August 3, 2020, alleging that the district's impartial hearing office failed to mail the final decision in a timely manner (Parent Ex. B at pp. 1, 3). The Office of Special Education concluded that the February 2020 decision was not timely transmitted to the parties but determined that no further action was required as the final decision had already been transmitted (id. at p. 3).

In April 2020, in response to the shift to remote instruction during the COVID-19 pandemic, the district issued the student a special education remote learning plan, which included one 30-minute session of counseling delivered in English per week, one 30-mintue session of speech-language therapy delivered in English per week, and one 30-mintue session of OT delivered in English per week (Parent Ex. H).

The independent neuropsychological evaluation of the student was completed on various dates in July 2020 and a report was issued on September 18, 2020 (Parent Ex. Q).[3] During the 2020-21 school year (second grade) the student remained in the same district specialized school she had attended since kindergarten with instruction provided remotely due to the COVID-19 pandemic (Tr. pp. 30-33; Parent Ex. E at p. 3).

The CSE convened on October 8, 2020 to review the student's progress and develop her IEP for the 2020-21 school year (Parent Ex. G). The CSE recommended a 12-month school year program delivered in English consisting of a 12:1+1 special class placement in a "non-specialized" district community school with related services (id. at pp. 1, 21-22, 28). Additionally, the CSE recommended one 30-minute session of group counseling per week, two 30-minute sessions of group OT per week, one 30-minute session of group speech-language therapy per week in the classroom, one 30-minute session of group speech-language therapy per week in the therapy room, and one 30-minute session of parent counseling and training per month (id. at p. 22).

On February 19, 2021, independent PT and OT evaluations of the student were conducted (Parent Exs. L; M). On March 22, 2021, the district completed a psychological update of the student as part of the student's triennial reevaluation and pursuant to the February 2020 IHO order (Parent Ex. N at p. 1). A BCBA conducted an independent FBA of the student over three dates in April 2021 (Parent Ex. J).

The CSE convened on April 19, 2021 to review the student's progress and develop her IEP for the 2021-22 school year (Parent Ex. F). The CSE recommended a 12-month school year program consisting of a 12:1+1 special class placement in a State-approved nonpublic school (id. at pp. 22, 27, 28). The CSE also recommended one 30-minute session of group counseling per week, two 30-minute sessions of individual OT per week in the therapy room, one 30-minute session of parent counseling and training per month, two 30-minute sessions of individual OT per week in the student's classroom, two 30-minute sessions of individual PT per week, and three 60-minute sessions of speech-language therapy per week (id. at p. 23). All of the special class instruction and related services were to be provided in English, with the exception of speech-language therapy which was to be delivered in Spanish (id. at pp. 22-23).

[3] While the IHO ordered a bilingual neuropsychological evaluation, there is nothing in the September 2020 neuropsychological evaluation report that identifies it as a bilingual evaluation (see generally Parent Ex. Q). The evaluator testified in an affidavit that she was "able to perform bilingual (Spanish and English) neuropsychological evaluations of students when needed" and indicated that she was familiar with the student because she "conducted a neuropsychological evaluation of her" (Parent Ex. EE ¶¶ 5, 7). The evaluator's affidavit does not indicate that a bilingual evaluation was performed on the student (see generally, Parent Ex. EE). Moreover, the parent's affidavit also refers to the September 2020 neuropsychological evaluation as "the awarded independent neuropsychological evaluation" without mention of the evaluation being bilingual (see generally Parent Ex. Y).

The CSE reconvened on June 23, 2021 to review the results of the June 2021 independent FBA (Parent Ex. E at p. 19). No changes were made to the student's IEP as a result of the FBA; however, the student's PT services were changed to three 30-minute individual sessions per week, following the recommendation of the February 2021 independent PT evaluation (Tr. pp. 222, 229; compare Parent Ex. E at pp. 11, 15; 19, with Parent Ex. F at pp. 13, 23).

The student remained in the same classroom at the district specialized school for the first part of the 2021-22 school year (third grade) and began attending Manhattan Star Academy (MSA) in January 2022 pursuant to a court ordered stipulation of settlement (Parent Exs. X ¶ 19; Z at p. 5). The parties agreed that the April 2021 IEP was not implemented and that the district "denie[d] any and all liability arising out of [the parent's] allegations"; however, the district agreed to fund three hours of bilingual speech-language therapy weekly at a rate of $180.00 per hour and fund the student's tuition at MSA for the 2021-22 school year in an amount not to exceed $90,915.00 (Parent Ex. Z at pp. 3-5). Further, the December 9, 2021 stipulation stated that the parent did not "release claims that she may have concerning alleged denial(s) of FAPE preceding [the student]'s first day of enrollment at MSA" (id. at p. 4). The stipulation further indicated that the parent did not in any way limit the district's obligation to provide the student with a FAPE for the 2022-23 school year (id.).

B. Due Process Complaint Notice

In a due process complaint notice dated May 16, 2022, the parent alleged that the district failed to provide the student with a FAPE for the 2019-20, 2020-21, and 2021-22 school years, specifically from May 16, 2020 through December 31, 2021 (Parent Ex. A at pp. 1, 7).

First the parent alleged that the district failed to have an IEP in place from May 16, 2020 to October 8, 2020. (Parent Ex. A at p. 1).

Next, the parent claimed that the district significantly impeded the student's comprehensive evaluations by failing to provide the parent with the prior IHO decision dated February 2, 2020 until June 26, 2020 and by failing to sufficiently evaluate the student timely to identify and accommodate her needs (Parent Ex. A at pp. 2-3). The parent further argued that these delays impeded the student's right to a FAPE and significantly impeded the parent's meaningful participation in the decision-making process (id. at p. 4).[4]

The parent then alleged that the district failed to provide appropriate notice for the October 2020 CSE meetings (Parent Ex. A at p. 5). Further, the parent alleged that the October 8, 2020 IEP failed to offer the student a FAPE because the IEP failed to offer an appropriate program to the student (id. at pp. 5-6). Specifically, the parent claimed that the October 2020 IEP did not reflect the student's evaluations or needs; failed to offer a research-based methodology for students with autism and language disorders; failed to offer the student any PT services; failed to offer the student a paraprofessional; and failed to recommend assistive technology for the student despite noting that the student required an assistive technology device or service (id.).

[4] The parent also alleged that the student was not formally evaluated for OT, PT, or speech-language therapy until April of 2021 and that such delay impeded the student's right to a FAPE (Parent Ex. A at p. 2).

The parent claimed that district failed to offer a student a FAPE for the 2021-22 school year (Parent Ex. A at p. 6). Specifically, the parent alleged that the April 2021 IEP recommended a 12:1+1 special education class without recommending a research-based multisensory method, teachers trained to work with students similarly situated to the student, an individualized paraprofessional, bilingual speech-language therapy, or tutoring or other method of making up for the student's loss of education and services noted in the student's evaluations and on the IEP (id.). Further, the parent alleged the district provided no reasoning as to why it made the recommendations on the April 2021 IEP and the April 2021 CSE failed to address the regulatory "Special Factors" for the student's needs (id. at p. 7).

Lastly, for the period from May 2020 through December 2021, the parent asserted that the April 2021 CSE acknowledged the district's programming was not addressing the student's needs and even after the April 2021 CSE meeting, the district failed to implement the April 2021 IEP (Parent Ex. A at p. 7).

For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, specifically from May 16, 2020 to December 31, 2021; an order awarding "compensatory academic and related services, at an enhanced rate, with the appropriate nature and total hours of such to be determined following the above evaluations"; and an order awarding "related services, at an enhanced rate, with the appropriate nature and total hours of such to be determined following the above evaluations" (Parent Ex. A at p. 8).

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 1, 2022 which concluded on December 7, 2022 after five days of proceedings (Tr. pp. 1-337). Following the conclusion of the impartial hearing, both parties submitted closing briefs to the IHO—both dated January 6, 2023 (Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.).

In a decision dated January 8, 2023, the IHO found that the district provided the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years and denied all of the parent's requested relief (IHO Decision at p. 21).

The IHO organized the decision by addressing each of the parent's requests for compensatory education separately (IHO Decision at pp. 17-21). First, the IHO addressed the parent's request for compensatory PT (id. at p. 17). The IHO found that the parent's assertion that between April 2021 and December 2021 the student should have received 90-minutes per week of PT and that the district only provided 60-minutes of PT per week was not accurate (id.). The IHO found that the June 2021 IEP mandated that the student receive 90-minutes of PT per week and testimony indicated the student received 90-minutes of PT beginning in June 2021 (id.). Further, the IHO found that based on the inaccuracy of the parent's assertion, the parent lacked credibility on this issue, which undermined the reliability of the March 2021 PT IEE as the evaluator indicated that "she had to rely on what the Parent reported" (id.). In the alternative, the IHO found that even if the student did not receive "the full complement of PT over the applicable period of time," the parent did not demonstrate the need for PT—specifically noting that the physical therapist who

had been working with the student did not believe the student required PT (id. at pp. 17-18). As a result, the IHO denied the parent's request for 15.5 hours of compensatory PT (id. at p. 18).

Second, the IHO addressed the parent's request for 276 hours of compensatory bilingual speech-language therapy (IHO Decision at pp. 11, 18). The IHO found that the recommendation for 276 hours of compensatory bilingual speech-language therapy was based on what the evaluator who conducted the September 2020 bilingual speech-language evaluation believed the student should have received during the 2018-19 and 2019-20 school years and that because the parent failed to raise any claims regarding the 2018-19 school year in her May 16, 2022 due process complaint notice, 136 hours of the request for compensatory bilingual speech-language therapy was not properly before the IHO (id. at p. 11).[5] Next, the IHO noted that "there is no objective basis in the record to conclude that the Student required bilingual services" (id.). Further, the IHO noted testimony that the primary reason the student needed bilingual speech-language therapy was so that the student could communicate at home better, which the IHO determined was not the purpose of school based speech-language therapy (id. at pp. 18-19).[6] The IHO held that the only reason the CSE mandated bilingual speech-language therapy in the student's April 2021 IEP was because the parent "insisted upon it" (id. at p. 18). As a result, the IHO denied the parent's request for compensatory bilingual speech-language therapy and, further, found in the alternative that such a request was barred by the statute of limitations (id. at p. 19).[7]

Next, the IHO addressed the parent's request for compensatory tutoring services (IHO Decision at pp. 19-21). The IHO found that it was "remarkable" that the parent's witness who evaluated the student in July 2022 concluded that the student was "performing either at, above, or fairly close to grade level across a broad array of academic areas" given the student's "various challenges and disabilities" and further held that this evidence shows the district did provide the student with a FAPE (IHO Decision at p. 19). The IHO also noted that the district assistant principal testified that the student was "performing at the top of her class academically" and so it was entirely "unclear what else the District was supposed to do for the Student" (id.). Moreover, the IHO found that the recommendations that the student receive 600 hours of compensatory tutoring was "pulled from thin air" and there was no further justification as to how the witness arrived at that number or "what she hoped to achieve with the Student should these hours be granted" (id.). Accordingly, the IHO denied the parent's request for 600 hours of compensatory

[5] The IHO further questioned whether the claim for the 2019-20 school year was barred by the statute of limitations, but found it irrelevant, holding the parent failed to demonstrate that the student either required or would have benefited from bilingual speech-language therapy (IHO Decision at p. 12).

[6] According to district's April 2019 bilingual speech-language evaluation, conducted in the student's home, the student's mother spoke both English and Spanish, but the student's father only spoke Spanish (Parent Ex. T at p. 3).

[7] In the decision, the IHO noted that the parent knew or should have known of the basis for her allegations regarding the bilingual speech-language therapy on or around September 28, 2020 when she received the September 2020 bilingual speech-language therapy evaluation, and further that it was entirely unclear why the parent waited until May 2022 to file a request for compensatory bilingual speech-language therapy (IHO Decision at p. 11).

tutoring finding that the student made "consistent and meaningful" progress while attending the district school and was "literally at the top of her class academically" (id. at pp. 20-21).

Lastly, the IHO claimed that the parent continually insisted on services for the student that the parent either knew or had good reason to know the student did not need which was a "recurrent theme" in the proceeding (IHO Decision at p. 20). In particular, the IHO found that the parent was insisting on PT services for the student even after being told by the district physical therapist that the student did not need such services and further found that removing the student from the classroom for unnecessary services, like PT, was harmful to the student and was not something the student benefited from (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's January 8, 2023 decision raising 32 enumerated issues for review, identified as follows:

1. The IHO erred in shifting the burden of proof to the parent;

2. The IHO erred in finding bilingual speech-language therapy time-barred or questionably barred;

3. The IHO failed to find the district did not have an IEP in place from May 16, 2020 through October 8, 2020;

4. The IHO failed to find that the district significantly impeded the student's comprehensive evaluations as ordered in the prior February 2, 2020 IHO decision;

5. The IHO failed to find that the district did not provide appropriate meeting notices for the October 2020 CSE meetings;

6. The IHO failed to find that the October 2020 provided an inappropriate program to the student;

7. The IHO failed to find that the April 2021 IEP and June 2021 IEP provided an inappropriate program to the student;

8. The IHO failed to find that the district failed to provide an appropriate program from May 16, 2020 to December 31, 2021;

9. The IHO erred in finding the district's witnesses credible;

10. The IHO failed to find the district's school psychologist not credible;

11. The IHO failed to find the district speech pathologist not credible;

12. The IHO failed to find the district's assistant principal not credible;

13. The IHO failed to find the district's physical therapist not credible;

14. The IHO erred in finding that the student did not need PT;

15. The IHO erred in finding the student received 90-minutes per week of PT;

16. The IHO erred in finding the parent not credible for refuting the district;

17. The IHO failed to find the student was entitled to 15.5 hours of PT as compensatory education;

18. The IHO erred in finding the student did not need bilingual speech-language therapy;

19. The IHO erred in requiring Spanish-only dominance;

20. The IHO erred in excluding a 2016 evaluation from the hearing record;[8]

21. The IHO erred in finding and relying on the student having a preference for English;

22. The IHO failed to award any compensatory bilingual speech-language therapy;

23. The IHO failed to find that the student had at least a two-year deficit in all subjects two years ago;

24. The IHO erred in finding the student was either near or above grade level in all areas;

25. The IHO erred in finding "consistent and meaningful progress" based on the student being "at the top of her class" according to the district assistant principal;

26. The IHO erred in finding that the district provided the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years;

27. The IHO erred in finding that the parent's witness's recommendation for 600 hours of compensatory education was "almost ... pulled from thin air" with "no justification whatsoever set forth in the witness's affidavit as to how she arrived at this number, let alone why";

28. The IHO failed to find what the parent's witness hoped to achieve with the student should the compensatory tutoring hours be granted asserting that the witness indicated the student should be able to achieve or come close to grade level academically;

29. The IHO failed to award any compensatory tutoring;

30. The IHO erred in finding unnecessary requests by the parent to be a "theme";

31. The IHO erred in dismissing the due process complaint notice; and

[8] The parent includes a copy of a bilingual psychoeducational evaluation of the student, conducted in February 2016, as additional evidence on appeal (Req. for Rev. Ex. 1).

32. The IHO's conduct of hearing process resulted in issues that were avoidable.

For relief, the parent requests a reversal of the IHO's decision, a finding that the district denied the student a FAPE from May 16, 2020 through December 31, 2021, and an award of 600 hours of compensatory tutoring at market rate, 276 hours of compensatory bilingual speech-language therapy at market rate, and 15.5 hours of compensatory PT at market rate.

In an answer, the district responds with general denials and asserts that the IHO's decision should be upheld in its entirety. The district argues that the IHO did not shift the burden of proof to the parent and claims that the decision was based on the weight of evidence. The district further alleges that the parent's claims relating to the 2018-19 and 2019-20 school years are barred by the statute of limitations. The district argues that it provided the student a FAPE for the 2020-21 and 2021-22 school years and that the IHO properly denied all of parent's request for compensatory education.

Further, the district argues certain claims raised on appeal are not within the scope of the hearing because the parent did not raise them in her due process complaint notice. Specifically, the district laid out the parent's issues with the October 2020 IEP that were specified in the May 2022 due process complaint notice and requests that any additional claims made on appeal be disregarded.[9] The district alleges that parent's request for compensatory PT for the 2021-22 school year should be denied because parent did not raise the district's April 2021 PT recommendation or the implementation of PT for the 2021-22 school year as a claim in her due process complaint notice. The district also asserts that the June 2021 IEP should not be addressed for the first time on appeal, alleging that the parent did not challenge the student's June 2021 IEP in her due process complaint notice. Moreover, the district claims the parent conceded that the parent did not in fact need assistive technology services and did not request any relief relating to assistive technology in her due process complaint notice.

The parent filed a reply to the district's answer. In her reply, the parent contends that the district's reference to prior State level administrative decisions did not support its argument that the IHO weighed the evidence in this matter properly and did not shift the burden to the parent. Further, the parent alleges that she appealed the IHO's entire finding regarding the statute of limitations and contends that the accrual dates for the parent's claims relating to the 2019-20 school year as determined by the IHO are within the statute of limitations. Also, the parent argues that the district's defense to the October 2020 IEP and the April and June 2021 IEPs are without merit.[10]

[9] According to the due process complaint notice, the parent alleged that the October 8, 2020 IEP was substantively inappropriate with respect to (1) assistive technology, (2) methodology, (3) physical therapy, and (4) lack of paraprofessional support (Parent Ex. A at pp. 5-6).

[10] Both parties submit additional evidence on appeal. The parent's request for review includes a copy of the bilingual psychological evaluation dated February 3, 2016 that the IHO excluded during the hearing (Req. for Rev. Ex. 1; see Tr. p. 167-70). The district's answer included a copy of a SESIS log with multiple dated entries from December 19, 2020 to October 8, 2020 (Answer Ex. 1). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b];

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. 386, 399 [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).

L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). For the parent's proposed additional evidence, I find no basis to disturb the IHO's decision to exclude the February 3, 2016 bilingual psychological evaluation as being irrelevant to the present matter, and further, I find the submitted evidence is not necessary to render a decision in this matter. Regarding the district's proposed additional evidence, as the information contained in the SESIS log was available during the impartial hearing, the document will not be considered on appeal, and it is also not necessary to render a decision in this matter. As such, I decline to accept the parent's proposed additional evidence or the district's proposed additional evidence. Further, because I find that the IHO was correct to exclude the parent's evidence from the impartial hearing record, the parent's claim relating to such will not be further addressed in this appeal.

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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[11]

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

VI. Discussion

A. Preliminary Matters

[11] 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., 580 U.S. at 402).

As an initial matter, an explanatory note concerning the structure of this decision is in order. While the bulk of the IHO's decision addressed whether the student was entitled to compensatory education, the IHO ultimately determined on the final page of the decision, that "'[b]ased on a review of the record and the details mentioned above, I find that the [d]istrict provided the Student a FAPE to the Student for the 2019-2020, 2020-2021 and 2021-2022 school years" (IHO Decision at p. 21). The only specific reasoning for the finding that the district provided a FAPE to the student was the IHO's statement in the preceding paragraph that "[t]he Student made consistent and meaningful progress at [the district school]. She was literally at the top of her class academically. Clearly, the District provided the Student with a FAPE" (id. at pp. 20-21). The IHO did not explain why the issue of whether the student was entitled to compensatory education was so thoroughly explored if the student was offered a FAPE in the first instance. Rather, any reasoning (beyond the brief and conclusory statement cited to above) by the IHO for finding that the district offered the student a FAPE must to some extent be extracted (where possible) from the IHO's discussion of why the parent's specific requests for compensatory education were not appropriate as relief. Accordingly, the preliminary focus in this decision concerns what issues are properly before me given the claims raised (or not raised) in the due process complaint notice, whether or not those claims were addressed (or not addressed) by the IHO, and what issues remain to be resolved on appeal.

1. Scope of Review

As an initial matter, the parent raises allegations relating to the IEE that was ordered pursuant to the February 2, 2020 IHO decision (Parent Ex. C). Specifically, the parent alleges that the district significantly impeded the student's comprehensive evaluations by failing to deliver the IHO's decision to the parent in a timely manner and thereby deprived the student of a FAPE (see Parent Mem. of Law at p. 17). The district argues that neither the IHO nor the undersigned have the authority to enforce a prior IHO decision (Answer ¶ 12).

It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

In review, any issues related to the completion of the IEEs ordered in the February 2, 2020 IHO decision is an attempt to review or enforce the IHO's decision issued in the prior matter and will not be addressed in the decision. According to State regulation, an IHO is required to "mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education" no later than 14 days from the date the impartial hearing officer closes the hearing record (8 NYCRR 200.5[j][5]). To the extent that the parent asserts that she did not receive a copy of the February 2020 IHO decision after it was issued by the IHO, the parent's recourse should have been to appeal from the IHO's decision in the prior matter and to the extent that the parent argues that the district did not immediately comply with the February 2020 IHO decision that claim is for enforcement. Accordingly, there is no basis to review the parent's

assertions related to the February 2020 IHO decision in this proceeding. Additionally, even if there were such a basis, the evidence in the hearing record shows that after the parent provided the district with the completed IEE, the CSE timely convened or reconvened to discuss the findings of the IEE (see generally Parent Exs. E-G, L-N, P-Q).

The district also requests that the SRO decline to review the June 2021 IEP for the first time on appeal alleging that the parent did not challenge the student's June 2021 IEP program in her due process complaint notice (id. ¶ 16).

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]).

Here, a review of the due process complaint notice demonstrates that the parent alleged that the district failed to recommend an appropriate program for the student for the 2021-22 school year and that the district failed to provide the student with an appropriate program and services from May 16, 2020 through December 31, 2022 (Parent Ex. A at pp. 6-7). A review of the due process complaint notice demonstrates that the parent did not raise any allegations regarding the June 2021 IEP specifically (see Parent Ex. A). Rather, the parent generally raised the allegation that the district failed to provide the student a FAPE from May 16, 2020 to December 31, 2021 (Parent Ex. A at p. 7). It should be noted that the parent's vague statement regarding the 2021-22 school year does not put the district on notice of what issues the parent had regarding the June 2021 IEP, however, as discussed further below, since I will be finding that the district did not provide the student with a FAPE from May 4, 2021 until December 31, 2021 on other grounds, I need not address specific claims raised relating to the June 2021 IEP in this decision.

2. Statute of Limitations

The district argues, and the IHO agreed, that the parent did not raise any claims in her due process complaint notice regarding the 2018-19 school year and as such her request for 276 hours of compensatory bilingual speech-language therapy for that school year was not properly before the IHO for consideration and even if the issue was properly pled, it was barred by the statute of limitations (Answer ¶ 9). More specifically, the IHO found it was unclear why the parent waited until May 2022 to file a request for compensatory speech-language therapy when she knew of her claims by, at the latest, September 2020 when she received the September 28, 2020 bilingual speech-language evaluation (IHO Decision at p. 11).

On appeal, the district argues that the parent's claim that the district did not have an IEP in place from May 16, 2020 to October 8, 2020 is barred by the statute of limitations because the parent knew or should have known that the student did not have an IEP in place for the 2019-20 school year on or about April 25, 2019, when the prior April 2018 IEP was set to expire (Answer ¶ 8). The IHO did not address this assertion specifically; however, the parent responds to the district's allegation asserting that she appeals from the IHO's statute of limitations determination, including his finding that any claims related to the 2018-19 school year were time-barred (Reply ¶¶ 7-10).

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

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

With respect to the parent's claim that the district failed to have an IEP in place from May 16, 2020 to October 8, 2020, after an independent review of the record, I find that such claims are barred by the statute of limitations and will not be reviewed further in this matter.

In review of the parent's due process complaint notice, the parent asserted that the student's April 2018 IEP "expired on April 25, 2019, and the [district] did not develop a new IEP until October 8, 2020" and that "during the time period of May 16, 2020 through October 8, 2020, [the student] remained entitled to a FAPE with her education under the governance of an appropriate IEP" (Parent Ex. A at p. 2).[12] On appeal, the parent argues that there was a continuing violation accruing each day after April 25, 2019 (see Reply ¶8). The parent further argues that the district

[12] The parent appears to have chosen the May 16, 2020 date as it was exactly two years prior to the date of the May 16, 2022 due process complaint notice.

had a duty to have an IEP in place for each school day and that, as of May 16, 2020, the district did not have one in place until October 8, 2020 (Parent Mem. of Law at p. 16).

While the parent is correct in her assertion that a failure to prepare and to provide an IEP to the student could be a discrete and actionable offense (see Scaggs v. New York Dept. of Educ., 2007 WL 1456221, at *10 [E.D.N.Y. May 16, 2007]), the parent did not make this specific allegation in the due process complaint notice, which focused on the April 2018 IEP being "expired" (Parent Ex. A at p. 2). Additionally, on appeal, the parent asserts that the district did not have an IEP "in place" during the May through October 2020 period (Parent Mem. of Law at p. 16). Pertinently, at no point in this process has the parent raised any allegations regarding the special education supports that the student did receive during the complained of time period. The evidence shows that student was receiving special education pursuant to a remote learning plan dated April 29, 2020 (Parent Ex. H).[13] According to the remote learning plan, services were "provided during the COVID-19 school closure" (Parent Ex. H). The parent testified that during the COVID-19 school closure the student received remote instruction (Tr. p. 70). Moreover, the parent did not allege issues related to the provision of special education to the student during the period of remote learning in her May 2022 due process complaint notice, or regarding the appropriateness of the special education and related services that the student did receive (see Parent Ex. A). To the extent the parent is now raising a challenge to the special education programming that the student received during remote instruction from May 16, 2020 to October 8, 2020, the parent's claim accrued when the parent was provided with the student's remote learning plan in April 2020, and as such, is barred by the IDEA's two-year statute of limitations.

Additionally, I find that the parent's requested relief of compensatory bilingual speech-language therapy is also barred by the statute of limitations.

The parent argues that her claim for compensatory speech-language therapy for services the student should have received during the 2018-19 and 2019-20 school years cannot be barred by the statute of limitations because the district did not provide her with the prior February 2020 IHO decision until June 2020; according to the parent, her claim did not accrue until September 28, 2020 when she received the bilingual speech-language evaluation (see Parent Mem. of Law at p. 15). The September 2020 bilingual speech-language evaluation recommended 276 hours of compensatory bilingual speech-language therapy to make-up for the lack of services during the prior two school years, namely the 2018-19 and 2019-20 school years (Parent Ex. P at p. 9).[14]

The district argued that the parent's claims relating to the 2019-20 school year, including the requested relief of compensatory bilingual speech-language therapy accrued on July 1, 2019, the first day of the extended 2019-20 school year (Tr. p. 13). According to the district, as of July

[13] The parent in her closing brief argued that the remote learning plan was not an IEP because the remote plan did not address all areas required for an IEP (Parent Post-Hr'g Br. at p. 17). In the post-hearing brief, the parent asserted that the remote learning plan only included related services and did not provide for special education; however, as noted above the parent did not raise this allegation in the due process complaint notice or on appeal.

[14] The parent did not raise any claims related to the 2018-19 school year in her due process complaint notice (see Parent Ex. A), and moreover, the parent filed a prior due process complaint notice on or about May 24, 2019 regarding the 2018-19 school year (see Parent Ex. C at p. 3).

1, 2019, the parent knew or should have known the district had not offered speech-language therapy to the student in the manner the parent desired for the 2019-20 school year. The IHO found that the parent's requested relief of compensatory bilingual speech-language therapy was based on what the evaluator believed the student should have received during the 2018-19 and 2019-20 school year and that the statute of limitations barred the claim (IHO Decision at p. 11). Upon review, as noted above, there was a remote learning plan in place for the student in April 2020, which did not include bilingual speech-language therapy (Parent Ex. H). The hearing record shows that the parent believed the student should have received bilingual speech-language therapy while the student was attending the district school (see Tr. pp. 44-52). The parent specifically testified that the September 2020 bilingual speech-language evaluation "confirm[ed] what [she] already knew—that [the student] should have been having bilingual Spanish-English [speech-language therapy]" (Parent Ex. X at ¶11). Additionally, the parent was on notice that the student was not receiving bilingual speech language therapy on or around April 29, 2020 based on the recommendations in the remote learning plan (see Parent Exs. H; X at ¶8).

Based on the foregoing, the evidence in the hearing record leads me to conclude that the parent's claims accrued as of the date of the student's remote learning plan, at the latest, and, therefore, the IHO was correct that the parent's claims were barred by the IDEA's two-year statute of limitations.

3. Burden of Proof and Credibility

The parent argues that the IHO improperly shifted the burden of proof on the issue of FAPE to the parents. In particular, the parent alleges that the IHO decision improperly cites to legal precedent and otherwise does not state or apply New York law, which provides that it is the district's responsibility to bear the burden of proof on all issues presented in a due process hearing other than the appropriateness of a unilateral placement. The parent also argues that the IHO failed to properly weigh the credibility of all of the witnesses, improperly credited the district's witnesses, and made improper inferences against the parent.

The district argues that the IHO noted the district's burden in his decision and that there is no basis to conclude that the IHO shifted the burden of proof to the parent. Additionally, the district asserts that even if the IHO had made an error and shifted the burden onto the parent it would not warrant a reversal of the IHO's decision as he properly weighed the evidence in support of his decision (Answer ¶ 6). The district also contends that the parent's disagreement with the IHO's weighing of the evidence does not support a finding that the IHO shifted the burden of proof to the parent (id.).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In his decision, the IHO cited to Schaffer to explain that the IDEA is a comprehensive statutory framework established by Congress to ensure that students with disabilities are afforded a FAPE (IHO Decision at p. 14). The IHO did not cite to Schaffer again within the decision (see IHO Decision pp. 1-21). Further the IHO decision stated "[i]n order to demonstrate that FAPE is being provided, the school district must show "that it complied with the procedural requirements set forth in the IDEA, and that the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits." (IHO Decision at p. 14; see Application of a Student with a Disability, Appeal No. 05-061, quoting Rowley, 458 U.S. at 206). While the IHO decision does not cite to New York's burden of proof statute or otherwise state with specificity that the burden of proof and persuasion is on the district with respect to the issue of whether or not the district provided the student with a FAPE, the parent does not cite to any further language used by the IHO that would suggest that he instead placed the burden of proof on the parent (see Req. for Rev. at p. 1; see Parent Mem. of Law at p. 14).

In addition, the IHO made detailed findings of fact with respect to the documentary and testimonial evidence presented at the impartial hearing (IHO Decision at pp. 5-14, 17-21). The IHO found that "[b]ased on the evidence presented by the parties, the Parent's request for compensatory services and education must be denied" (id. at p. 20). While the IHO's discussion of the parent's evidence may have appeared at times to shift the burden of proof to the parent when making findings of fact, the decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses in the evidence presented by both the district and the parent. [15] Thus, even assuming the IHO misallocated the burden of proof to the parents, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3).

Notwithstanding the above, the parent's concerns are understandable given the IHO's word choice and focus on what the parent's evidence proved or did not prove within a discussion of the district's offer of a FAPE, where it is indisputable that the district bore the burden of proof. Rather than engaging in an analysis of the district's evidence and then indicating whether or not the parent had come forward with persuasive evidence to refute the district's case, the IHO instead centered his analysis around the parent's requests for services. The structure of the IHO's analysis may have created some confusion on the application of the district's burden.

In any event, I have conducted an impartial and independent review of the entire hearing record and applied the correct burden of proof, which is on the district (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see Educ. Law § 4404[1][c]). As discussed further below, I do not agree with the IHO that the district established that it offered the student a FAPE from May 4, 2021 to December 31, 2021.

[15] In the IHO's decision, the IHO noted that the parent "has failed to demonstrate that the Student either required or would have benefitted from [bilingual speech-language] therapy" (IHO Decision at p. 12) and "the Parent completely failed to demonstrate the need for or appropriateness of [physical] therapy (id. at p. 18). The IHO also did not further elaborate on the reasoning underpinning his determination that the district provided the student a FAPE other than by restating the opinion of the district assistant principal that the student was at the top of her class academically (IHO Decision at p. 20).

Next, I will address the remainder of the parent's claims concerning the IHO's credibility findings and the weight of the evidence (Req. for Rev. at pp. 4-10).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

The parent argues that the IHO erred in finding the district's witnesses credible. The parent claims that the district called witnesses whose opinions the district representative, present at the April and June 2021 CSE meetings, had "already rejected," and the district did not call the district representative as a witness during the impartial hearing (Req. for Rev. ¶9). In support of this vague assertion, the parent only cites to the attendance pages of the April 2021 IEP and the June 2021 IEP and the start of the transcripts identifying the district's witnesses (id.; see Tr. pp. 23, 159; Parent Exs. E at pp. 20-21; F at pp. 29-30). In her memorandum of law, the parent adds some context alleging that the "district representative's memorialized findings" and the student's records are contrary to the IHO's credibility findings (Parent Mem. of Law at p. 21).[16] However, the parent again did not identify to what "memorialized findings" she was referring (id.). Accordingly, it is unclear what the parent means when she asserts the district called witnesses who the district representative had "already rejected." It is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Turning to the specific claims regarding the district witnesses, the parent alleges that the IHO failed to find the district school psychologist not credible. The parent argues that the district school psychologist improperly compared the student's scores reported in the IEE to the "rejected" January 2018 psychoeducational evaluation scores as a basis for suggesting academic progress; and when she was questioned on the impact of testing variations, she could only respond that she

[16] The parent did not attempt to call the district representative who was present at the April and June 2021 CSE meetings as a witness to testify. If the parent believed that the district witnesses who appeared at the impartial hearing were not credible and had already been discredited by the district representative, the parent could have attempted to compel the testimony of the district representative.

did not write either report (Req. for Rev. at p. 4).[17] Further, the parent argues that the district's March 22, 2021 psychological update contained narrative "updates" created in anticipation of litigation (Req. for Rev. at pp. 4-5).

However, the IHO did not cite to the district school psychologist's testimony in support of any of his findings or make any credibility determinations with regard to her testimony. Similarly, there is no indication that the IHO made definitive credibility findings with respect to the district witnesses who testified at the impartial hearing on issues related to the student's need for bilingual speech-language therapy and PT. As discussed below, with respect to the district witnesses, the IHO primarily relied on and credited the testimony of the district assistant principal to find that the student was making consistent and meaningful progress at the district's school and weighed testimonial evidence presented by both the parent and district concerning relief in the form of compensatory education without making definitive credibility determinations. Moreover, regarding the parent's claim that the district school psychologist's March 2021 psychological update was prepared in anticipation of litigation, the March 2021 psychological update indicated that the update was a part of a "triennial as well as a mandate to reconvene" (Parent Ex. N at p. 1). Accordingly, the hearing record does not support this contention.

Next, the parent alleges that the testimony of the district speech pathologist was not credible because there was evidence that showed the district speech pathologist was attempting occasional, minimal Spanish speech inquiries and instruction at least one year before having the proper certification to do so. Generally, the parent alleges that the district speech pathologist was engaging with the student in Spanish before the district speech pathologist acquired the appropriate certificate to provide bilingual speech-language therapy services. Additionally, according to the parent, the length of time the speech pathologist provided what the parent believed were inappropriate services should not be used as a basis for refuting the opinions of other witnesses.

Pursuant to the New York state teacher certification lookup, the district speech pathologist obtained a bilingual education extension on May 5, 2021 (Parent Ex. DD). According to the district speech pathologist she is fluent in Spanish and English (Tr. p. 84). Further, she testified that she provided the student with speech-language therapy in English, as recommended in the student's April 2018 and October 2020 IEPs, beginning in 2018 until 2021, and that she would engage the student in Spanish only if she thought the student did not understand something (Tr. p. 88; see Parent Exs. G at p. 22; I at p. 7). According to the speech pathologist, the engagement in Spanish was "probably once throughout each session" and it was not "very frequent" (Tr. pp. 88-89). After the April 2021 CSE meeting, the district speech pathologist stopped providing speech-language therapy to the student and another district speech-language therapist took over services (Tr. p. 108).

The parent testified that the student had two speech-language therapy providers during the time she attended the district school, and that the student's second speech-language therapist was bilingual (Tr. pp. 51, 54). After a review of the evidence, the district speech pathologist was

[17] The parent alleges in her request for review and her supporting memorandum of law that the district's January 2018 psychoeducational evaluation had been "rejected" because the parent disagreed with the evaluation and her disagreement was the basis for the awarded IEEs in the prior February 2020 IHO decision (Req. for Rev. at pp. 4-5; Parent Memo. of Law at p. 21).

providing monolingual speech-language therapy in English as mandated in the student's IEPs up and until the mandate was changed during the April 2021 CSE meeting (see Parent Exs. F at p. 23; G at p. 22).[18] Based on the above, the parent's contention that the district speech pathologist was attempting occasional, minimal Spanish speech inquiries and instruction at least one year prior to having the proper certification to do so was not supported by the weight of the evidence.

Next, the parent alleges the IHO failed to find the district school assistant principal was not credible, arguing that the assistant principal improperly administered and significantly inflated the student's Student Annual Needs Determination Inventory (SANDI) scores. Further the parent argues that the assistant principal did not present any other assessments the school utilized for the student. According to the assistant principal, the SANDI assessments are conducted in the classroom by the teacher who would complete the reading, writing, and math sections and then the speech therapist would complete the communication development section (Tr. p. 196). The district physical therapist confirmed that the student's teacher would input the scores on the SANDI but that he had "ongoing conversations with the teacher about every functional aspect for the student" including how the student was doing in the classroom and therapy room (Tr. p. 231). The parent does not specifically address in what manner she believed that the assistant principal improperly administered or significantly inflated the student's SANDI scores and further the testimony presented at the impartial hearing clarified that the assistant principal did not input the scores on the SANDI (see Tr. p. 196).

Further, assistant principal testified that other assessments were also administered to the student while she attended the district school (Tr. p. 197). Specifically, the student was administered the Fountas & Pinnell Running Record, the Literacy Foundation Skills Continuum, and the Math Foundation Skills Continuum (Tr. pp. 199-201). According to the assistant principal, the assessment results were in the student's IEP and review of the hearing record shows that the assessment results are on the first page of the October 2020 IEP (Tr. p. 201; Parent Ex. G at p. 1).

Next, the parent alleges the IHO failed to find the district physical therapist was not credible arguing that the district physical therapist testified that he provided the student with PT services from when the student began attending the district school in 2018 until April 2021 and then resumed services in June 2021, but when confronted during the impartial hearing about the time period from October 2020 to April 2021, he changed his testimony to not knowing whether PT was provided to the student during that time (Req. for Rev. at pp. 5-6; Parent Mem. of Law at pp. 22-25).

At the impartial hearing, the district physical therapist testified that he provided PT services to the student, on and off, for about three and a half years beginning in 2018 (Tr. p. 221). He testified that when he began services in 2018, the student was recommended to receive PT "once a week in a group of two" and by the time she left the district school in December 2021, the student was recommended to receive PT "three times a week individually" and that each session was 30-minutes (Tr. p. 222). According to the student's April 2018 IEP, the student was recommended to

[18] There was ample evidence presented by both parties at the impartial hearing that the student's dominate language was and still is English and that the student required speech-language therapy in English (see generally, Tr. pp. 87-89, 91-91, 118-20, 194, 206-07, 215, 239-43, 277, 285, 292; Parent Exs. J at p. 2; Q at pp. 4, 7, 14-15; R at p. 4; T at pp. 3, 5-8; W at p. 3, 5; Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at p. 3).

receive one 30-minue session per week in a group of two (Parent Ex. I at p. 6), and according to the June 2021 IEP the student was recommended to receive three 30-minute individual sessions per week (Parent Ex. E at p. 15).

The district physical therapist further testified that the CSE had "serious meeting[s]" regarding whether PT services should be discontinued for the student, as recommended in the district's April 2019 PT evaluation, but that the CSE ultimately decided, per the advice of the "school administration," to abide with the recommendation from the parent's privately obtained March 2021 PT evaluation which recommended 90-minutes of individual PT services per week (Tr. p. 229).[19] When asked by the parent's attorney if the physical therapist provided services from October 2020 through April 2021, the physical therapist testified that he provided services remotely, but indicated the student transferred out of the school in December 2020 (Tr. pp. 231-32). The physical therapist later attempted to clarify that at the October 2020 CSE meeting, which he was in attendance for, the CSE decided to discontinue PT services and then, after the parent obtained her March 2021 PT evaluation, at the next April 2021 CSE meeting, PT services were added back to the student's recommended related services (Tr. p. 235).[20] However, when asked if the student received PT during the time between the October 2020 IEP and the April 2021 IEP, the physical therapist testified he could not remember (id.).

Although the physical therapist's testimony contains some inconsistencies, they should be left to the judgment of the fact finder to make a credibility determination as they do not appear to have been incredible or unexplainable by confusion, mistake, or a lapse in memory. Accordingly, the parent does not present a sufficient basis on appeal to find the testimony of the physical therapist was not credible.

Further, the parent claims the IHO erred in finding the parent not credible arguing that the parent correctly testified that, after the April 2021 IEP, PT services were being recommended for 60-minutes per week rather than the 90-minutes recommended in the March 2021 PT evaluation; that the June 2021 IEP added a 30-minute session; and that the parent believed the district PT services continued from June 2021 to December 31, 2021, but only for 60-minutes per week (id.). The IHO found that the parent's assertion that the student should have received 90-minutes per week of PT services between April 2021 and December 2021 and the district only provided 60-minutes per week was not accurate and further that it was "more than a little disconcerting" that the parent would make this claim knowing full well that there was an IEP from June 2021, placed into evidence by the parent, that specifically mandated that the student receive 90 minutes of PT per week (IHO Decision p. 17).

[19] Based on the hearing record, the school administration was the district representative present at the CSE meeting who, according to the district assistant principal, has the "deciding vote" on the final decisions regarding the student's recommended IEP program (Tr. p. 214).

[20] The October 2020 IEP did not include a recommendation for PT (Parent Ex. G at p. 22). In addition, the student's remote program plan did not recommend that the student receive PT, however, the district physical therapist testified that he provided services remotely to the student during the COVID-19 pandemic (Tr. pp. 221, 231, Parent Ex. H). According to the April 2021 IEP, the student was receiving services remotely due to the COVID-19 pandemic (Parent Ex. F at p. 3).

Review of the parent's testimony shows that it was not consistent with the documentary evidence in the hearing record or the testimony of the physical therapist. The parent testified that she knew the student was not receiving 90-minutes per week of PT services because "the [CSE] told me, that they only can do 30 minutes" (Tr. p. 62). When asked to specify which CSE meeting she was referring to, the parent responded, "We have so many [CSE] meetings that we talked the same thing, so I can't tell you exactly what [CSE] meeting [it] was" (id.). In the parent's affidavit she stated, "I believe the [district's] PT continued with the twice weekly sessions" after the June 2021 CSE meeting (Parent Ex. X at ¶ 18). The parent does not state with specification why she believes that district PT services continued twice weekly after the June 2021 CSE meeting (see generally Tr. pp. 28-78; Parent Ex. X). As noted by the IHO, this testimony was not consistent with what was recommended in the student's educational programs. The April 2021 IEP recommended two 30-minute session per week of PT (Parent Ex. F at p. 23). The June 2021 IEP increased PT sessions to three 30-minute sessions per week (Parent Ex. E at pp. 10, 15). According to the April 2021 IEP "[t]he [CSE] team members as well as [the student's] mother agreed to continue [PT] service twice per week individually for 30 minutes" (Parent Ex. F at pp. 10-11). The June 2021 IEP noted that the "IEP was reconvened" and that the PT mandate was changed to three times weekly for 30-miunutes individually (Parent Ex. E at p. 10). There was no evidence presented at the impartial hearing that the student did not receive the recommended amount of PT after the June 2021 CSE meeting (see generally Tr. pp. 1-337; Parent Exs. A-BB, DD-JJ; Dist. Exs. 1-12). Accordingly, there is no reason to depart from the IHO's findings regarding the parent's testimony related to PT.

In addition, the parent alleges that the IHO erred in finding that the director of EBL Coaching's recommendation that the student receive 600 hours of compensatory tutoring was "almost ... pulled from thin air" with "no justification whatsoever set forth in the witness's affidavit as to how she arrived at this number, let alone why"; the parent further contends that the IHO erred in questioning what the parent's witness hoped to achieve with the student should the compensatory tutoring hours be granted (Req. for Rev. at p. 8-9). Further the parent alleges that the district and the IHO focused almost exclusively on what the recommended 600 hours would entail and cost, to which the director of EBL Coaching "provided clear and straightforward responses" (id. at p. 9).

According to the director of EBL Coaching's affidavit, she reviewed a September 2020 neuropsychological evaluation, a January 2018 district psychoeducational evaluations, a March 22, 2021 district psychological update, a September 2020 independent bilingual speech-language evaluation and the student's April 2021 IEP and June 2022 IEP in addition to her assessment of the student on July 21, 2022 (Parent Exs. Y at ¶¶ 9-11; Y2 at p. 1). [21, 22] Based on the review of

[21] Included with the director of EBL Coaching's affidavit are two attachments, a copy of her resume and a copy of a letter report she prepared based on her assessment of the student dated July 22, 2022—labeled attachment 1 and attachment 2 respectively—which are citated as "Parent Ex. Y1" or "Parent Ex. Y2," with the appropriate page numbers.

[22] According to the director of EBL Coaching's affidavit dated July 25, 2022, she reviewed the student's IEPs dated July 5, 2022 and May 4, 2021 "both of which I understand are being offered as evidence in this matter" (Parent Ex. Y at ¶ 10). As noted by IHO in his decision, there was no July 5, 2022 or May 4, 2021 IEP admitted into evidence but the provider was most likely referring to the June 2022 IEP which had an implementation date

those documents, the director opinioned that the student should receive "600 hours of one-on-one multi-sensory tutoring using the Orton-Gillingham technique, as well as similar multi-sensory tools to build her written language, mathematics, and reading comprehension skills" and further that in her professional opinion the student "has the potential with the recommended 600 hours of compensatory services, to reach where she should have been had she received a free, appropriate public education" (Parent Ex. Y at ¶¶ 14-15). When asked by the district's attorney "Where do you believe the student's reading levels will be at the conclusion of that 600 hours?" she responded "I believe that she has the potential to make significant progress across the board academically, not just with her reading but with her other academic skills as well and really come close to, if not even achiev[e], grade level academically" (Tr. p. 315). The director of EBL Coaching only worked with the student once, on July 21, 2022, and has not worked with her since (id. p. 318). The director of EBL Coaching did not indicate with specification how she arrived at the 600 hours of compensatory tutoring other than indicating which evaluative information on which she based her recommendation (see generally Tr. pp. 303-139; Parent Exs. Y, Y2). Based on the above, as determined by the IHO, the testimony provided to support the recommendation for 600 hours of compensatory education was indefinite so that it was unclear how the number of hours were computed; however, there was some testimony indicating what the director of EBL Coaching expected from the student with the provision of the recommended compensatory education.

Upon review of the evidence in the impartial hearing record, as discussed above, I am not persuaded by the parent's arguments on appeal related to the credibility of the various witnesses, nor am I persuaded that the IHO made an inappropriate determination as to the weight of the testimonial evidence and how it was applied. In any event, there is no indication that the parent was prevented from cross-examining the district witnesses who appeared at the impartial hearing and, therefore, she had an opportunity to impeach the witnesses to the extent she believed that evidence in the record undermined their credibility. The mere fact that the IHO may have weighed the evidence or assessed witness credibility differently than the parent does not support a finding that the IHO's determinations, to the extent such are even clearly stated, should be overturned or that his decision is against the weight of the evidence. However, in the context of the IHO's findings on the merits and, based on my independent review of the hearing record, I will address the parent's claims of factual and legal error that remain viable on appeal in the discussion below.

Turning to the IHO's findings regarding the parent's testimony, the one witness where the IHO specifically identified credibility as an issue, the IHO found that the parent requested relief based on facts which she almost certainly knew were not true and noted there was a recurrent theme that the parent continually insisted upon services that she either knew or had good reason to know the student did not need, especially regarding bilingual speech-language therapy (IHO Decision at pp. 7, 17, 20). The parent argues that the IHO's finding is "wholly untrue" and argues that qualified experts were the ones who recommended the types of services she requested only after the district denied the student such services (Req. for Rev. at p. 10). The parent argues that it was not a recurrent theme because she did not request compensatory OT nor further pursue the recommendation contained in the September 2020 neuropsychological evaluation that the student needed a paraprofessional after a district representative advised the parent that the student no

of July 5, 2022 and the April 2021 IEP which had an implementation date of May 4, 2021 (IHO Decision at p. 12).

longer needed one (id.). For the most part, the IHO's findings regarding the parent's credibility relate to the amount of PT services the student received during the school years in question, as discussed in detail above (see IHO Decision at p. 7, 17). As the IHO's determination as to PT is supported by the hearing, there is no basis for departing from the IHO's decision on that point. However, extrapolating that finding out to the parent's other requests runs the risk of faulting the parent for advocating on behalf of the student's interests (see Anchorage Sch. Dist. V. M.P., 689 F.3d 1047, 1056 [9th Cir. 2012] ["it would be antithetical to the IDEA's purposes to penalize parents—and consequently children with disabilities—for exercising the very rights afforded to them under the IDEA"]).

B. October 2020 CSE Process and IEP

Turning now to the parent's arguments that the IHO erred by failing to find that various issues with the October 2020 CSE process and resultant IEP denied the student a FAPE for the period of time from October 8, 2020 until the student left the district public school on December 31, 2021, I will first review the IEP issues identified by the parent on appeal. As an initial matter, the district argues that the SRO should decline to review any additional claims relating to the 2020-21 school year that were not raised in the parent's due process complaint notice (Answer ¶ 13). Therefore, at the outset of this discussion I will determine which issues are properly before me on appeal.

The parent argues on appeal, without explanation, that the October 2020 IEP: (1) "changed placement in the incorrect direction"; (2) too-belatedly added the 12-month program; (3) removed the "limited English proficiency" notice; (4) reflected a need for assistive technology without mandating any device/service; (5) removed necessary PT; (6) added counseling and parent counseling and training; (7) divided monolingual speech-language therapy into separate group sizes and did not recommend the necessary bilingual speech-language therapy or note the recommendation from any of the parent's IEEs; and (8) added a read-aloud test accommodation without addressing research-based methodology (Req. for Rev. at p. 3).[23]

In her May 2022 due process complaint notice, the parent alleged that the district failed to provide appropriate meeting notices to the parent for the October 2020 CSE meeting and that the October 2020 IEP failed to recommend a research-based methodology for students with autism and language disorders; failed to recommend PT; failed to recommend a paraprofessional; and failed to recommend an assistive technology device (Parent Ex. A at p. 5-6).

Upon review, I find that the parent failed to raise specific allegations in her May 2022 due process complaint notice regarding (1) a change in placement in an "incorrect direction"; (2) a 12-month program; (3) removal of the "limited English proficiency" notice; (4) counseling and parent counseling and training; (5) speech-language therapy; and (6) adding a read-aloud test

[23] The parent concedes that the district recommended counseling services on the student's April 2020 remote learning plan and the student was receiving such services prior to the October 8, 2020 CSE meeting (Req. for Rev. fn. 7 at p. 3).

accommodation without addressing research-based methodology. These issues are not properly before me in this appeal and will not be further addressed.[24]

Regarding the addition of a need for assistive technology on the October 2020 IEP without recommending any device/service (see Parent Ex. G at p. 11, 22-23), the district asserts that the selection of the assistive technology "checkbox on the IEP was clearly a clerical error," and review of the student's other IEPs and remote learning plan do not indicate that she required assistive technology devices or services (see generally Parent Exs. D at p. 7; E at p. 11; F at p. 13; H at p. 1; Answer ¶ 14). Additionally, the parent acknowledged in her May 2022 due process complaint notice that despite the October 2020 IEP's indication that the student needed a device or service for communication, none of the student's "evaluations or reports" reflected that she demonstrated a need for assistive technology and the parent is not requesting relief related to this allegation (Parent Ex. A at pp. 5, 8). Therefore, any claim relating to assistive technology will not be addressed further in this appeal. Additionally, the parent has not raised any claims regarding the district's alleged failure to recommend a paraprofessional on the October 2020 IEP in her request for review; accordingly, this claim will not be addressed further in this appeal.

Based on the above discussion, the two remaining issues that are properly before me on appeal are the parent's claims that the district failed to provide her with appropriate meeting notices for the October 2020 CSE meeting and that the October 2020 IEP failed to recommend any PT services for the student.

1. October 2020 CSE Meeting

The parent argues that the district failed to provide her with the proper notice of the October 2020 CSE meeting (Req. for. Rev at pp. 2-3). Specifically, the parent claims that the CSE's two calls for "impromptu meetings" made to her on October 1 and October 8, 2020 were neither timely nor sufficient written notice and further that she informed the CSE "that she was not prepared and the IEEs were ongoing" (id.). Also, the parent claims that the October 2020 IEP improperly accused her of "refusing to participate" at least four times within the document (Req. for Rev. at p. 3 fn. 5; see Parent Ex. G at pp. 5, 8, 10, 29-30). The district alleges that it made multiple "documented" attempts to secure the parent's attendance but "it was abundantly clear [p]arent was unwilling to participate" (Answer ¶ 11).

As to the scheduling of the CSE meeting and the requirements regarding a parent's participation, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain

[24] Moreover, I find that the parent's allegation that the district "changed placement in the incorrect direction" is too vague to identify exactly what the parent means by "incorrect direction." The parent's memorandum of law does not clarify what placement recommendation was changed in the "incorrect direction" (Parent Mem. of Law at pp. 18-19).

detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

In affidavit testimony, the parent stated that she was not informed about a meeting on October 1, 2020, and that the IEE of the student was not completed when the district school psychologist telephoned her on October 8, 2020, seeking to hold a CSE meeting "right then and there" (Parent Ex. X ¶ 12). She further testified that the district had not previously informed her of when it wanted to have a meeting, and that she "thought that we were waiting until the evaluations were completed" (id.). According to the parent, she informed the district that she could not participate in a meeting that she was not prepared for and that she wanted to reschedule, but the district refused (id.).

The district did not introduce any CSE meeting notices into evidence at the impartial hearing (see generally Tr. pp. 1-337; Dist. Exs. 1-12). According to the October 2020 IEP, the district made two attempts to include the parent in the CSE meeting in that she was contacted by email and phone (Parent Ex. G at p. 5). The October 2020 IEP indicated that the parent refused to participate in the meeting scheduled for October 1, 2020, which was then rescheduled to October 8, 2020 to offer the parent another opportunity to participate (id. at pp. 5, 29). As reported in the October 2020 IEP, when the parent answered the telephone on October 8, 2020, she "was very angry, stating that she did not agree to this meeting, and her lawyer had advised her not to participate" and further that the parent "hung up the phone and did not listen to the [CSE's] data about [the student] and her progress or final recommendations" (id. at p. 5). Further, the October 2020 IEP stated that the "[p]arent was informed via telephone and email that [a] meeting was being held to give [the student] an IEP for the 20[20-]21 school year" and that it was explained to the parent "that [the student]'s scheduled and approved evaluations would go through as planned, and that another meeting would be held to incorporate the findings, as necessary" (id. at p. 29).

The parent argues that the district's failure to provide meeting notices significantly impeded the parent's meaningful opportunity to participate in the decision-making process. Upon review of the hearing record, the parent had an opportunity to participate in the October 8, 2020 CSE meeting. The parent knew on or around October 1, 2020 that the CSE would be reconvening on October 8, 2020 to allow the parent the opportunity to participate in the decision-making process; the October 2020 IEP noted that the parent opted not to participate in the meeting per the advice of her attorney (see generally Parent Ex. G at p. 5; 29). However, while the hearing record does not support the parent's account of events, the hearing record also does not include copies of the required meeting notices or sufficient information to show that the district met its obligation to ensure the parent's participation in the CSE meeting by maintaining detailed records of its attempts to arrange a mutually agreed upon time and place for the meeting (see 34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]). Accordingly, based on the information available in the hearing record, the parent is correct in her assertion that she was denied the opportunity to participate in the October 2020 CSE meeting. Nevertheless, the parent has not requested any relief that is attributable to a denial of FAPE due to lack of parent participation. Additionally, even where a district significantly impeded the parents' opportunity to participate in the decision-making process, such a violation would not support an award of compensatory education absent a finding of a substantive deficiency due to either the content of the IEPs or the delivery of the mandated services (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"]).

2. October 2020 IEP—Physical Therapy

The parent claims that the IHO erred in finding that the October 2020 IEP was appropriate as the October 2020 CSE "removed necessary PT" (Req. for Rev. at p. 3). The district alleges that the CSE's decision to remove PT from the student's October 2020 IEP was appropriate considering the evaluative material and input from the district physical therapist who provided PT services to the student (Answer ¶¶ 12, 14).

As noted above, the October 2020 CSE reviewed the student's progress and developed an IEP for the student for the 2020-21 school year (Parent Ex. G). The October 2020 CSE recommended a 12-month school year program consisting of a 12:1+1 special class in a district community school and one 30-minute session of group counseling per week, two 30-minute sessions of group OT per week, one 30-minute session of group speech-language therapy per week in the classroom, and one 30-minute session of group speech-language therapy per month in the therapy room (id. at pp. 21-22, 27, 28). The October 2020 CSE also recommended one 30-minute session of parent counseling and training per month (id. at p. 22).

The October 2020 IEP reflected that the CSE considered the results of several recent evaluations, including the fall 2019 SANDI, the Fountas and Pinnell Leveled Literacy Intervention System, the Winter 2020 Literacy Foundational Skills Continuum and Winter 2020 Math Foundational Skills Continuum, the April 2019 speech-language evaluation, the December 2019 Vineland Adaptive Behavior Scales-Third Edition (parent/caregiver form), the April 2019 FBA, the April 2019 OT evaluation, and the April 2019 PT evaluation (Parent Ex. G at pp. 1-3, 6, 8-10).

Pertinent to the issue raised on appeal, the October 2020 IEP included scores from the student's April 2019 PT school function evaluation (compare Parent Ex. G at p. 9, with Parent Ex. S). On the Gross Motor Function Classification System (GMFCS)—a clinical classification system that describes gross motor function on a scale of zero to five, with zero being no physical limitations and five being significantly physically impaired—the student obtained a level zero indicating that she walked without limitations (Parent Exs. G at p. 9; S at p. 5). The October 2020 IEP noted that on the School Function Assessment (SFA), a scale of 1-6 (1 meaning participation is extremely limited and 6 meaning full participation) used to measure the student's participation in six major school activities, the student received a score of 6/6 for classroom, toileting, transitions, mealtime, recess, and transportation, "as she [was] able to perform activities in these areas to the same extent as her peers" (Parent Exs. G at p. 9; S at p. 5). Further, the student "was found physically capable of safely and efficiently navigating her school environment to access her educational program, and [was] physically capable of participating in school-related physical activities with her peers" (Parent Exs. G at p. 9; S at p. 5). The October 2020 IEP mentioned that according to the student's teacher, she performed school functional activities independently and navigated her school environment without any difficulties (Parent Ex. G at p. 9).

Consistent with the April 2019 PT school function evaluation, the October 2020 IEP further described that the student was an independent ambulator with a typical heel-toe gait pattern (compare Parent Exs. G at p. 9, with Parent Ex. S at p. 4). She was observed to negotiate four flights of stairs in an empty stairwell and safely ascended and descended the stairs in a reciprocal pattern while holding onto the handrail (Parent Exs. G at p. 9; S at p. 4). The student demonstrated functional range of motion of her arms, trunk, and legs and functional strength of her trunk and extremities (Parent Exs. G at p. 9; S at p. 4). The student ran approximately thirty feet then changed direction without losing her balance, coordinating with her upper and lower extremities to do so, and jumped forward approximately 1.5 feet with a two-footed takeoff and landing (Parent Exs. G at p. 9; S at p. 4). The student's gross-motor performance on the Timed Up & Down Stairs test, the 30 Second Walk Test, and Pediatric Balance Scale was within the range of typically developing peers on all assessments (Parent Exs. G at pp. 9, 10; S at p. 4). The student completed the finger to nose test and cross-crawls activity, which assesses motor coordination with verbal cues and demonstration (Parent Exs. G at p. 10; S at p. 4).

The October 2020 IEP reflected the physical therapist's conclusion that based on test and assessment results, the student "was not found to have difficulty performing school functional activities" as she "present[ed] with functional strength, balance and coordination," and her "[g]ross motor abilities d[id] not appear to impact her ability to participate in school activities" (Parent Exs. G at p. 10; S at p. 4). Speaking to the student's physical development, the October 2020 IEP reported that based on clinical observations, interviews, and assessments administered as part of the April 2019 PT evaluation, PT was not recommended as "[the student] [was] participating within the typical range of her peers" (Parent Ex. G at p. 9).[25]

In his testimony, the district physical therapist described the student as "high functioning,"; when he began working with her in 2018, she "came with mild physical deficiencies and it mostly showed as sometimes she had a little bit of clumsiness navigating in the classroom, or occasionally she trip[ped] sometimes during [] recess" (Tr. pp. 220, 221-22, 225). He explained that PT helped the student to navigate the staircase safely and efficiently so she could walk at the same pace with her class going up and down stairs, and participate in activities in the gym or during recess, such as playing with a ball or using the playground equipment, "such as a slide or obstacle course or a ladder, [and] she participate[d] with the activity and she [had] the physical capability to participate and if she needed assistance in that area, we worked with her to address her needs" (Tr. pp. 225-26). The district physical therapist testified that the student showed steady progress during the time she attended the district specialized school "[a]nd at [a] certain point, the school-based support team asked our administration for the evaluation [of] [the student]" (Tr. p. 226). He noted that a physical therapist from the "evaluation team" conducted the April 2019 evaluation and concluded that the student no longer needed PT (Tr. pp. 226-27). The district physical therapist testified that he agreed with these findings (Tr. p. 227).

The district physical therapist stated that the purpose of school-based PT was to help the student function independently in the school setting, which, according to the results of the April

[25] The April 2019 PT school function evaluation report noted that the student's parent completed the occupational therapy/physical therapy checklist and did not report concerns regarding the student's performance in school or describe how she hoped therapy would help the student in school (Parent Ex. S at p. 2). The parent indicated that the student was weak, tired easily, was slow, and fell down a lot when running (id.).

2019 PT evaluation, was occurring at that time (Tr. pp. 222, 223; Parent Ex. S). Based on the above, the evidence in the hearing record shows that the October 2020 CSE's decision to discontinue PT services was substantiated by the evaluative information regarding the student available at the time of the October 2020 CSE meeting. As such, the hearing record supports the IHO's finding that the discontinuation of PT in October 2020 did not result in a denial of a FAPE to the student and further, that compensatory education in the form of PT is not warranted.

C. April 2021 IEP

Turing to the parent's claims relating to the April 2021 IEP, the parent argues that the IHO erred by finding that the April 2021 IEP offered the student a FAPE. The parent also claims that the district recommended a nonpublic school in the April 2021 IEP, but did not locate one for the student to attend, which resulted in a denial of a FAPE until December 31, 2021.

The district convened a CSE on April 19, 2021 and recommended a 12-month school year program consisting of a 12:1+1 special class in a State-approved nonpublic school with one 30-minute session of group counseling per week, two 30-minute sessions of individual OT per week in the therapy room, two 30-minute sessions of individual OT per week in the student's classroom, two 30-minute sessions of individual PT per week, and three 60-minute sessions of individual speech-language therapy per week, recommended to be delivered in Spanish (Parent Ex. F at pp. 22-23, 27, 28). The April 2021 CSE also recommended one 30-minute session of parent counseling and training per month (id. at p. 23).

At the outset of the following discussion, it is important to note that the hearing record contains a December 2021 stipulation and order signed by the parties regarding the April 2021 IEP in which the district agrees that the April 2021 IEP was not implemented (Parent Ex. Z at pp. 1-3). The April 2021 IEP indicated that it was to be implemented beginning May 4, 2021 (Parent Ex. F at p. 1). Additionally, the stipulation indicated that the parent did not release any claims concerning a denial of FAPE preceding the student's first day of enrollment at MSA (Parent Ex. Z at p. 4). Therefore, from May 4, 2021 until the student's enrollment at MSA after December 31, 2021, the district did not meet its burden in this proceeding to show that it implemented the student's April 2021 IEP (see Parent Ex. Z).

Based on the foregoing, the IHO's determination that the district provided the student a FAPE was erroneous as the district failed to implement the April 2021 IEP from May 4, 2021 until December 31, 2021. However, to determine the appropriate relief for the district's denial of FAPE, a discussion on the student's present levels of performance and needs must be addressed.

1. Present Levels of Performance and Student Needs

The evidence in the hearing record reflects that the April 2021 CSE considered the results of the September 2020 independent neuropsychological evaluation, and the April 2021 IEP noted the student's performance on selected subtests of the Weschler Individual Achievement Test-Third Edition, the Behavior Assessment System for Children-Third Edition, Parent Rating Scales, the Adaptive Behavior Assessment Scale-Third Edition, and the Gilliam Autism Rating Scale-Third Edition, in addition to district administered measures (Parent Ex. F at pp. 1-5). According to

information reflected in the IEP, the neuropsychological evaluation was conducted by video conferencing and "selected subtests" of various assessments were administered (id. at pp. 1-2).[26]

Speaking to the student's academic skills, the April 2021 IEP reflected that on the fall 2020 Fountas and Pinnell Leveled Literacy Intervention System benchmark assessment, the student was at an independent reading level F and an instructional reading level G, which correlated to a late first grade reading level (Parent Ex. F at p. 3). The April 2021 IEP also included the results of the fall 2020 administration of the Literacy Foundational Skills Continuum and Mathematics Foundational Skills Continuum, and a fall 2020 and spring 2021 teacher pre-assessment referral form (id.). According to the student's teachers, the student was "high functioning for her class," she was functioning "significantly above" or "comparable" to her peers in tasks involving oral language, visual spatial processing, fluid reasoning, problem solving, memory, processing speed, receptive, expressive, and social/pragmatic language skills (id. at pp. 3-4). The April 2021 IEP described that the student was, at the time "in the second grade and [was] performing on a first grade level across all academic domains" (id. at p. 4).

Regarding the student's physical development, the April 2021 IEP described that the student's parent reported that the student needed supervision for bathing and grooming activities, including brushing her teeth and putting on lotion, and sometimes required assistance with closures on her clothes (Parent Ex. F at p. 9). During OT teletherapy sessions the student moved her upper extremities functionally and smoothly, maintained an upright sitting posture at the table and pulled her chair in and out to sit down (id.). She liked exercising and followed simple exercises following a video with no loss of balance (id.). The April 2021 IEP included the results of the February 2021 independent OT evaluation which found that the student exhibited "severely decreased visual motor integration, visual perceptual skills, motor coordination and behavioral outcomes of severe sensory processing deficits" (compare Parent Ex. M at p. 5, with Parent Ex. F at p. 9).

The April 2021 IEP also described the results of the February 2021 independent PT evaluation, which found that the student exhibited low muscle tone throughout her upper and lower extremities as well as trunk musculature, and reduced muscle strength compared to other students her age (compare Parent Ex. F at p. 10, with Parent Ex. L at p. 2). According to the IEP, the evaluation report indicated that the student exhibited "decreased strength/core weakness, postural instability/postural impairments, ligament laxity/joint hypermobility interfering with her ability to perform age appropriate gross motor activities with good quality of movement" (Parent Ex. F at p. 10). Additionally, the student's "[m]uscle weakness and reduced body awareness [made] it difficult for her body to position and stabilize [her] legs, trunk, and pelvis, move [her] arms and legs, [and] maintain her focus on [the] activity and her balance simultaneously" (id.). The IEP reflected the independent physical therapist's conclusion that these factors impacted the student's overall gross motor development and made it difficult for her to perform many of the complex,

[26] The April 2021 IEP noted that the district school psychologist expressed concern about the results of the September 2020 independent neuropsychological evaluation because the evaluator used individual subtests rather than test batteries and did not include a disclaimer that results should be interpreted with caution because the test was not normed on students engaged in remote learning (Parent Ex. F at p. 2). The district school psychologist opined that consequently, "school data [was] considered a more valid reflection of [the student's] progress" (id. at p. 2).

dynamic, gross and fine motor skills required at her age, and the recommendation that the student receive two 45-minute sessions of individual PT per week (id.).

The April 2021 IEP further noted that "in contrast, [the district's] [p]hysical [t]herapy [e]valuation conducted [April 12, 2019], did not recommend physical therapy as [the student] was found to be functioning within the range typical for her peers" (Parent Ex. F at p. 10). As noted above, the April 2019 PT evaluation revealed that the student "was found to be physically capable of safely and efficiently navigating her school environment to access her educational program," and was "physically capable of participating in school-related physical activities with her peers" (id.). The April 2021 IEP reflected that the CSE discussed the recommendations in the independent PT evaluation report and "explained that [the student] [was] independent in her school function skills" and further explained that "[s]chool based PT provide[d] support to help students physically participate within the context of their educational program" (id.). The April 2021 IEP noted that there were additional physical activity programs throughout the school day as well as community based recreational activity programs that would benefit the student (id.).

The district physical therapist testified that at the time of the district's April 2019 PT school function evaluation, he agreed that the student no longer required PT (Tr. p. 227). He stated that he explained to the parent why PT should be discontinued, but the parent "insisted in the meeting to have [PT] . . . applied in the IEP" and "the [school] administrator intervened and acknowledged the evaluation mandate and asked us to . . . put [PT] in the IEP" (Tr. pp. 228-30). The district physical therapist noted that the October 2020 CSE "recommended that [the student] . . . be graduated from physical therapy based on our evaluation . . . [a]nd at that point, I do believe we discontinued" (Tr. pp. 234-35). He added that "shortly after that . . . [we] kind of reopened again with the [parent's] evaluation and we continued with [the student] again . . . for service" (Tr. p. 235). The April 2021 IEP noted that "the team members as well as [the student's] [parent] agreed to continue PT service[s] twice per week individually for 30 minutes" (Parent Ex. F at pp. 10-11). The April 2021 IEP stated that the "[t]herapist suggested that this mandate [was] to be revisited upon [the student's] return to in-person learning [in] October 2021 . . . [and] suggested that a re-evaluation [] be conducted upon [her] return to [the] school building to determine [the] appropriate skilled intervention needed" (id. at pp. 10-11, 23).

2. Compensatory Relief

For the district's failure to provide a FAPE to the student during the 2021-22 school year, the parent requests 15.5 hours of compensatory PT. Further, the parent alleges that the IHO erred by not awarding any of the requested 600 hours of academic compensatory tutoring with EBL Coaching.[27]

[27] The parent in her memorandum of law alleges that the Office of State Review "is well aware" of the director of EBL Coaching's credentials and process because SROs have accepted her recommendations in past administrative proceedings (citing, Application of a Student with a Disability, Appeal No. 22-013; Application of a Student with a Disability, Appeal No. 21-218; Application of a Student with a Disability, Appeal No. 21-180; Application of a Student with a Disability, Appeal No. 21-135). However, in each of the appeals, the director specifically recommended a frequency at which the student should be receiving compensatory education (Application of a Student with a Disability, Appeal No. 22-013 at p. 23; Application of a Student with a Disability, Appeal No. 21-180 at p. 11), the recommended compensatory education was awarded fully by the SRO for the district's failure

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

---

to submit any evidence to the contrary during the impartial hearing (Application of a Student with a Disability, Appeal No. 21-218 at p. 15), or was awarded because neither party appealed the IHO's final determination that such recommended hours of compensatory education was supported by the evidence in the record (Application of the Dep't of Educ., Appeal No. 21-135 at pp. 8-9, 12). For example, in Application of a Student with a Disability, Appeal No. 22-013 the director recommended the student "receive an average of ten hours of compensatory education per week over a two-year school time span, equivalent to 800 hours" (Application of a Student with a Disability, Appeal No. 22-013 at p. 23). As discussed above, there is an insufficient basis to disturb the IHO's determinations regarding the testimony and evidence presented by the director of EBL Coaching and, moreover, the determinations in other State level administrative decisions were based on the facts as presented in those matters and do not support a finding as to the credibility or weight to be attributed to evidence presented in another proceeding.

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

Initially, I will address the parent's argument that 600 hours of compensatory education services in the form of tutoring should be awarded for the district's failure to provide a FAPE as recommended by the EBL Coaching director (see generally Parent Exs. Y at ¶ 14; Y2 at p. 1).

Such an argument could be interpreted to be a request for a default judgment. An outright default judgment awarding compensatory education—or all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts.

The IHO's rationale for denying the parent's request for 600 hours of compensatory tutoring in its entirety was, in this case, consistent with his other findings. As discussed above, the IHO found the EBL Coaching director's recommendation that the student receive 600 hours of compensatory tutoring was "almost . . . pulled from thin air" with "no justification whatsoever set forth in [the EBL Coaching director's] affidavit as to how she arrived at this number, let alone why"; or what the EBL Coaching director "hoped to achieve with the [s]tudent" should the compensatory tutoring hours be granted (IHO Decision at p. 19). In its answer, the district asserts that the IHO's decision not to award compensatory tutoring was appropriate and further, that the recommendation was to remedy an alleged denial of FAPE for the 2018-19 and 2019-20 school years, which were barred by the statute of limitations.

As noted above, in this matter, the district presented evidence of the student's programming and services received during the relevant school years. Further, the district had the opportunity to cross-examine the director of EBL Coaching during the impartial hearing and argues that the director did not specify the period of time the student was denied a FAPE that she included in her calculation or how she arrived at the requested 600 hours. Review of the hearing record shows that it is not clear how the EBL Coaching director arrived at the number of hours from compensatory tutoring other than her opinion that 600 hours of tutoring would help the student "reach where she should have been had she received a free, appropriate public education" (Parent Ex. Y at ¶ 15). The EBL Coaching director never identified a time period in which she believed that the student was denied a FAPE (see Tr. pp. 303-20; Parent Ex. Y). Accordingly, having found

a denial of FAPE for the limited period of time from May 2021 through December 2021, granting the parent's request for 600 hours of compensatory tutoring, based on the unsubstantiated recommendation made by the director of EBL Coaching, would be more akin to an impermissible default judgment rather than a remedy designed to make up for the denial of FAPE.

Turning to the educational program that the student did receive, review of the evidence in the hearing record supports finding that the student made academic progress during the 2020-21 and the early part of the 2021-22 school years. As noted above, the April 2021 IEP described that according to the student's teachers she had made progress within the past year in reading, math, and writing (Parent Ex. F at p. 2). In reading, the student progressed from the pre-kindergarten level for decoding and the kindergarten level for reading comprehension in February 2020 to the first grade level for decoding and reading comprehension in March 2021 (id. at p. 4). In math, the student's calculation and math reasoning skills were at the pre-kindergarten level in 2020 and in 2021, her calculation skills were at the first grade level and her math reasoning skills were at the kindergarten level (id.). The student's writing skills progressed from the pre-kindergarten level in 2020 to the kindergarten level in 2021 (id.).

The document entitled SANDI Results Progress Over Time showed that between fall 2020 and fall 2021 the student's scores increased in all areas assessed (Dist. Ex. 9 at p. 1). The student's scores increased from 220 to 267 in reading, 130 to 144 in writing, 139 to 143 in math, and 255 to 274 in communication (id.).[28] The district specialized school assistant principal testified that the SANDI Results Progress Over Time chart "show[ed] an overall growth through the period of time that [the student] [had] been in [the district specialized] school" and that there was an observable "general upward trend" in nearly all areas in each assessment (compare Tr. pp. 207, 210, with Dist. Ex. 9 at p. 2).[29]

The hearing record is sparse regarding the student's progress after fall 2021; after December 2021, the student no longer attended the district specialized school. The student's June 2022 IEP reported a "teacher estimate" of her performance at the upper second grade level in reading and the first grade level in math (Parent Ex. D at p. 1). The student was working on answering literal and inferential questions in "Level M texts," was able to write letters and was working on using proper spacing and was able to write sentences but required support to organize her thoughts (id.). In math the student was working on adding numbers to 20 and had developed strength in counting coins (id.).

Comparison of the June 2022 IEP with the student's scores on the fall 2021 administration of the SANDI revealed that the student had already mastered some of the skills described in the

[28] The SANDI "is a specially designed comprehensive summative and formative assessment for students with intellectual disabilities" (Parent Ex. AA at p. 1). To the extent that the parent argues that the student "was a 'standard assessment', not alternative SANDI assessment student," the district specialized school assistant principal clarified that the SANDI was an assessment used "to track student progress and student specific needs," aligned to Common Core learning standards, and informed instruction and IEP goal writing (Tr. pp. 191, 195-96).

[29] The district specialized school assistant principal explained that the district did not administer the SANDI in Spring 2020 due to the COVID-19 school closures and "the system" pulled student's scores from the Fall 2019 administration into the Spring 2020 section (Tr. at p. 210-11).

June 2022 IEP "school progress report" (compare Parent Ex. D at pp. 1, 2, with Dist. Ex. 12 at pp. 1, 7, 15-16, 21). For example, the June 2022 IEP reflected the school progress report which described that the student enjoyed listening to stories read aloud and was able to sit in her seat and listen for 20 minutes (Parent Ex. D at p. 1). The student was working on answering "wh" questions and identifying 10 sight words and she could identify all the letters of the alphabet and repeat letter sounds when asked (id.). However, on the fall 2021 administration of the SANDI the student had already obtained a score of 3 (developed) on "reads 20 common high-frequency words," a score of 4 (proficient) on "produces/vocalizes phonemes for 21 consonants," and a score of 3 on "produces/vocalizes phonemes for 5 short vowel sounds" (Dist. Ex. 12 at pp. 15-16). Further, she scored a 4 on "reads 100 word text at a first grade level with fluency" (id. at p. 16). According to the June 2022 IEP, as described in the school progress report, the student could count to 10 objects with support and was working on addition sentences "through counting objects up to 20" (Parent Ex. D at p. 1). On the fall 2021 SANDI report the student obtained a score of 4 on "counting dots or objects up to 10," a score of 4 on "counting out 10 objects from a group of 15 of the same objects when requested," and a score of 4 on "counting dots up to 20" (Dist. Ex. 12 at pp. 6, 7). The June 2022 IEP indicated that the student was working on writing "all letters of the alphabet, specifically her name" but required prompting and support (Parent Ex. D at p. 2). However, the fall 2021 SANDI report noted that the student obtained a score of 4 on "writes first and last name upon request on 5 different domains/papers over a 2-day period" (Dist. Ex. 12 at p. 21).

The director of EBL coaching testified that she assessed the student on July 21, 2022 at which time "[the student] tested at an upper first grade level for both spelling and mathematics, an upper second grade level for decoding, a first grade level for writing, and a second grade level for reading comprehension" (Tr. p. 318; Parent Ex. Y at ¶¶ 11, 12).

Based on the above, the hearing record shows that the student had been making progress in the district program; however, there is a lack of evidence regarding the student's progress during the period of the denial of FAPE from May 2021 through December 2021. Additionally, while the parent's requested compensatory tutoring is the only approach presented for computing a compensatory award it does not provide a basis for the request so that a determination could be made as to whether it would be an appropriate award. In consideration of the above, the IHO erred in denying any compensatory academic services. "Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students" (Stanton v. Dist. of Columbia, 680 F. Supp 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at *1 [D.D.C. Jan. 3, 2017]). Although it would be better to have a more developed hearing record to identify an appropriate compensatory award, I will award the equivalent of five hours per week of 1:1 instruction by a special education teacher for each week the student was denied a FAPE from May 4, 2021 until the student's enrollment at MSA on December 31, 2021. According to my calculation, this time period consisted of 30 weeks of school, accordingly, the student will be awarded 150 hours of 1:1 instruction by a special education teacher.

Turning to the issue of compensatory PT services, the March 2021 independent PT evaluation recommended that the student receive two 45-minute sessions per week of individual PT, and the April 2021 CSE recommended that the student receive two 30-minute sessions per week of individual PT (Parent Exs. F at p. 23, L at p. 5). However, the hearing record lacks

evidence of the PT services the student actually received from May 4, 2021 until December 31, 2021. Therefore, I find the IHO's denial of any compensatory PT was in error. For the period between May 4, 2021 and December 31, 2021, including the 12-month school year summer program, I find that the student is entitled to 15.5 hours of PT as compensatory education at the cost of the market rate to be used within two years of the date of this decision.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determinations that the statute of limitations barred certain claims made by the parent and that the October 2020 IEP provided the student a FAPE through the implementation date of the April 2021 IEP, which was May 4, 2021. However, the IHO erred by not finding that the district failed to implement the April 2021 IEP from May 4, 2021 until December 31, 2021, and by failing to award compensatory education.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision dated January 8, 2023, is modified by reversing the portions which found that the district provided a FAPE for the 2021-22 school year until December 31, 2021, and denied the parent's request for compensatory education and PT services; and

IT IS FURTHER ORDED that the district shall provide the student with compensatory education services in the form of 150 hours of 1:1 instruction by a special education teacher and 15.5 hours of PT services by providers selected by the parent; and

IT IS FURTHER ORDED that the compensatory education and PT services awarded to the student shall expire two years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
April 20, 2023

STEVEN KROLAK
STATE REVIEW OFFICER