



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-034

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

**Appearances:**

Ferrara Fiorenza P.C., attorneys for petitioner, by Susan T. Johns, Esq.

Martin Kehoe & Associates, P.C., attorneys for respondents, by Martin J. Kehoe III, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to fund the cost of an independent educational evaluation (IEE) for respondents' (the parents') daughter. 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 specialized programming through the CSE since kindergarten (Dist. Ex. 8 at p. 1). The student is nonverbal, deafblind, and has multiple disabilities, including global developmental delay, mild to moderate sensorineural hearing loss bilaterally, cortical visual impairment (CVI), dysphagia, scoliosis, low muscle tone, refractory epilepsy, microcephaly, and decreased bone density (Parent Ex. F at pp. 1, 3, 4; Dist. Exs. 8 at p. 1; 12).<sup>1</sup> She has daily seizures

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<sup>1</sup> Throughout the hearing record the terms deaf and blind, deaf blind, Deafblind, Deaf/Blind, and DeafBlind are used to describe the student and community of individuals with combined diagnoses of hearing and vision loss and may be used interchangeably throughout the decision (see generally Tr. pp. 45, 48, 50, 51, 54; Parent Exs. A at p. 5; F at pp. 4, 11; IHO Decision at p. 12).

and vomiting episodes, and receives all nutrition through a gastrostomy tube (G-tube) (Parent Ex. F at p. 1; Dist. Exs. 8 at pp. 1-2; 12-14). In October 2018, an audiologist reported that the student was fit with new bilateral hearing aids that were not compatible with the FM system receivers she was using (Dist. Ex. 2). The audiologist recommended that the district order new receivers that were compatible with the student's FM system (id.). In February 2019, the audiologist reported that the student's hearing aids were checked and found to have satisfactory functioning (Dist. Ex. 3 at p. 1). Additionally, the student's FM system was calibrated, confirmed to be functioning as expected, and the audiologist enclosed documentation demonstrating the outcome of the student's system evaluation which indicated satisfactory benefit (id. at pp. 1-3).

In March 2021, the district school psychologist completed a re-evaluation summary for the student, and on March 29, 2021, the CSE convened for a reevaluation/annual review meeting and to develop an IEP for the student for the 2021-22 school year (Dist. Exs. 8; 9 at p. 1). Finding the student eligible for special education programming as a student with multiple disabilities, the CSE recommended that the student receive within the home setting: two 60-minute sessions of direct consultant teacher services per week; four 60-minute sessions of individual vision services per month; three 60-minute sessions of individual hearing services per week; three 60-minute sessions of individual speech-language therapy sessions per month; six 60-minute sessions of individual occupational therapy (OT) per month; six 60-minute sessions of individual physical therapy (PT) per month; and four 60-minute sessions of individual music therapy per month (Dist. Ex. 9 at p. 10).<sup>2</sup> Additionally, the CSE recommended one two-hour session of indirect consultant teacher services per month; individualized curriculum, materials, and resources to meet student's needs as a deaf/blind student; and access to adaptive equipment including an adapted stander, adaptive seating, hearing aids (parent provided), an adaptive input device, a slant board, a personal auditory trainer/FM system, an augmentative communicator, as well as two 30-minute sessions per year of assistive technology consultation with the parents to monitor the student's assistive technology needs (id. at pp. 10-12). Further, the IEP provided one 30-minute OT consultation per quarter to modify the student's environment and/or create new learning materials, three 60-minute educational team meetings per year in the student's home, and two 60-minute sessions of professional development per year from the "NYSDBC" (id. at p. 12).<sup>3, 4</sup>

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<sup>2</sup> The student's eligibility for special education programming as a student with multiple disabilities is not in dispute (34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>3</sup> It appears the CSE intended to obtain professional development from the New York DeafBlind Collaborative (NYDBC). The acronym "NYSDBC" is used throughout the hearing record to refer to this agency (see Tr. pp. Tr. pp. 46, 48; Parent Exs. A at p. 5; G; Dist. Ex. 9 at p. 12).

<sup>4</sup> The student was approved for 12-month programming during summer 2021, with recommended services within the home setting on a weekly basis that included one 45-minute session of individual direct consultant teacher services, one 45-minute session of individual vision services, one 30-minute session of individual telehealth PT, one 45-minute session of individual OT, three 60-minute sessions of individual hearing services, one 45-minute session of individual speech-language therapy, and one 45-minute session of individual music therapy (id. at pp. 12-13).

On October 21, 2021, the parent emailed the CSE chairperson requesting an evaluation of the student by an educational audiologist (Parent Ex. B; see Parent Exs. C; E at p. 1).<sup>5</sup> On October 25, 2021, the student's special education teacher emailed district staff in support of "having an [e]ducational [a]udiologist on board" for the student (Parent Ex. D; see Parent Ex. E at p. 1).

On November 4, 2021, the CSE reconvened for a program review of the student's 2021-22 IEP (Parent Ex. E at p. 1). The November 15, 2021, prior written notice indicated that no changes were made to the March 2021 IEP, rather, parent concerns were discussed at the November 2021 CSE meeting (Dist. Ex. 11 at p. 1; compare Dist. Ex. 9 at pp. 1, 10-13, with Parent Ex. E at pp. 1, 10-13).

In a letter dated May 10, 2022 to the district, a medical professional following the student's care at Boston Children's Hospital opined that the student "would require a high level of specialized nursing care and attention" and an aide in order for her to safely return to a school-based program (Dist. Ex. 12). Additionally, the student's medical professional recommended continued home-based related services and indicated that the student required hearing aid and FM system support and strict reliance on COVID-19 protocols, due to the student's medical fragility (id.).

The CSE convened on May 23, 2022 for an annual review and to develop an IEP for the student for the 2022-23 school year IEP (Parent Ex. F). The CSE recommended that the student continue to receive instruction and related services within the home setting with services at the same duration and frequencies as the prior school year in the areas of direct and indirect consultant teacher services, vision and hearing services, and speech-language and music therapy, as well as the same modifications, and assistive technology services (compare Dist. Ex. 9 at pp. 1, 10-13, with Parent Ex. F at pp. 1, 11-13). The CSE recommended that the frequency of PT remain the same at six therapy sessions per month with a reduction in duration from 60-minute to 45-minute sessions (compare Dist. Ex. 9 at p. 10, with Parent Ex. F at p. 11). For the 2022-23 school year, consultation services, educational team meeting, and professional development consultations remained the same as the March 2021 IEP, with the addition of six 30-minute PT consultations with the parents provided yearly (compare Dist. Ex. 9 at p. 12, with Parent Ex. F at p. 12).

In a prior written notice dated June 1, 2022 the district informed the parents of the CSE's recommendation to decrease PT services due to the student's level of fatigue during sessions (Dist. Ex. 16 at p. 1).

### **Due Process Complaint Notice**

In an amended due process complaint notice dated August 9, 2022, the parents alleged that procedural and substantive violations by the district denied the student a free appropriate public

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<sup>5</sup> The school district personnel to whom the parent sent the email request was identified as "[a]dministrator" on the student's March 29, 2021 IEP and as "[c]hairperson" on the November 4, 2021 and May 23, 2022 IEPs (see Parent Exs. E at p. 1; F at p. 1; Dist. Ex. 9 at p. 1). For consistency within the decision, this district personnel will be referred to as the CSE chairperson.

education (FAPE) for the 2021-22 and 2022-23 school year (Parent Ex. A).<sup>6</sup> As an initial matter, the parents requested that pendency in this matter be based on the last agreed upon IEP dated April 27, 2020 (Parent Ex. A at pp. 3-4; see Dist. Ex. 5).

Turning to the substance of the complaint, the parents alleged procedural violations related to the May 2022 IEP, such as that the student's program was predetermined, the CSE acted without sufficient evaluative materials, and the CSE failed to consider or discuss expert provider opinions supplied by the parents (Parent Ex. A at p. 4). The parents also alleged that substantively, the programming recommendation was not appropriate because there was a reduction in the student's PT mandate (id. at p. 5). In addition, the parents asserted that the district failed to implement direct and indirect consultant teacher services for the 2021-22 and 2022-23 school years and that there had been a "systemic" reduction in consultant teacher services (id.). The parents further argued that the district failed to implement direct teacher of the visually impaired (TVI) services for the 2022-23 school year (id. at p. 6). The parents also raised a number of allegations related to section 504 of the Rehabilitation Act of 1973 ("section 504") (id. at pp. 6-8).

Relevant to the current appeal, the parents asserted that during the 2021-22 school year, they requested an independent hearing evaluation, but the request was denied, and that they "do disagree with the evaluations and/or lack thereof" obtained by the district (Parent Ex. A at p. 6). Finally,

As relief, the parents requested findings that the student was denied a FAPE for the 2021-22 and 2022-23 school years, and that the district violated section 504 (Parent Ex. A at p. 13). The parents also requested a "remand" to the CSE directing that it "maintain the PT mandate" of services twice per week for one hour and district funding of compensatory education for missed direct and indirect consultant teacher services, TVI services, and teacher of the deaf services (id. at pp. 13-14). The parents further requested additional make-up services until such time that the district provides a FAPE, qualitative compensatory education designed to put the student "in the situation she could have been in had the [d]istrict not failed to provide appropriate services," as well as providers of the parents' choosing paid at "market rate" for their services (id. at p. 14). Finally, relevant to this appeal, the parents requested an independent educational evaluation (IEE) for an independent hearing evaluation (id.).

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

The IHO conducted a prehearing conference on August 15, 2022 (Aug. 15, 2022 Tr. pp. 1-24).<sup>7</sup> During the hearing, the parties agreed that pendency lay in the November 4, 2021 IEP;

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<sup>6</sup> The parents' initial due process complaint notice was filed on June 27, 2022 (June 27, 2022 Due Process Complaint Notice). At the August 15, 2022 hearing date, the IHO allowed the parents to amend their original due process complaint notice; the IHO admitted the amended due process complaint into evidence at the November 8, 2022 hearing date as Parent Exhibit "A" and District Exhibit "1," noting that they were duplicative (Aug. 15, 2022 Tr. p. 9; Nov. 8, 2022 Tr. pp. 13-18). This decision will cite to the parents' exhibits where there are duplicates. The original due process complaint notice dated June 27, 2022 was not admitted into evidence at the impartial hearing but was included as part of the hearing record on appeal.

<sup>7</sup> The numeration of transcript pages is not consecutive from one volume to the next. Therefore, the date of the proceeding is cited.

however, the IHO declined the parents' request to issue a pendency order as the IHO stated that the parties' agreement was "on the record" and "[w]e have a transcript of the same" (Aug, 15, 2022 Tr. pp. 2-8, 17-18; see Parent Ex. E).

Following two resolution meetings held in September 2022, the district proposed a resolution agreement, which the district contended would have fully resolved the parents' complaints, except for the request for an IEE (Tr. pp. 11-12; Parent Ex. G).

A prior written notice dated October 13, 2022, indicated that the CSE had met that day, reviewed the student's current special education services, and that "[n]o changes were made to the IEP at this time" (Dist. Ex. 18 at p. 1). The notice indicated that the CSE meeting was held with related service personnel for speech-language, PT, OT, and teacher of the deaf services, who agreed that combining related services at the same time would be beneficial for the student as a collaborative approach to support goal progress, stamina, and motivation during related services (id.).<sup>8</sup>

The parties proceeded to an impartial hearing on November 8, 2022 (Nov. 8, 2022 Tr. pp. 1-64). After questioning the student's mother, counsel for the district moved to dismiss the parents' claims arguing that there was "no valid reason for an educational audiological evaluation right now," "[t]here is no right to an independent evaluation to get a second opinion regarding a privately obtained evaluation," and, further, that "[i]f the reason is to determine whether [the student] needs an FM system, she is using an FM system and therefore that matter is moot" (Nov. 8, 2022 Tr. p. 32). The parents' attorney responded by presenting a rebuttal document consisting of an email exchange in which the district's assistive technology personnel stated that the student "isn't using the FM system," which the student's mother testified was the "third attempt from the district . . . to withhold FM services, FM equipment from [the student] over the years" and that the teacher of the deaf and the NYSDBC advised on an educational audiological evaluation of the student, but the district did not provide the evaluation (Nov. 8, 2022 Tr. pp. 33-39; see Parent Ex. I).<sup>9</sup> The IHO questioned the student's mother as to what her "prime purpose" was in requesting this particular evaluation and the mother responded that "I would just like a comprehensive eval that is independent from the district in having to do with educational settings and specific to [the student], the deaf blind child" (Nov. 8, 2022 Tr. p. 50). The student's mother further testified that her "reasoning for wanting this evaluation [wa]s to put to rest any issues regarding [her] daughter's need for an FM system" and "[j]ust as a comprehensive educational eval. I mean, we have the eval from . . . the audiologist, but she is a medical audiologist. And [the student] is a deaf blind student with multiple disabilities and so I think an educational audiologist would be valuable to provide specific educational recommendations" (Nov. 8, 2022 Tr. pp. 50-51). The district then renewed its motion to dismiss, the IHO clarified that the district agreed to relief requested by the parents, including—"PT three times 45," "compensatory consult[ant] teach[er] services that were missed from November to June and that totaled 44 hours," and "two additional professional development

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<sup>8</sup> The district included emails from August 2022 through October 2022 between the district, agency service providers and the parents related to scheduling of services, cancelations of services due to student illness or fatigue, makeup sessions, and following up on the parents' request for related service co-treatments (Dist. Ex 17).

<sup>9</sup> The individual who provided the student's hearing services is referred to in the hearing record as a teacher of the deaf and a hearing specialist, interchangeably (see e.g. Nov. 8, 2022 Tr. p. 27; Ex. E at p. 1).

sessions for relevant staff from the New York State Deaf Blind Co[llaborative]"—and the IHO directed the parties to submit written post-hearing briefs to address the "detailed relief requested" by the parents and the "request to dismiss" by the district (Nov. 8, 2022 Tr. pp. 52-54, 57).

The impartial hearing concluded on December 12, 2022 (Dec. 12, 2022 Tr. pp. 1-20). The IHO entered the parties' briefs into evidence as IHO exhibits and denied the district's motion to dismiss "in light of the fact that there is still the outstanding issue . . . of the FAPE denial as [] well as the issue of the educational hearing evaluation" (Tr. p. 10; see IHO Exs. I; II).

In a final decision dated January 26, 2023, the IHO found that the district denied the student a FAPE for the 2021-22 and 2022-23 school years stating that "[a]lthough the d[i]strict did offer to provide some of the requested relief; the fact still remains that the reduction in services and the failure to implement the mandated services on the 5/23/22 IEP resulted in a denial of FAPE" (IHO Decision at p. 11). With respect to whether the district violated section 504, the IHO found "no evidence to support that the districts actions r[is]e to the level of 'discriminatory' practice or procedure" and "the [r]ecord [wa]s void of any evidence the district acted in a discriminatory manner" and "there [wa]s no evidence the [d]istrict acted with bad faith or gross misjudgment" (id.).

Next, the IHO found that while the district agreed to provide most of the requested relief, the "main dispute between the parties seem[ed] to center around the [p]arents requesting the [d]istrict provide the student with an independent [] educational [audiological] evaluation and the [d]istrict not agreeing to do so" (IHO Decision at p. 12). In finding that the district should fund an independent educational audiological evaluation "by a provider of the [p]arents['] choosing at a [r]easonable [m]arket [r]ate," the IHO stated that she "d[id] not concur with the [d]istrict's position" as it was "not a question of providing the evaluation to 'maximize' the student's potential," but one of "providing the student with what she may need and/or require to make meaningful educational progress" (id. at p. 13). The IHO further explained her rationale noting that "[a]s the [p]arent states, it is a 'complete evaluation to cover everything that has to do with [the student's] education and her hearing loss'" and that "[a]lthough the student does have the FM unit, the [p]arent is uncertain [] it's the most appropriate thing to enable her daughter to obtain educational benefit" as the student is multiply disabled, and an educational audiological evaluator specializes in making educational recommendations for students with such disabilities (id.).

Finally, the IHO found that equitable considerations weighed in support of the parents, that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, and that the district did not violate section 504 for the 2021-22 and 2022-23 school years (IHO Decision at p. 15). The IHO ordered the district to provide the student with PT for three 45-minute sessions per week, 44 hours of direct consultant teaching services to make up for missed services from November 2021 through June 2022, and further ordered the district to arrange for two additional professional development sessions for relevant staff from the NYSDBC as a compensatory educational service (id.). The IHO also ordered the district to pay the cost of an independent educational audiological evaluation "at market rate upon invoice submitted" to the district (id.).

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

The district appeals alleging that the IHO erred in ordering the independent educational audiological evaluation because the district did not first obtain an educational audiological evaluation with which the parent disagreed, and the reason offered by the parents for the need for an educational audiological evaluation was legally wrong. Specifically, the district argues there was no allegation that the student's IEP and the services provided were not sufficient to provide the student with a FAPE, "other than the issue of reduced physical therapy for the 2022-2023 school year and the lack of a special education teacher for part of the 2021-2022 school year." In addition, the district asserts that there was no allegation that the CSE lacked sufficient evaluative information regarding the student's special education needs, and that the CSE's role is not to determine whether there "might be something better" or to ensure that it is providing "the best." The district argues that the IHO acknowledged that the FM auditory trainer was appropriate in stating that the "[requested evaluation] would be a 'complete' evaluation to help determine if perhaps there is something else that would be more appropriate to enable the student to make meaningful educational progress." Finally, the district asserts that the IHO erred in ordering the district to fund an evaluation "just to see if something might be better." As relief, the district requests that the IHO's decision ordering the educational audiological evaluation be annulled.

In an answer the parents assert that, first, equitable considerations support the IHO as IHOs have broad authority to determine the type of relief which is appropriate considering the equitable factors present and, here, "objective evaluative data is long overdue" considering that the date of the student's last psychoeducational evaluation was April 2017 and issuance of an IEE was fully within the IHO's discretionary authority. Second, the parents argue that regulations support the IHO as both federal and State regulations allow a hearing officer to order an IEE, noting that "[i]f a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense" (34 C.F.R. 300.502 [d] and 8 NYCRR 200.5[g][2]). Also, the district argues that courts have found that an IHO can order an IEE as part of equitable jurisdiction under the IDEA, particularly when a district fails to evaluate a child. The parents request that the appeal be rejected.

#### **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).

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]).<sup>10</sup>

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

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

## **VI. Discussion**

### **A. Scope of Review**

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). In addition, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Neither party challenged the IHO's findings that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, that the district did not violate section 504 for

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<sup>10</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

the 2021-2022 and 2022-2023 school years, or that equitable considerations favor the parents.<sup>11</sup> Nor did either party challenge the IHO's order for the district to provide the student with PT for three 45-minute sessions per week, the order for the district to provide 44 hours of direct consultant teacher services to make up for missed services, or the order for the district to arrange for two additional professional development sessions for relevant staff from the NYSDBC as a compensatory educational service. Accordingly, these findings have also become final and binding on the parties and will not be reviewed on appeal.

## **B. Independent Educational Evaluation and District Reevaluation**

The sole issue presented on appeal is the district's contention that the IHO erred in awarding district funding of an independent educational audiological evaluation.

Initially, the parents' June 27, 2022 due process complaint notice did not include any allegations that the district failed to evaluate the student or a request for an IEE (June 27, 2022 Due Process Complaint Notice).

In the parents' August 2022 amended due process complaint notice, they requested an IEE stating that "during the 2021-2022 [school year] the parents requested an independent hearing evaluation, but the request was denied"; the parents then referenced federal and State regulations regarding parents' rights to obtain an IEE at public expense, if the parents disagree with the evaluation obtained by the school district and noted "[t]he [p]arents do disagree with the evaluations and/or lack thereof obtained by the [d]istrict" (Parent Ex. A at p. 6).

The parents' amended due process complaint notice, in connection with claims alleging a denial of a FAPE, also asserted that "[a] district must ensure that a student is appropriately assessed in all areas related to the suspected disability . . . "; however, "[t]he CSE acted without proper evaluative materials" at the May 2022 CSE meeting, by failing to consider or discuss the expert opinions which were supplied by the parents from providers with significant history with the student (Parent Ex. A at p. 4). More specifically, the parents asserted that "[t]here has been no updated psychoeducational evaluation since April 2017" (*id.*).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (*see* 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; *see* 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses

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<sup>11</sup> An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (*see A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; *see also F.C. v. New York City Dep't of Educ.*, 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]).

disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

As an initial matter, the district argues on appeal that the IHO erred in ordering the "independent" educational audiological evaluation because the district did not first obtain an educational audiological evaluation with which the parents disagreed. However, that argument is without merit because guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

Nevertheless, I have concerns with the parents' inclusion of the request for an IEE in the amended due process complaint notice in the first instance (see Parent Ex. A at p. 4). Initially, although the parents asserted in their amended due process complaint notice that they had previously requested an independent hearing evaluation during the 2021-22 school year, the hearing record does not support this contention. In an October 21, 2021 email to the CSE chairperson, the parent requested an educational audiological evaluation of the student and indicated that it was her understanding that the district had "30 school days from the request" (Parent Ex. B). In a follow up email, the parent provided clarification and information on what an educational audiologist was with a resource link and reaffirmed the request for the evaluation to be completed by an educational audiologist (Parent Ex. C).<sup>12</sup> The parent testified that an

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<sup>12</sup> Notably, in her direct testimony by affidavit, the parent did not indicate that she requested an IEE in fall 2021, only making reference to requesting the evaluation, but no reference to an independent evaluator (Parent Ex. H ¶ 2). The parent testified by affidavit that, at the November 2021 CSE meeting, the district failed to take action to further the parents' October 2021 request for an educational audiological evaluation (id. H ¶ 3). The prior written

educational audiologist specializes in making educational recommendations on the IEP after the evaluation (Nov. 8, 2022 Tr. p. 27). The parent testified that in a phone conversation with the CSE chairperson, she offered to "find the person who could do the eval" (Nov. 8, 2022 Tr. p. 28). However, according to the parent, the CSE chairperson reportedly refused and stated it was the district's job to find the specialist and advised the parent to not reach out to the specialist (id.).

Under these circumstances, the evidence in the hearing record convinces me that the parent was asking the CSE to initiate its own educational audiological evaluation, and in the exchange, the staff appeared to have reasonably interpreted the request as one for a district evaluation. In reviewing the correspondence (Parent Exs. B; C), the parent did not make her request in a way that the district should have expected the parent was disagreeing with an evaluation conducted by the district or that she was seeking an IEE at district expense (see Application of a Student with a Disability, Appeal No. 19-018 [where the parent did not seek an evaluation by an independent evaluator, appropriate relief was to order the district to conduct the evaluation rather than award an IEE]). Accordingly, the hearing record indicates that the parents' first expression of disagreement and request for an IEE was in the amended due process complaint notice and, as noted above, even the parent's direct testimony by affidavit did not express dissatisfaction with an evaluation conducted by the district and that she was requesting a IEE at public expense as a result in fall 2021.

While in past decisions SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), this is not the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).<sup>13</sup> My own study of the judicial guidance and administrative guidance on the topic has not yet let me to a decision on whether to outright bar the approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first), but I am convinced in this case that the parents may have delayed sufficiently clear communication of the IEE request until the amended due process complaint or more likely included the request for an IEE in the amended due process complaint notice as an afterthought. This is an improper use of the due process procedures.

I have warned parties in past SRO decisions, for example, where it is obvious that the parent is delaying the IEE request in favor of including it in their own due process complaint notice—perhaps as a means to obtain evidence to support other claims against the district rather than as a means to understand the student's needs—then trying to use the IEE request to allege that

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notice issued after the November 2021 CSE meeting did not reflect the content of the discussion, if any, related to the requested educational audiological evaluation, noting in the proposed or refused action section that "there were no other factors relevant at this time" (Dist. Ex. 11 at p. 1).

<sup>13</sup> The court in Trumbull speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

their complaint has actionable claims, that this is an improper use of the due process procedures (see Application of a Student with a Disability, Appeal No. 22-150; Application of the Dep't of Educ., Appeal No. 22-121; Application of a Student with a Disability, Appeal No. 21-170 at n. 11). Moreover, based upon more recent study and research, I am becoming more convinced that this approach is not consistent with State and federal law and regulations. Here, in particular, the parents not only first included their request for an IEE and stated their disagreement with the district's "evaluations and/or lack thereof" in their amended due process complaint notice in August 2022 but failed to include the IEE request and stated disagreement at all in their original due process complaint notice (see June 27, 2022 Due Process Complaint Notice). The parents cannot do this.

The parents' failure to follow the process outlined in the IDEA and its implementing regulations for seeking an IEE in this case convinces me that the IHO erred in awarding an IEE at public expense in the form of an independent educational audiological evaluation. While the district did not initiate an impartial hearing to defend its evaluations, there is no evidence that the parents requested an IEE or articulated any disagreement with a district evaluation or lack thereof prior to seeking the IEE in the amended due process complaint notice. This, notwithstanding that at the impartial hearing there was further development of what the disagreement was and what exactly the parents were seeking (see Nov. 8, 2022 Tr. pp. 50-51). The parents' failure to follow the process for obtaining an IEE at public expense—which they appear to concede in their answer—is further compounded by the manner in which the allegations about the evaluations were framed in the amended due process complaint notice, i.e., as a procedural violation underlying a denial of a FAPE, instead of as a specific articulation of disagreement with a district evaluation underlying a request for an IEE.<sup>14</sup> Specifically, the parents' statement of disagreement, "[t]he [p]arents do disagree with the evaluations and/or lack thereof obtained by the [d]istrict," is vague, conclusory, and lacking in specific detail (Parent Ex. A at pp. 4, 6). Given the manner in which the purported insufficiency of the district's evaluations was raised by the parents, as well as the fact they sought an IEE via an amended due process complaint notice, I find that the IHO erred in awarding an IEE at public expense in this instance.

I also find inapposite, the parents' argument that federal and State regulations granted the hearing officer the authority to order an IEE as the ultimate relief in this matter. It is generally within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at \*7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merion Sch. Dist., 2010 WL 8913276, at \*3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at \*9 n.9 [D.R.I. Jan. 14, 2014]

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<sup>14</sup> In their answer, the parents assert that "[e]ven if the parents' request for the IEE was not according to Hoyle," that issuance of an IEE is within the IHO's broad authority to determine relief and that both federal and State regulations "make clear that IEEs are contemplated as part of a hearing" and if ordered by an IHO as part of a hearing, the cost must be provided at public expense. While not further clarified by the parents, the phrase "according to Hoyle" commonly means "according to the rules and regulations; in the prescribed, fair, or correct way" (Webster's New World College Dictionary, 4th Edition, 2010).

[acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1<sup>st</sup> Cir. 2014]). In this instance, the IHO did not indicate an intent to order the IEE as part of the hearing in this matter and neither the IHO, nor the parents on appeal, have explained how the IEE would have informed the hearing record in the present matter (see 8 NYCRR 200.5[g][2]; [j][3][viii] [referring the IHO's authority to request an IEE at district expense "as part of a hearing"]; see also 34 CFR 300.502[d]; Lyons, 2010 WL 8913276, at \*3). Under these circumstances, ordering the IEE was not an exercise of the IHO's discretion, nor was it within the IHO's discretionary authority as it was not ordered as a part of the impartial hearing.

While the parents' request for an independent educational audiological evaluation at district expenses is denied, I will now address the parents' substantive evaluation claims.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Turning to the evaluative information available to the March and November 2021 CSEs, the school district psychologist completed the student's reevaluation summary in March 2021 and reported that the student was referred to the CSE for reevaluation in accordance with New York State law, acknowledging that students receiving special education must be reevaluated every three years (Dist. Ex. 8 at pp. 1, 3). The school psychologist reported that the student's reevaluation began in spring 2020; however, her reevaluation/annual review meeting was scheduled for spring 2021 (id. at p. 1). The summary report indicated that due to the student's significant medical needs, complicated by the COVID-19 pandemic, "in person observations and standardized testing did not occur" (id. at p. 2). The summary listed evaluation methods that included a review of records,

parent input, therapist input, and administration of the Adaptive Behavior Assessment System-3 (ABAS-3) (id. at p. 1).<sup>15</sup>

The March 2021 reevaluation summary provided background information that included reference to some of the student's diagnoses and disabilities, and that the student had received services through the CSE since kindergarten, as well as a list of special education and related services the student was currently receiving in the home (Dist. Ex. 8 at pp. 1, 2). Additionally, in the area of academics, the summary reported that the student would be working on identifying the letter M, and the present levels of performance indicated that when she was feeling well, the student attended to a video; made a choice, usually of her preferred activity, when prompted; and at times pushed a picture or symbol on the iPad to communicate completion of an activity with prompting (id. at p. 2). According to the summary, the student's use of the iPad to communicate was "often inconsistent" and dependent on how she felt and her activity level that day (id.). The summary included that the student enjoyed spending time with family and enjoyed music (id.). Following review of the student's records, the school psychologist concluded that the student continued to require special education services and that it was important for all of her service providers to continue to collaborate and share techniques/approaches to help the student succeed (id. at pp. 2-3). While the summary listed hearing loss as one of the student's multiple disabilities and indicated that the student received hearing services, it did not provide evaluative or educational information regarding the student's needs arising from her hearing loss or her level of performance in this area (see id. at pp. 1-3).

On March 29, 2021, the CSE convened for a "reevaluation/annual review" meeting and to develop the student's IEP for the 2021-22 school year (Dist. Ex. 9 at p. 1). The student's hearing specialist was not listed as a participant at the March 2021 CSE meeting and review of the March 2021 IEP shows that it did not include present levels of performance related to the student's hearing needs or services (id. at pp. 1, 3-7; see Nov. 8, 2022 Tr. pp. 36-37). The IEP noted that the student was diagnosed with mild to moderate hearing loss bilaterally and the speech-language and cognitive present levels of performance both reported that virtual services were difficult for the student due to her combined vision and hearing loss (Dist. Ex. 9 at pp. 3, 4). Although the CSE recommended that the student wear hearing aids at all times with FM transmitters to be used during sessions and receive three 60-minute sessions per week of hearing services, the March 2021 IEP did not include annual goals related to hearing (see id. at pp. 7, 8-10).

As noted above, in October 2021, the parent requested an educational audiological evaluation (Parent Exs. B; C). In addition, the student's special education teacher emailed district staff supporting a recommendation for an educational audiologist on the basis that "auditory learning [wa]s a very important and even presumably preferred and comfortable means of learning for [the student]," and that "knowing more about her specific hearing capabilities and challenges

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<sup>15</sup> The specific records reviewed were not listed on the reevaluation summary; however, the student's March 2021 IEP reflected a list of evaluations/reports that included, in addition to the March 2021 reevaluation summary, a March 2021 Adaptive Behavior Inventory, a March 2021 OT progress summary, an April 2020 speech-language evaluation, an April 2018 speech-language progress summary, a March 2018 PT progress summary, an April 2017 psychoeducational evaluation, and March 2016 parent report and observations (Dist. Ex. 9 at pp. 1-2). The March 2021 IEP reflected test results from the March 2021 administration of the ABAS-3 to the parent that included a general adaptive composite standard score of <50 (id. at p. 2).



as well as environmental considerations would certainly help all of her providers" to meet the student's educational needs (Parent Ex. D at p. 2).

The CSE convened thereafter in November 2021 for a "program review" of the student's March 2021 IEP (Parent Ex. E). Although the hearing specialist was listed as a participant at the November 2021 CSE meeting, the November 2021 IEP did not identify present levels of performance regarding the student's hearing needs and services, and despite continuing the hearing supports and services from the March 2021 IEP, the November 2021 IEP did not include annual goals to address the student's hearing needs for the remainder of the 2021-22 school year (Parent Ex. E at p. 1; compare Parent Ex. E, with Dist. Ex. 9). Review of the prior written notice issued subsequent to the meeting indicated that no changes were made to the student's IEP, that "[t]he team gathered to discuss parent concerns and needs but no changes were recommended at this time," and that the reports and evaluations listed under the evaluations/reports section of the IEP were considered (Dist. Ex. 11 at p. 1; see Parent Ex. E at p. 1).

Upon receipt of the parent's request for an educational audiological evaluation, the district should have considered whether it would have been appropriate to conduct the evaluation to assess the student's special education needs and, after due consideration, provided the parent with prior written notice describing, if applicable, its reasons for concluding that the additional evaluative data requested by the parent was unnecessary (see 8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the district would have complied with its procedural obligations, much of the litigation in this matter may have been avoided.

Turning to more current information regarding the student, the May 2022 CSE convened for the student's annual review and to develop an IEP for the student for the 2022-23 school year (Parent Ex. F at p. 1). New evaluative information available to the May 2022 CSE included an April 2022 PT progress summary and a May 2022 OT progress summary (compare Parent Ex. F at p. 1, with Parent Ex. E at p. 1). The hearing specialist participated in the May 2022 CSE meeting and the IEP provided information regarding the student's performance in hearing services sessions, specifically, that she required sensory breaks, one session per week was a co-treat session with OT, and that verbal, ASL, tactile signs, objects, pictures, and cued speech were used to communicate with the student (Parent Ex. F at pp. 4-5). According to the IEP, the parents used tactile signs with the student and the material and lessons provided to the family were kept as simple as possible for the family's use outside of sessions (id. at p. 4). The IEP reflected that a hearing services goal was to present signs in a hand-under-hand manner while using auditory stimulation during tactile sign and using objects, pictures, and cued speech, which allowed the student the opportunity to participate in the communication (id.). The hearing specialist reported that the student required more processing time with new signs, activities, and textures, and with auditory stimulation, she "tend[ed] to be more attentive and interested" (id. at p. 5). The IEP indicated that the student kept her hearing aids on and became excited when observing her FM system being connected to her devices (id.). As such, the hearing specialist reported that it was "very important that all her service providers use the FM system when working with [the student]" as it allowed her to isolate the speaker's voice and trust her surroundings (id.). Additionally, the hearing specialist encouraged providers to narrate what they were doing when working with the student (id.). The IEP continued to provide management needs for the student that included use of hearing aids and that the FM system be used during sessions, three 60-minute sessions of hearing services per week, and, in addition, the CSE developed two hearing services annual goals (compare

Parent Ex. F at pp. 1, 7, 9-10, with Parent Ex. E at pp. 1, 7, 8-10). Review of the June 1, 2022 prior written notice resulting from the May 2022 CSE meeting shows that it does not mention the parents' request for an educational evaluation or reflect any discussion about the student's hearing supports and services (see Dist. Ex. 16).

The parent testified that, prior to her request for the evaluation, staff from the district's assistive technology department indicated that the student did not "even really utilize her FM" system; there was a longstanding issue of statements made by the CSE and other providers that the student did not need the FM system because she was "a home student and not a school student"; and that despite a recommendation for an FM system from the "medical audiologist," the district continued to question whether or not the student needed an FM system, which prompted the parent to request the educational audiological evaluation (Nov. 8, 2022 Tr. pp. 27-29). Further, the parent stated that although the student did have an FM system, she wanted to know if that was "the most appropriate thing" for the student, which an educational audiologist would know because that is their specialty (Nov. 8, 2022 Tr. p. 29). The parent testified that more than just providing information on the student's FM system, an educational audiological evaluation would provide a "complete evaluation to cover everything that ha[d] to do with [the student's] education and her hearing loss" (id.). The parent testified that she learned about this type of evaluation through being a part of the deafblind community, and that other parents of deafblind students used this evaluation for clarity with their districts (Nov. 8, 2022 Tr. p. 28). The parent testified that the teacher of the deaf, the special education teacher at that time, and the NYSDBC advised on the student having an educational audiological evaluation (Nov. 8, 2022 Tr. pp. 38-39).

As stated above, the hearing record included parent-obtained reports from the student's medical audiologist from October 15, 2018 and February 2019 that reflected the student received hearing aids in 2018, needed compatible receivers for continued FM system use, and referenced the satisfactory functioning of the hearing aids and FM calibration system (Dist. Exs. 2; 3; see Nov. 8, 2022 Tr. p. 28). At the hearing, the district contended that because the CSE had sufficient evaluative information regarding the student's hearing impairment in that the student had hearing aids and an FM system, and as the student's 2021-22 and 2022-23 school year IEPs provided for the use of hearing aids and FM system during sessions, the parents' October 2021 request for an educational audiological evaluation was "moot" (Nov. 8, 2022 Tr. pp. 32, 42-43; Parent Exs. E at p. 7; F at p. 7). The district further argued that as the student already used the FM system, an evaluation to determine if the student actually "need[ed] a device which she [wa]s already using was pointless" (Nov. 8, 2022 Tr. pp. 32, 44). The parent testified that the request for the evaluation was to provide "a comprehensive educational eval" as "we ha[d] the eval from . . . a medical audiologist" but that because the student "is a deaf blind student with multiple disabilities" the parent believed that "an educational audiologist would be valuable to provide specific educational recommendations" (Nov. 8, 2022 Tr. p. 51).

As stated previously, the district did not show that the November 2021 or May 2022 CSEs were responsive to the parents' October 21, 2021 email request for an educational audiological evaluation, in that this request or any discussion thereof was not reflected in the November 2021 or May 2022 IEPs or within the prior written notices prepared subsequent to those CSE meetings (see Parent Exs. E; F; Dist. Exs. 11; 16). The district's position at the impartial hearing that it was not required to provide the educational audiological evaluation because the student was known to the CSE as having a bilateral hearing impairment and the CSE recommended use of hearing aids

and an FM system is not sufficient to show that it adequately responded to the parents' evaluation request (Nov. 8, 2022 Tr. p. 44; Dist. Exs. 2; 3). The parents made clear that their request for an educational audiological evaluation for the student was to find out more than just information about the student's FM system, rather, they wanted a "complete" evaluation to "cover everything that ha[d] to do with [the student's] education and her hearing loss," as well as to obtain educational recommendations for the student's IEP following the evaluation (Nov. 8, 2022 Tr. pp. 27, 29).

Moreover, the parent testified that she wanted a comprehensive evaluation related to the educational settings and "specific to [the student], the deaf blind child" (Nov. 8, 2022 Tr. p. 50). Review of the student's IEPs indicates that a psychoeducational evaluation of the student was last conducted in April 2017, and although the IEPs contained information from OT and PT progress summaries, it is unclear when the student was last assessed in those areas (see Parent Exs. E at pp. 2-3; F at pp. 2-3, 6-7; Dist. Ex. 9 at pp. 2-3).

Here, the district did not show that it sufficiently responded to the parents' evaluation request or adequately evaluated the student, accordingly, I find the parents are entitled to a comprehensive reevaluation of the student in all areas of suspected need, including an educational audiological evaluation (Trumbull Bd. of Educ., 975 F.3d 152).

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports reversal of the IHO's award of an IEE, and having further found that the parents are entitled to a comprehensive reevaluation of the student in all areas of suspected need, including an educational audiological evaluation, the necessary inquiry is at an end.

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

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO decision, dated January 26, 2023, is modified by reversing that portion of the decision that ordered the district to pay for the cost of an independent educational audiological evaluation at market rate upon invoice submitted to the district; and

**IT IS FURTHER ORDERED** that the district shall conduct a comprehensive reevaluation of the student including an educational audiological evaluation and, if the parties agree, the district is authorized to use an evaluator recommended by the NYSDBC.

**Dated:**            **Albany, New York**  
                         **March 31, 2023**

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