The University of the State of New York

The State Education Department
State Review Officer
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No. 23-039

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

Appearances:
The Law Firm of Tamara Roff, P.C., attorneys for petitioner, by Jessica Stoneburner, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Jewish Center for Special Education (JCSE) for the 2020-21 school year. The appeal must be sustained.

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

Review of the hearing record includes information regarding educational planning for the student going back to the parent's request for a reevaluation of the student on December 21, 2018 and parental consent for the reevaluation on January 15, 2019 (Dist. Ex. 5 at p. 1).

The district conducted a classroom observation of the student on February 13, 2019 (Dist. Ex. 4 at p. 1).[1] The corresponding report indicated that the student was observed as part of the

[1] Although the classroom observation was conducted on February 13, 2019, the date of the resultant report was February 15, 2019 (Dist. Ex. 4 at p. 2).

turning five evaluation process and that he had been diagnosed with autism spectrum disorder (id.). The report further indicated that, at that time, the student was receiving special education services in a 6:1+3 center-based program with related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id.). According to the observation report, the student continued to need a highly structured learning environment that focused on behavior management needs, language development, and social skills (id. at p. 2).

In January 2020, the parent filed a due process complaint notice challenging the district's program recommendations for the student for the 2019-20 school year (Parent Ex. C at p. 2). As part of the prior proceeding, an IHO determined that when the CSE convened in March 2019, the only evaluation considered by the CSE was the report of the February 2019 classroom observation (id. at p. 4-5).

In February 2020, the student's related service providers completed OT, PT, and speech-language therapy progress reports (see Dist. Ex. 7, 8, 9). All of the related services progress reports recommended that the student continue to receive related services (see Dist. Exs. 7, 8, 9). Additionally, a teacher progress report completed in February 2020 provided information concerning the student's academic and social-emotional functioning in his then-current classroom at JCSE (see Dist. Ex. 10).

The CSE convened on April 23, 2020 to develop an IEP for the student for the 2020-21 school year (see Dist. Ex. 1 at pp. 21-22, 25).[2] The April 2020 IEP included information from the February 2020 teacher progress report and related services progress reports and noted that no new testing was completed (id. at pp. 1-2). The CSE continued to find the student eligible for special education and related services as a student with autism (id. at pp. 1, 26). The CSE recommended a 12-month program with placement in a 6:1+1 special class for five periods per week each in math, social studies, and sciences and ten periods per week in English language arts (ELA), as well as related services of two 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, four 30-minute sessions of individual speech-language therapy per week, and one 60-minute session of parent counseling and training every five weeks (id. at pp. 20-21).[3] In addition, the CSE recommended that the student be placed in a district specialized school and receive special transportation services (id. at pp. 24-25).

A prior written notice, dated June 1, 2020, indicated that, in developing the April 2020 IEP, the CSE reviewed the February 2019 classroom observation, a February 2020 OT progress report, a February 2020 PT progress report, a February 2020 speech-language progress report and February 2020 teacher report and included the program recommendations contained in the April 2020 IEP (Dist. Ex. 2 at pp. 1-2). A school location letter, dated June 1, 2020, identified the school site the student was assigned to attend and provided the name and telephone number of a contact person for assistance in arranging a visit, as well as the telephone number for contacting the school (Dist. Ex. 3).

[2] A May 20, 2020 "student information" sheet from the April 23, 2020 CSE meeting was entered into the hearing record (see Dist. Ex. 6).

In a letter dated June 19, 2020 the parent informed the district that she had not yet received a copy of the April 2020 IEP, although she had received the school location letter (Parent Ex. B at p. 1). The parent indicated that she had contacted both telephone numbers provided on the school location letter and left messages but had not received a response (id.). The parent indicated that without a copy of the IEP or any other information, she would place the student at JCSE for the 2020-21 school year and would pursue public funding for the student's placement (id.).

On July 6, 2020, the parent executed two separate enrollment contracts for the student's attendance at JCSE for the 2020 summer program from July 6, 2020 to August 18, 2020 and for the 2020-21 10-month school year (Parent Ex. E at pp. 1-2, 4-5). Each of the contracts provided an addendum for related services which indicated that the student would receive related services as indicated on his IEP and the parents would be billed for related services in addition to the cost of the student's tuition (id. at pp. 3, 6).

A. Due Process Complaint Notice

By due process complaint notice dated January 19, 2021, the parent asserted that the district failed "to provide a procedurally valid and substantively appropriate IEP and placement recommendation for the 2020-2021 school year" (Parent Ex. A at p. 1). The parent contended that the district failed to conduct sufficient evaluations and failed to obtain sufficient clinical data to support its recommendations (id.). The parent asserted that the 6:1+1 special class recommendation with related services in a district community school was "wholly inappropriate" to meet the student's needs (id. at pp. 1-2).

Regarding the failure to evaluate, the parent argued that the CSE failed to conduct sufficient evaluations and failed to include her in the evaluation process (Parent Ex. A at p. 2). The parent alleged that the CSE failed to review existing data and determine what additional evaluations were required, which resulted in a failure to evaluate the student in all areas of need (id.). According to the parent, the failure to conduct and consider adequate evaluations rendered the CSE unable to create an appropriate IEP for the student (id.).

The parent noted that she did not receive a copy of the IEP and that it was her belief the CSE was not duly constituted as the district did not "secure the participation of a qualified district representative" who had knowledge of the full range of services available to the student (Parent Ex. A at p. 2). Moreover, the parent contended that the district did not consider the full continuum of services and the recommendations of the CSE were predetermined, based on district policy rather than the student's needs (id.). The parent asserted that these failures denied her from fully participating in the creation of the student's educational program (id.).

The parent noted again that she did not receive a copy of the April 2020 IEP and she reserved the right to modify the due process compliant notice upon receipt of the IEP (Parent Ex. A at p. 2). Further, the parent indicated that she received the school location letter, but the school failed to respond to the parent after she made multiple attempts to contact the school (id.). The parent requested funding or reimbursement for the student's placement at JCSE (id.).

B. Impartial Hearing Officer Decision

After four prehearing conferences between December 22, 2021 and April 14, 2022, during which the parties indicated they were attempting to settle this matter, the parties presented documentary evidence on May 13, 2022 and opening statements on June 6, 2022 (Tr. pp. 1-43). After a status conference on July 7, 2022, the parties proceeded to an impartial hearing, which concluded on December 29, 2022 (Tr. pp. 44-138).[4] In a decision dated January 29, 2023, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 5, 10). The IHO found that the district presented testimony and evidence to support a finding that it offered the student a FAPE for the 2020-21 school year and that, therefore, the district met its burden of proof in the proceeding (id. at p. 5).

Initially, the IHO held that April 2020 CSE was duly constituted as the CSE included all required members including a special education teacher who served as the district representative (IHO Decision at p. 6). The IHO noted that a regular education teacher was not required because the student was not being considered for a general education setting (id.). The IHO further determined that the CSE had sufficient information about the student to develop appropriate recommendations for the student as the progress reports produced by the nonpublic school contained detailed descriptions of the student (id. at p. 7). The IHO also found that the annual goals and short-term objectives recommended by the CSE were created after discussion with the student's teacher, were based on the progress reports, and were obtainable based on the testimony of the representative, therefore, the IHO found the annual goals and short-term objectives appropriate and measurable (id. at p. 8).[5]

Regarding the 6:1+1 special class recommendation, the IHO noted that the district representative testified that the CSE listened to the parent's concerns and "believed the smallest class size would be the most beneficial for the Student" (IHO Decision at p. 9). The IHO also noted that the CSE considered other program recommendations including an 8:1+1 special class and a 12:1+1 special class but rejected them as being insufficiently supportive (id.). The IHO again noted the testimony of the district representative indicating that the recommended 6:1+1 special class setting was appropriate for the student (id. at p. 10).[6] Moreover, the IHO noted that the principal of the proposed school testified that the school would have been able to implement the student's IEP (id.).

Based on all the evidence and testimony in the hearing record, the IHO determined the program recommendation and related services were appropriate to meet the student's special education needs (IHO Decision at p. 10). As the district met its burden of proof, the IHO noted

[4] After the conclusion of the hearing, the parties submitted closing briefs (see Parent Post Hr'g Br.; Dist. Post Hr'g Br.).

[5] The IHO noted that the district witness testified the CSE developed and discussed management needs and that such management needs were discussed with the student's teachers "who indicated what they were utilizing within the classroom that seemed to be working for the Student" (IHO Decision at p. 8).

[6] The IHO noted that "no stated objections were voiced to the recommended related services at the [CSE] meetings or impartial hearing" (IHO Decision at p. 9).

that no further analysis was needed (id.). However, the IHO went on to find that had the district not offered the student a FAPE, JCSE was appropriate and equitable considerations did not disfavor the parent (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent again notes that she never received the IEP from the April 2020 CSE meeting, until after she filed the due process complaint notice. The parent contends that the IHO failed to address the multiple procedural violations committed by the district which cumulatively denied her right to meaningfully participate in the decision-making process and denied the student a FAPE. The parent further asserts that the IHO failed to address the fact that the parent was not provided with a copy of the IEP and that the district's witness failed to provide adequate testimony to establish that the IEP was mailed to her. According to the parent, no other information was offered by the district to prove that a copy of the IEP was sent to her. The parent contends that the failure to provide her with a copy of the IEP denied her the right to meaningfully participate as she did not become aware of the recommendations such as the lack of a behavior intervention plan (BIP), the failure to mandate a special class for the entire school day, and the failure to mandate 1:1 instruction within the classroom. Additionally, the parent asserts that the IHO failed to address the inadequacy of the prior written notice. According to the parent, the prior written notice failed to address how a 6:1+1 special class would have addressed the student's needs and why the IEP failed to include a BIP or adequate behavioral strategies. Next, the parent contends that she was not afforded an opportunity to visit the proposed school or learn information about it. Moreover, the parent asserts that the district conceded that the phone number listed on the school location letter was incorrect.

The parent also argues that the evaluative information used by the CSE was deficient, asserting that the district failed to evaluate the student in all areas of suspected disability. According to the parent, the district, during the hearing, conceded that it did not conduct testing of the student prior to the April 2020 CSE meeting, nor could the district witness recall the last time the student was comprehensively evaluated. Moreover, the parent contends that the district failed to conduct a functional behavior assessment (FBA), despite the student's behavioral challenges, that the classroom observation was outdated as it was from 2019, and that the documentation that was used by the CSE does not support the recommendation of a 6:1+1 special class as neither 1:1 instruction nor behavioral interventions were recommended. The parent contends that the IHO erred by not addressing the district's failure to develop a BIP and that the district's recommendations failed to appropriately address the student's behavioral needs.

The parent asserts that the recommendation of a 6:1+1 special class was not appropriate to meet the student's needs. According to the parent, the IHO's decision was not well-reasoned or thorough because it relied solely on the testimony of the district representative. The parent contends that the district representative did not explain how a 6:1+1 special class would have met the student's needs, specifically, his need for 1:1 instruction and behavioral support. The parent further contends that the IHO should have relied on the testimony from JCSE's director that a 6:1+1 special class would not have provided the student with enough support. Further, the parent asserts that the IHO erred in finding that the recommended management needs and annual goals and objectives were appropriate.

The parent further argues that the IHO erred in allowing the testimony of the principal of the assigned public school. The parent asserts that the principal's testimony was "irrelevant and unfairly prejudicial" because the parent was not afforded the opportunity to visit the school. The parent asserts that any evidence regarding the school was not available to the parent when she had to make the decision to unilaterally place the student, and, therefore, such information is irrelevant in this proceeding.

Lastly, the parent argues that the IHO failed to consider the appropriateness of JCSE or equitable considerations. The parent asserts that JCSE was appropriate for the student and that equitable considerations favor her. The parent requests that the IHO decision be reversed with a finding that the student was not provided with a FAPE for the 2020-21 school year, that JCSE was an appropriate placement for the student, and that equitable considerations favor the parent's request for relief. The parent seeks direct funding or reimbursement for the student's placement at JCSE for the 2020-21 school year.

In an answer to the parent's request for review, the district responds to the parent's allegations. As an initial matter, the district contends that the IHO's finding that the CSE was duly constituted was not appealed by the parent and is now final and binding.

The district acknowledges that the failure to provide the parent with a copy of the IEP was a procedural violation, but argues it did not rise to a denial of FAPE because the parent attended the CSE meeting and was aware of the program recommended by the CSE. Moreover, the district contends that the parent has not alleged she did not receive the June 1, 2020 prior written notice which identified the educational program recommended in the IEP and she conceded that she received the June 1, 2020 school location letter.[7] As such, the district argues that the failure to provide the parent with a copy of the IEP does not rise to a denial of FAPE.

Regarding the assigned school, the district asserts that the IDEA does not grant parents a general entitlement to observe a proposed school. A parent is able to obtain information about a proposed school; however, in this case, the district contends that the parent has not established what information she was looking to learn about the proposed school. Further, the district argues that the parent did not provide any details about her attempts to contact the school.

The district further contends that the CSE reviewed sufficient evaluative information regarding the student and that the CSE members included the parent and participants from JCSE. The district argues that the April 2020 CSE had sufficient evaluative information to determine the student's needs and to develop the April 2020 IEP inclusive of goals, management needs, and present levels of performance. The district notes that when the April 2020 CSE convened it had only been fourteen months "since the student's last evaluation and he was not yet due to be reevaluated." Moreover, the district asserts that there is no evidence in the hearing record showing that the February 2019 classroom observation was outdated. To the extent any of the information from the classroom observation was outdated, the district argues the JCSE progress reports would have made a new classroom observation duplicative.

[7] The district argues that any argument that the prior written notice was inadequate was not raised in the due process complaint and is not properly before the SRO.

Turning to the issues of the lack of an FBA or a BIP, the district contends that these claims were not raised in the due process complaint notice. The district points out that the parent could have amended her due process complaint notice but did not make an attempt to do so. In the alternative, the district argues that the IEP, as a whole, addressed any behavioral concerns/needs of the student and the failure to conduct an FBA or develop a BIP did not rise to the level of a denial of FAPE. The district also asserts that the student's management needs included behavior reminders and a social-emotional goal, which demonstrates that there was ample information in the IEP regarding approaches to address the student's behavior.

The district further argues that the due process complaint notice did not include allegations regarding goals or management needs and, to the extent these claims are within the scope of the hearing, the IHO correctly determined that the IEP was appropriate. Further, the district contends that the IEP, as a whole, cured any deficits regarding annual goals or management needs. The district asserts that the CSE did not have to mandate 1:1 instruction as the IEP stated that the student required intensive instruction and a highly structured small group setting. According to the district, the CSE appropriately left the precise methodology to be used with the student off of the IEP. In addition, the district contends that the hearing record demonstrates that the CSE considered larger class settings for the student and the 6:1+1 special class recommendation was the least restrictive environment for the student.

Lastly, the district contends that the IHO did not err in considering the school principal's testimony. According to the district, the principal was aware of the recommended program and his testimony was not impermissibly retrospective as it was being used to show the district was capable of implementing the IEP, not to rehabilitate the IEP. The district requests that the parent's request for review be dismissed in full and the request for funding be denied.

The parent filed a reply. In the reply, the parent argues that she raised the issue of CSE composition in the request for review by challenging the qualifications of the district representative and that the issue should be addressed. Regarding the district's claims that allegations regarding the lack of an FBA and a BIP, management needs, and annual goals were not raised in the due process complaint notice, the parent asserts that she was not required to allege all of the details of the insufficiency of the district to evaluate the student because the district was on notice of her claim that the district failed to properly evaluate the student's behavioral needs or provide appropriate behavioral supports. The parent points to her general claim that the district failed to evaluate the student in support of her position. Moreover, the parent contends that any failure of detail in the due process complaint notice was due to the district's failure to provide the parent with a copy of the IEP and no objections were made by the district during the hearing.

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]).[8]

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

In the due process complaint notice, the only discernible issues raised by the parent related to the district's failure to deliver a copy of the IEP, the parent's inability to visit the assigned school, the appropriateness of the special class recommendation, the sufficiency of the evaluative information, and CSE composition (see Parent Ex. A). However, the IHO rendered her decision on several additional issues, including an analysis of the recommended management needs and annual goals (IHO Decision at pp. 7-8). The district asserts in its answer that these issues were

[8] 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).

outside the scope of the hearing; however, in reply, the parent counters that they were within the scope of the hearing and that the IHO erred in finding in favor of the district on these matters.

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 original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint 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]).

At the May 13, 2022 hearing, the parent's attorney objected to the district entering the April 2020 IEP and the June 2020 school location letter into the hearing record because the parent had not received them prior to the hearing (Tr. pp. 23-25).[9] After the IHO overruled the parent's objection, the parent's attorney requested to amend the due process complaint notice based on any concerns the parent had with the documents, to which the IHO stated "[y]ou have that right" (Tr. pp. 25-26).[10]

The next hearing was held on June 6, 2022, at which time the parties made their opening statements (Tr. pp. 30-43). In the parent's opening statement, the parent's attorney did not indicate any desire to expand the issues raised in the due process complaint notice (Tr. pp. 35-39). The parent's attorney asserted that the CSE convened for the school year in question in April 2020 and recommended a 6:1+1 special class with related services in a community school (Tr. pp. 36-37).[11] However, rather than raise concerns regarding the student's recommended educational program, the parent's attorney focused on the district's failure to provide the parent with a copy of the IEP and failure to respond to the parent when she reached out to the assigned school for information (Tr. p. 37).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51;

[9] The parent's June 2020 letter to the district indicated that she had received the school location letter (Parent Ex. B).

[10] It is noted that the parent's attorney did not amend the due process complaint and there is no indication in the hearing record that there was any attempt to do so beyond the statement made at the May 13, 2022 hearing.

[11] The attorney indicated the CSE recommended placement in a community school; however, the IEP included a recommendation for placement in a district specialized school (Dist. Ex. 1 at p. 25).

see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Review of the district's questioning of its first witness, the special education teacher who served as the district representative at the April 2020 CSE meeting, shows that the district opened the door to some of the issues addressed by the IHO and raised by the parent in the request for review (see Tr. pp. 57-71).

The district representative testified that the for the 2020-21 school year the CSE recommended a 12-month program in a 6:1+1 special class with related services of OT, PT, and speech-language therapy (Tr. pp. 59-61). After questioning the district representative as to what documents were used to develop the student's IEP, the district's attorney followed up by asking the district representative what type of student the student was and what his strengths and weaknesses were (Tr. pp. 62-63). The attorney also asked about the CSE developing the student's management needs and discussing his social-emotional development, as well as the creation/development of the student's goals (Tr. pp. 64-66). The representative was questioned about whether any other programs were considered to which she testified an 8:1+1 special class and a 12:1+1 special class were considered but rejected after listening to parent and teacher concerns (Tr. p. 67). The representative testified that she believed that the program recommended by the CSE "would have given [the student] th[e] attention that he needed at the time" and that it was the best placement for him (Tr. pp. 69-70). Moreover, the district addressed all of these issues in its closing brief (see Dist. Post H'ring Br.). Specifically, the district argued that the CSE was duly constituted, the annual goals and short-term objectives were appropriate and measurable, and the 6:1+1 special class recommendation was appropriate (id. at pp. 4-11). Based on the above, the district's line of questioning was designed to elicit testimony in support of its position that the evaluative information relied on by the CSE was sufficient to identify the student's needs and develop appropriate management needs and annual goals and as further support for a finding that the special class recommendation was appropriate. Accordingly, the IHO was correct in addressing the appropriateness of the student's management needs and annual goals and short-term objectives.

Although, the district opened the door to the issue of whether the goals and management needs were appropriate, the hearing record does not indicate that the district opened the door to any allegations regarding the student's behavioral needs. Additionally, the parent did not raise these issues in the due process complaint notice and failed to amend the due process complaint when the IHO offered her the opportunity to do so based on the April 2020 IEP.[12]

[12] Despite the parent's arguments in the reply, the parent did not raise the issue of CSE composition in the request for review, only in the memorandum of law. It has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at *11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). As such, the IHO's finding that the CSE was duly constituted has become final and binding on the parties and will not be reviewed on appeal (34 CFR

B. Cumulative Procedural Violations

The parent contends that the IHO failed to address procedural violations by the district which cumulatively denied her right to meaningfully participate in the CSE's decision-making process and denied the student a FAPE. In particular, the parent asserts that the district failed to evaluate the student in all areas of suspected disability, failed to provide her with a copy of the April 2020 IEP, and did not provide needed information regarding the assigned school. As noted above, when 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). However, under some circumstances, the cumulative impact of procedural violations may result in a denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2nd Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

1. Evaluative Information

The IHO found that April 2020 CSE had sufficient evaluative information regarding the student to make an appropriate recommendation (IHO Decision at p. 7). The parent contends that the IHO erroneously found that the district relied on sufficient evaluative material when creating the April 2020 IEP. Specifically, the parent argues that the district failed to demonstrate that it conducted sufficient evaluations prior to the April 2020 CSE meeting in part because the CSE used an outdated classroom observation and because the district did not present evidence establishing when the student was last evaluated. The parent also maintains that the CSE considered progress reports that could not be construed as a substitute for formal testing. The district argues that the April 2020 CSE had adequate evaluative information to identify the student's education needs from which to develop the April 2020 IEP and that the present levels of performance, goals, and management strategies sufficiently reflected the student's needs. The district contends that it was only 14 months since the student's last evaluation therefore the 2019 class observation was not "outdated" and lastly, the district contends that the 2019 classroom observation was consistent with the February 2020 progress reports.

Pursuant to the IDEA, federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per

300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

According to the prior written notice, in proposing an educational program for the student for the 2020-21 school year, the April 2020 CSE relied on reports from the student's JCSE providers including a February 1, 2020 teacher report, the February 1, 2020 progress reports from the student's speech-language pathologist, occupational therapist, and physical therapist, and the February 1, 2019 classroom observation conducted by the district (Dist. Ex. 2 at p. 2; see Dist. Ex. 5). The district representative also indicated that the CSE considered the parent's concerns and information the student's teacher provided at the CSE meeting but stated that she did not believe the student "had any recent testing" (Tr. p. 62). She testified that she did not recall when the last psychoeducational evaluation, speech-language evaluation, OT evaluation, PT evaluation, social history, or classroom observation were completed (Tr. pp. 73-74). She did not recall reviewing the February 13, 2019 classroom observation prior to the April 2020 CSE meeting, nor did she believe that she had discussed the results of the classroom observation with the author of the report (Tr. pp. 74-75). Although, at the time of the hearing, the district representative could not recall the last time specific evaluations were conducted, she testified that she had that information prior to the CSE meeting, indicating that through the district's SESIS records, the CSE "had access to all [the student's] preschool assessments prior. That was in our system" (Tr. pp. 79-80). Further, the district representative testified that, at the time of the CSE meeting, the district was functioning remotely due to COVID 19 so "[t]here was no real testing being completed" and no assessments could be given (Tr. pp. 62, 75). According to the district representative, the CSE relied on the JCSE provider reports because, at the time, they were the ones working directly with the student (Tr. p. 77). She also indicated that the district developed an assessment-like checklist that the teachers at JCSE were asked to complete, but at the time of the CSE meeting the student's providers

"felt that their progress reports were sufficient" and encompassed everything about the student, so they did not complete the requested teacher checklist (Tr. pp. 62, 75-76). The district representative testified that the information the parent and teachers communicated at the time of the April 2020 CSE meeting suggested that the progress reports encompassed the student's current levels of performance (Tr. p. 77).

To address the parent's contention that the April 2020 CSE lacked sufficient evaluative information, a review of the documents considered by the CSE must be conducted. First, a classroom observation was completed on February 13, 2019, as part of the student's turning five evaluations for his transition from preschool special education (CPSE) to school age special education (CSE). (Dist. Ex. 4 at p.1). At that time, the student had received a diagnosis of autism spectrum disorder and was attending a 6:1+3 special class in a center-based program with mandated related services including speech-language therapy, OT, and PT (id.).[13] The observer noted that during a circle-time singing activity the student did not make eye contact with the teacher or peers but he responded to the teacher's verbal cue to sit, and he was rewarded with a pretzel (id.). Given this preset, the student transitioned easily to the next activity which was to view the visual schedule for the class for the day (id.). According to the observer, the student's ability to focus on the chart and repeat aloud each activity along with his teacher was inconsistent (id.). The student made a choice for a movement to include in a new song and he appeared to be more engaged in the movement aspects of the song than singing along with his peers and teacher (id.). At the end of the singing activity the student responded appropriately to the teacher's cue to sit before moving on to center activities, where he was given a 24-piece puzzle (id.). According to the observer, the student worked on the puzzle to completion and then named the represented characters (id. at pp. 1-2). The class transitioned to musical chairs and the observer indicated that student got confused regarding the direction of the activity, but he was excited to play the game despite the fact that he appeared to struggle with spatial awareness and negotiating his surroundings, as he frequently bumped into his classmates during the game (id. at p. 2). The observer noted that, by teacher report, the student had a difficult time with changes in routine, could become easily upset, and struggled to communicate when upset (id.). Based on his observation, the observer concluded that the student continued to need a highly structured learning environment that focused on behavior management needs, language development, and social skills (id.).

Next, the February 2020 teacher's progress report, completed by the student's JCSE teachers, indicated that the student enjoyed learning and was generally cooperative, but needed to be involved in structured activities throughout the day (Dist. Ex. 10 at p. 1). The teachers' progress report indicated that a behavior plan was implemented to maintain the student in a calm state and to reduce outburst incidents (id.). As noted in the teachers' progress report, the student was learning to use words to express his needs and wants as opposed to crying and he received stickers throughout the day when he sat quietly and followed the teacher's instructions (id.). The teachers' progress report indicated that when he was acting silly or hyper, or when tantrums occurred, the student had to sit at his desk with a timer until he was calm (id.). However, at times the student needed to leave the classroom until he could demonstrate calm behavior (id.). The teacher's

[13] During the February 2019 classroom observation there were only four students, a classroom teacher, and a teacher assistant in the classroom as the other two students were out of the room for therapy (Dist. Ex. 4 at p.1).

progress report indicated that, during group lessons, the student could answer questions independently but at times he lost focus and needed redirection; therefore, hands-on projects and activities were needed to maintain his focus and motivation (id. at p. 2).

The February 2020 teachers' progress report noted that the student's reading performance was at the kindergarten level and his instruction was provided in a group of two (Dist. Ex. 10 at p. 2). The teachers' progress report stated that the student was beginning to answer simple WH questions while listening to a story and he was sequencing the main events of the story with picture cards (id.). It also stated that the student could identify all the letters of the alphabet and the corresponding sounds as well as matching objects to the initial letter (id.). According to the teachers' report the student was able to orally blend two-syllable words and blend onset and rime, identify short vowel sounds, and he was learning to decode CVC words with the short vowel /a/ (id.).

According to the February 2020 teacher's progress report the student also received math instruction in a group of two where, for numbers 1-15, he was learning to rote count, count with one-to-one correspondence, sequence numbers, match amounts to the number, and trace the numbers (Dist. Ex. 10 at p. 1). The progress report noted that the student was learning to demonstrate concepts of addition using manipulatives and he was learning money skills including the identification of penny, nickel, and dime (id.). According to the teacher's progress report, the student needed to use multisensory materials, hands-on activities, and games to motivate him and to keep him focused (id.).

With respect to fine motor skills, the teachers' February 2020 progress report noted that the student was able to trace letters and numbers, use a glue stick and runny glue independently, and use scissors to cut a straight line while also learning to cut basic shapes and assemble a simple puzzle (Dist. Ex. 10 at p. 2). According to this report, the student could write some letters and numbers and he was learning to write his first name with proper alignment and formation (id.). With respect to his social skills, the February 2020 teachers' progress report stated that the student enjoyed interacting with his peers, but he had difficulty sharing and needed prompts to follow the rules of play (id. at p. 1). The teacher's progress report also noted that the student was learning to initiate conversation with his classmates, but he required direct social skills training, positive reinforcement, role playing, and modeling to assist him in acquiring better social skills (id.).

In addition to the teachers' progress report, the April 2020 CSE considered a February 2020 JCSE speech-language progress report which indicated the student presented with significant delays in receptive and expressive language, severely compromised speech intelligibility, poor overall social-emotional/pragmatic development, and attentional concerns (Dist. Ex. 9). The speech-language progress report indicated that the student's progress and performance were further hindered by a severe sensory integration dysfunction (id.). According to the 2020 speech-language progress report, the student's receptive language skills included his ability to identify and categorize many common objects and pictures when given prompts and cues (id.). However, the student exhibited difficulty following directions to complete tasks, answering inferencing questions, and understanding age-appropriate concepts, including the correct use of early pronouns (id.). The speech-language progress report also indicated that expressively the student communicated using spontaneous word combinations and telegraphic speech but when he was frustrated, he tended to cry and tantrum instead of communicating with words (id.). The February

2020 speech-language progress report indicated that the student had a limited vocabulary, a restricted mean length of utterance, and his syntactic development was described as immature (id.). The student's speech intelligibility was noted to be very poor on the single word level even to a familiar listener, and his speech was reported to be replete with phonological processes and articulation errors (id.). The speech-language progress report noted that the student's issues with speech intelligibility may have been due, in part, to a motor planning disorder/dyspraxia but that the student was responding "very well" to direct training of sounds and processes with use of modeling, repetitive drill tasks, the use of PROMPT therapy, and other effective strategies (id.).[14]

According to the February 2020 speech-language progress report, the student's social-emotional/pragmatic development was significantly delayed, and the student presented with difficulty focusing and maintaining attention to task, reciprocal emotional and gestural signaling, topic maintenance, consistent eye contact, and self-direction (Dist. Ex. 9). According to the speech-language report, the student tended to go off on unintelligible tangents when required to perform or he was frustrated as his frustration tolerance was poor resulting in frequent tantrums (id.). The speech-language progress report indicated that the student's tantrums were decreasing in frequency with use of tangible reinforcers, verbal praise, role playing, and prompts and cues to use his words, and he was showing positive gains regarding his peer interactions during playtime (id.).[15]

With respect to the student's physical development, the April 2020 CSE considered the February 2020 OT progress report which indicated that the student received OT services to address his fine motor, visual perceptual, and motor planning skills (Dist. Ex. 7). The OT progress report noted that the student responded well to behavior modification techniques, and had made significant progress transitioning from classroom time to therapy time, generally doing so without incident (id.). According, to the OT progress report, the student required set up to achieve an age-appropriate grasp but then he could draw a vertical and horizontal line, circle, square, triangle and the letter "S" (id.). The 2020 OT progress report indicated that the student had difficulty cutting with scissors with one hand while stabilizing the page with the other, but he was able to sort fruits by color using tweezers, complete a 24-piece interlocking puzzle, and create a two-color pattern with math link cubes (id.).

The information from the February 2020 PT progress report indicated that PT addressed the student's delays in the areas of sensory integration, balance, strength, motor planning, coordination, and gross motor skills (Dist. Ex. 8). Although the progress report stated that the student was cooperative during PT sessions, it also indicated that he presented with poor regulation skills and tended to dysregulate with too much vestibular input (id.). The PT progress report noted that the student's poor balance was the result of the internal rotation of both his feet and knee flexion which contributed to the student's frequent falling (id.). According to the report, the student had difficulty with motor planning and coordination, and he tended to move before he had an idea

[14] "PROMPT" is typically used as an acronym for "prompts for restructuring oral muscular phonetic targets"—a method of instruction used by speech-language pathologists (see, e.g., Application of a Student with a Disability, Appeal No. 20-002).

[15] The 2020 speech-language progress report recommended that the student's hearing acuity be evaluated and monitored to rule out hearing loss as a contributing factor in his speech-language delays (Dist. Ex. 9 at p. 2).

in mind, noting that he also had difficulty coming up with more than one motor idea at a time (id.). The PT progress report also indicated that the student had difficulty adapting a motor plan midway and syncing his upper and lower extremities (id.). Regarding the student's play skills, the 2020 PT progress report indicated that the student preferred to play the same games because they provided him with predictability (id.). The progress report stated that the student had difficulty with dribbling a ball with his dominant hand and he presented with poor body awareness (id.). Lastly, the PT progress report indicated that the student's motor delays affected his self-esteem, social skills, and academic performance as well as hindering his ability to play with and interact with peers (id.).

Based on the above, the April 2020 CSE's consideration of the February 2019 classroom observation, the February 2020 progress reports, and the teacher and parent's input at the CSE meeting appear to have provided the CSE with adequate information regarding the student's strengths and needs. However, in this instance, the hearing record lacks information that should have been available to the April 2020 CSE.

In developing the recommendations for a student's IEP and when conducting an annual review of the student's IEP, State regulations require that a CSE must consider the results of the initial or most recent evaluation, as well as the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments; and any special factors as set forth in federal and State regulations (see 8 NYCRR 200.4[d][2]; [f][iii]; see also 34 CFR 300.324[a]-[b]).

Here, the February 2019 classroom observation states that it was conducted as part of the student's "Turning 5 evaluation process" but the hearing record is void of information that would identify what, if any, other evaluations were completed. The district in its answer stated that the student was not yet due for a reevaluation because the student was evaluated 14 months before the April 2020 CSE meeting (Answer at ¶ 9). However, the hearing record does not include copies of any evaluations conducted during this time period, other than the February 2019 classroom observation, and the district's statement in its answer does not elaborate on what other evaluations were completed.

According to the February 1, 2021 IHO decision regarding the prior proceeding related to the 2019-20 school year, the district did not establish what evaluative information was included as part of the student's turning five process or when any such evaluations were completed and found that:

> The Parent has raised a variety of challenges to the CSE's recommended program and placement. According to the CSE's Prior Written Notice (the "PWN") the document considered by the CSE at the March 2019 CSE meeting was a February 15, 2019 Classroom Observation. Per the testimony of the School Psychologist, the CSE also considered a developmental evaluation conducted by Downstate University. The evaluation was not included in the Hearing Record, and it was not clear as to when the evaluation had been performed. Based on the vague testimony about

> the developmental evaluation and upon the contents of the PWN and IEP, it appears that the CSE's recommendations were based exclusively upon the classroom observation. This was not a sufficient basis for formulating program recommendations.

(Parent Ex. C at p. 5).

Turning back to this proceeding, the April 2020 IEP does not identify any previous evaluations or when they might have been conducted, relying solely on the February 2019 classroom observation and the February 2020 progress reports (see Dist. Ex. 1). Although, the district representative testified that through the district's SESIS records, the CSE "had access to all [the student's] preschool assessments prior. That was in our system," there is no basis in the hearing record to support finding that the April 2020 CSE actually considered any previous evaluative information other than the February 2019 classroom observation. Therefore, the district committed a procedural violation in that the April 2020 CSE did not consider the most recent evaluation of the student and by not producing evidence to show that the student had been properly evaluated.

Most troublingly, by not including copies of the student's most recent evaluation in the hearing record (whether or not it was reviewed by the April 2020 CSE), the district has made it impossible to properly review some of the evaluation claims contained within the parent's due process complaint notice. For example, the parent asserted that the district "failed to conduct sufficient evaluation of [the student] prior to the April 2020 IEP review"; "failed to include [the student's] parents in the evaluation process"; "failed to "review the already existing data and decide. . . what additional data/evaluations [we]re required"; and that these failures "rendered [the CSE] unable to create an appropriate IEP" (Parent Ex. A at p. 2). Without knowing when the student was last evaluated, what evaluative information was available to the CSE, or what information about the student was contained within the missing evaluations, there is no way to address these claims. Indeed, the Second Circuit has held that the failure to memorialize which evaluative information a CSE reviewed constitutes a "serious procedural violation" (L.O. v. New York City Dep't of Educ., 822 F.3d 95 [2d Cir., May 20, 2016]). The Court in L.O. cautioned that, when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often months or years later, are left to speculate as to how the CSE formulated the student's IEP; the court specifically noted "we are left to wonder whether these persistent errors and omissions in developing [the student's] IEPs are the result of the CSE's failure to consult the evaluative materials available to it at the time" (L.O., 822 F.3d at 110-11). Here, the failure of the CSE to document what, if any, information from the student's initial evaluation was considered in developing the April 2020 IEP, other than the classroom observation, precludes me from finding that the CSE fulfilled its obligation to consider the student's initial evaluation, and testimony referencing the general availability of such materials through SESIS does not suffice to overcome that conclusion. Accordingly, given the district's failure to reference the student's last evaluation in the IEP or prior written notice or to have the evaluative materials at issue admitted into evidence at the impartial hearing impedes any adjudication of the specific claims raised by the parent with respect to the sufficiency of the district evaluations. As a result, I find that the district's failure to consider the student's initial evaluation is a procedural violation that contributed to a denial of a FAPE.

2. Receipt of IEP

Here, the parent has continually asserted that she did not receive a copy of the April 2020 IEP (see Parent Exs. A; B). The district acknowledges that the failure to provide the parent with an IEP is a procedural violation but argues that it does rise to the level of a denial of FAPE because the parent attended the CSE meeting, was aware of the contents of the IEP, and received both the prior written notice and school location letter (Answer at ¶ 7). The IHO did not address this issue in the decision.

The district is required to have an IEP in effect for each student with a disability at the beginning of the school year and provide a copy of the IEP to the parents (34 CFR 300.322[f]; 300.323[a]; 8 NYCRR 200.4[e][1][ii], [e][3][iv]; Cerra, 427 F.3d at 193-94 [holding that a district "fulfill[s] its legal obligations by providing the IEP before the first day of school"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE if the violation (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]; see G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 246 [S.D.N.Y. 2015] [finding the failure to provide the IEP before the first day of school was a procedural violation that did not significantly impede the parents' participation in the CSE process]; K.M. v. New York City Dep't of Educ., 2015 WL 1442415, at *1 [S.D.N.Y. Mar. 30, 2015] [same]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 225-27 [S.D.N.Y. 2014] [finding the failure to provide a copy of the IEP before the beginning of the school year impeded the provision of a FAPE to the student]).

In this instance, it is undisputed that the district's failure to send the parent a copy of the IEP was a procedural violation (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The salient question, therefore, is whether, under the circumstances present here, the failure of the district to provide the parent with a copy of the IEP rose to the level of a denial of FAPE to the student. For example, in some cases, evidence that the parent attended the CSE meeting at issue and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation contributed to a denial of FAPE (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student];]; see also N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]). Here, the parent did attend the CSE meeting and there is evidence that she had at least some knowledge of the program and placement recommendations contained in the April 2020 IEP as she was able ultimately to articulate general challenges to the CSE's recommendations concerning class size in the due process complaint notice.[16]

[16] This is supported by the due process complaint notice raising the issue of the class size and the parent's affidavit (Parent Exs. A; B).

However, a review of the parent's 10-day notice letter reveals that while she believed the student had been recommended for a 6:1+1 special class in a community school, she also informed the district that "[i]n the absence of an IEP or any information regarding the public school placement, my client will place [the student] at the Jewish Center for Special Education [and] [i]f [the parent's] concerns are not addressed, we will request an impartial hearing to pursue public funding for [the student's] tuition and services at this placement" (Parent Ex. B). While, the district argues, in part, that the parent's receipt of the prior written notice was sufficient to notify her of the CSE's recommendations, it is not meant to be a substitute for an IEP and does not contain important educational information about the student such as the student's present levels of performance, annual goals, and management needs. Here, the parent put the district on notice that she was requesting the April 2020 IEP and would pursue a unilateral placement at public expense absent receipt of that document. Rather than assert any disagreement with the recommendations of the CSE, she instead put the district on notice that its failure to provide her with a copy of the IEP in the first instance, as it was obligated to do, formed the basis for her dispute. The district was given an opportunity to cure that procedural defect but failed to do so. Accordingly, under the circumstances present, the parent lacked a complete understanding of the student's educational program, as shown in both her 10-day notice and the due process complaint notice, due to the district's failure to provide her with a copy of the IEP prior to the start of the school year, as required. Based on the above, the district's failure to provide the parent with a copy of the April 2020 IEP contributed to a denial of a FAPE to the student.

3. School Location Letter

Finally, the parent asserts that the school location letter was deficient as it did not contain the correct contact information for the assigned school and she further contends that the assigned school failed to respond to her attempts to contact and obtain information from the school. The district acknowledges that the contact information was incorrect but argues that the parent did not detail her attempts to contact the school or demonstrate what information she was attempting to obtain. Additionally, the district asserts that, in any event, a parent does not have an unqualified right to visit an assigned school.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has explained that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187).

Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3).[17] Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3).

Regarding the parent's allegation that she was unable to obtain information about the assigned public school site due to the district's failure to include correct contact information in the school location letter, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16

[17] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

[S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

While the district contends that the parent has failed to provide sufficient detail with respect to her attempts to contact the assigned school, the parent informed the district in her 10-day notice, dated June 19, 2020, that she "ha[d] called these [contact] numbers repeatedly, and left messages, but ha[d] not a received a response" and she also explicitly requested "information as to how . . . [to] receive information about the proposed program . . . or arrange for a visit" (Parent Ex. B). Moreover, the district's witness testified that the school location letter contained an incorrect phone number and that this caused a continuous issue affecting the assigned school and the district office (Tr. p. 115-117).[18] More specifically, the assistant principal explained that when school location letters were generated, they usually included "the number for the main office downstairs" and that the "counter secretary downstairs" was the person who received messages for that number (Tr. p. 116). He indicated that there was a procedure in place in which the main office would usually call the assigned school and let them know but acknowledged that if the parent had reached out to the school she may have contacted the generic number and if the assigned school was not informed it was possible that no one would have returned her call (Tr. p. 117). Overall, despite that the parent's 10-day notice explicitly notified the district that the parent sought information about the assigned school and a means to contact the assigned school, as well as that the district knew that the contact numbers provided to parents sometimes resulted in a parent not receiving a call-back from the assigned school, the district did not respond to the parent or otherwise attempt to connect the parent to the school for the purpose of the parent receiving more information concerning the assigned school site.

While the district may be correct that a parent does not have a general entitlement to visit a proposed school, it also acknowledges in its answer that, in accordance with some of the case law cited above, "'a parent has a right to obtain information about an assigned public school site'" (Answer at ¶8). Although the district faults the parent for not specifying the information she sought, it does not cite any authority for the proposition that the parent must particularize his or her questions and concerns in order to find that a district impeded the parent's ability to gain information from the assigned school. Here, the parent requested both a copy of the IEP and a means of contacting the assigned school to obtain additional information about the school and/or to arrange a visit. The district does not dispute that it was obligated to provide the parent with a copy of the April 2020 IEP and also acknowledges that the parent had a right to obtain information about the assigned school. Despite being informed of the parent's lack of the IEP or an effective way to contact the school, the district failed to provide the parent with either. As a result, the

[18] It is noted that the parent objected to the testimony of this district witness. The parent argued that she did not have the information regarding the assigned school when she had to make a determination about the appropriateness of the IEP and that the testimony was therefore impermissibly retrospective. However, the parent's arguments with respect to this witness are without merit. The witness testified to demonstrate that the assigned school would have been able to implement the IEP. He did not testify regarding anything related to the recommendations made by the CSE. In reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; D.A.B., 973 F. Supp. 2d at 361-62). Retrospective evidence presented at a hearing that materially alters an IEP may not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). The testimony of the district witness was not retrospective as it was not presented to rehabilitate the IEP after the fact. Accordingly, the IHO correctly considered the witness' testimony.

district's failure to respond to the parent's request for further information regarding the assigned school also contributed to a denial of a FAPE to the student.

VII. Conclusion

As discussed above, the district committed several procedural violations which impeded the parent's ability to participate in the decision making process regarding the student's educational programming and, each of which, contributed to a denial of FAPE. The district failed to establish that it properly evaluated the student prior to the April 2020 CSE meeting, failed to provide the parent with a copy of the April 2020 IEP, and failed to show that it provided the parent with information about the assigned school location. In review of the cumulative effect of these procedural violations, it cannot be determined that they did not affect the substantive appropriateness of the April 2020 IEP (see L.O., 822 F.3d at 123-24). This impeded the student's right to a FAPE, hindered the parent's opportunity to participate in the decision-making process, or otherwise deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5 [j][4][ii]). Therefore, the cumulative effect of these procedural violations resulted in a denial of FAPE to the student for the 2020-21 school year.

Having found that the district's procedural violations cumulatively deprived the student of a FAPE for the 2020-21 school year, it is unnecessary to determine whether any of these violations, individually, amounted to a denial of FAPE. Additionally, as the IHO found that the unilateral placement was appropriate and that equitable considerations favored the parent (IHO Decision at p. 10) and the district did not appeal from those findings, they are final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the parent is entitled to funding for the student's placement at JCSE for the 2020-21 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO Decision, dated January 29, 2023, is modified by reversing that portion of the decision that found that the district offered the student a FAPE for the 2020-21 school year; and

IT IS FURTHER ORDERED that, the district shall reimburse the parent for or directly fund the cost of the student's attendance at JCSE for the 2020-21 school year, including tuition and costs for related services.

Dated: **Albany, New York**
May 15, 2023

STEVEN KROLAK
STATE REVIEW OFFICER