



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-071**

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

#### **Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Fiona M. Dutta, Esq.

Thrive Advocacy, LLC, attorneys for respondent, by David Kahane, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2022-23 school year and awarded compensatory education. 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]-[j]).

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**

During the 2020-21 school year when the student was approximately age three, he attended a private general education preschool where he received special education itinerant teacher (SEIT) services along with related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (see Dist. Exs. 9, 11; 13). A teacher progress report, generated at the end of the 2020-21 school year, indicated that the student had mastered numerous pre-readiness skills but had difficulty answering "wh" questions, following directions, maintaining attention in group activities, and interacting with peers (Dist. Ex. 9). A contemporaneous OT annual report indicated that the student demonstrated deficits in core and upper body strength, immature grasping patterns, decreased fine motor strength and bilateral coordination, decreased visual-perceptual and visual-motor skills, an inability to effectively process sensory information, decreased body awareness

and inadequate motor planning, difficulty sustaining attention, and difficulty engaging in cooperative play (Dist. Ex. 13). Similarly, a PT annual report indicated that the student demonstrated overall gross motor weakness, including low tone within his core; poor visual attention; decreased balance, coordination, and object manipulation skills; and poor motor planning (Dist. Ex. 11). The student's teacher recommended an increase in the student's SEIT services (Dist. Ex. 9 at p. 6).

The student switched preschools for the 2021-22 school year (age four) (see Tr. pp. 37-38; Dist. Ex. 10 at p. 1). In December 2021, the student's SEIT provider at his new school prepared a "Rational for Increase of Services," which requested an increase in the student's SEIT services as well as the provision of 12-month services (Dist. Ex. 10 at p. 1). The SEIT provider indicated that although the student had made progress in all areas of classroom functioning, the student required adult intervention to help him "navigate [] the classroom focus during circle time, deal with transitions, accept disappointments, interact with [] peers and address his sensory needs" (*id.*).

A committee on preschool special education (CPSE) convened on February 2, 2022 and increased the student's recommendation for SEIT services from 8 hours per week to 10 hours per week (Parent Ex. C at pp. 3-14). The February 2022 IEP indicated that the student was receiving two 45-minute sessions of individual OT per week but that he would benefit from an increase in OT so that he could "participate in more sensory exercises, specifically vestibular and proprioceptive input to facilitate improved self-regulation to better attend in a classroom/therapy setting" (*id.* at p. 4). The CPSE recommended an increase in the student's OT by adding one 30-minute session of group (2:1) OT per week to the two 45-minute sessions of individual OT per week the student was receiving (*id.* at pp. 4, 14). The CPSE further recommended that the student receive three 30-minute sessions of individual speech-language therapy per week and two 45-minute sessions of individual PT per week (*id.* at p. 14). The CPSE also recommended that the student receive services on a 12-month basis (*id.* at p. 15).

In spring 2022, the district conducted a reevaluation of the student to determine his eligibility for special education for the beginning of the 10-month 2022-23 school year, when the student would transition from preschool to school-age services (Dist. Exs. 3, 4, 6).<sup>1</sup> At the time of the February 2022 social history update, the student was attending a private parochial preschool, was receiving group SEIT 10 hours per week, as well as related services of three 30-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual OT, one 30-minute session per week of group OT, and two 45-minute sessions per week of individual PT (Parent Ex. C at p. 1; Dist. Ex. 6 at p. 1-2).

On February 2, 2022, a district social worker interviewed the student's mother for an updated social history (Dist. Ex. 6). In the course of the interview, the student's mother noted that she was concerned about the student's ability to socialize (*id.* at p. 2). Subsequently, in March 2022, a district school psychologist conducted a classroom observation of the student, which was

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<sup>1</sup> State law defines a preschool student with a disability as a student who is eligible to receive preschool programs and services and "who will not have become five years of age on or before December first of the school year, or a later date if a board established such later date for eligibility to attend school" (Educ. Law § 4410[1][i]). The district in this matter has established December 31st as its eligibility date (Tr. p. 19; see "A Family Guide to Preschool Special Education Services," at p. 7 [2019], available at <https://www.schools.nyc.gov/special-education/preschool-to-age-21/moving-to-preschool>).

memorialized in a report dated April 29, 2022 (Dist. Ex. 4). According to the observation report, the student became upset when asked to engage in nonpreferred activities; however, he was able to be redirected with encouragement and support (id. at p. 1). During the observation, the student was fidgety, distracted, and required redirection and prompting (id. at p. 2). He was able to complete some of the tasks presented with prompting and individual attention, and he benefited from movement breaks, focusing prompts, and positive reinforcement (id.). Finally, the student exhibited a low frustration tolerance and difficulties socializing with his peers (id.).

On March 29, 2022, the same district school psychologist who conducted the classroom observation conducted a psychoeducational evaluation of the student that culminated in a report dated April 28, 2022 (Dist. Ex. 3 at pp. 1, 4). The evaluator reported that "due to [the student's] inattention, focus, and self-directed behaviors a full cognitive assessment was not completed" (id. at p. 4). With regard to academics, the evaluator reported that the student attained grade level scores in word reading but noted delays in the student's alphabet writing fluency, math problem solving, listening comprehension, and oral expression (id.). The evaluator noted that the student's behaviors suggested that he was self-directed with low frustration and required some redirection and repetition of instruction (id.).<sup>2</sup>

A CSE convened on May 6, 2022 and, upon finding the student continued to be eligible for special education services as a student with a speech or language impairment, developed an individualized education program (IEP) for the student for the 2022-23 school year (kindergarten) (Dist. Ex. 2 at pp. 1, 20). The CSE noted that the student was attending a private preschool and that the student was "recommended to receive Special Education Itinerant Teacher Support, Speech and Language Therapy, Physical Therapy and Occupational Therapy," presumably in reference to the student's February 2022 IEP (Parent Ex. C at pp. 1, 14; Dist. Ex. 2 at p. 1). The CSE recommended that the student receive a total of 25 periods per week of integrated co-teaching (ICT) services for ELA and math, as well as the following weekly related services: one 30-minute session of group counseling, two 30-minute sessions of individual OT in the therapy room, two 30-minute sessions of individual OT in the classroom, two 30-minute sessions of individual PT, two 30-minute sessions of individual speech-language therapy, and one 30-minute session of group speech-language therapy (Dist. Ex. 2 at pp. 15-16).

In a prior written notice dated June 10, 2022, the district informed the parent of the May 2022 CSE's recommendations for the student for the 2022-23 school year along with a notice of the location of the student's assigned public school site where the services in the public school IEP would be implemented (Dist. Ex. 8 at pp. 1-2).

In an agreement dated July 1, 2022, the parent entered into a contract with Special Edge Support LLC (Special Edge) to provide services to the student from July 1, 2022 through June 30,

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<sup>2</sup> The evaluator reported that "[a]s part of the IEP review" she considered, among other things, a preschool teacher progress report completed by the student's general education teacher and reports from the student's SEIT provider (Dist. Ex. 14 at p. 1). The hearing record includes a "T5 Teacher Report"; however, it is not clear whether the student's general education teacher, SEIT provider, or both contributed the report (Dist. Ex. 5; see Dist. Ex. 2 at p. 22). Teacher comments on the report indicated that the student had emotional outbursts when things did not go the way he liked or when he was asked to perform a non-preferred activity (Dist. Ex. 5 at p. 6). In addition, the report indicated that the student's articulation and language skills were significantly delayed, and under concerns with fine and gross motor skills, the teacher indicated he had difficulty cutting (id. at pp. 9, 15).

2023 (Parent Exs. D at pp. 1-2; E at pp. 1-2). In a letter dated August 18, 2022, the parent notified the district that it had failed to "assign a provider for the services mandated in the [student's May 6, 2022] IEP," requested that the district "fulfill the mandate in the IEP," and stated that if the district "fail[ed] to assign a provider, the parent [would] be compelled to unilaterally obtain the services through a private agency at an enhanced market rate" (Parent Ex. A). The student was not enrolled in the assigned public school's kindergarten class for the 2022-23 school year, instead, the parent had the student repeat prekindergarten in a private school (February 14, 2023 Tr. pp. 52-53; Parent Ex. I at p. 1).

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

By due process complaint notice dated September 8, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2022-23 school year (Dist. Ex. 1 at p. 1).

As an initial matter, the parent discussed a prior IEP from February 2, 2022 through which the district recommended the student receive 10 hours of SEIT services, OT, PT, and speech-language therapy and asserted that the student should receive the program recommended in the February 2022 IEP pursuant to pendency (stay-put) (Dist. Ex. 1 at p. 1).

Next, the parent argued that the district did not conduct necessary evaluations (*id.*). The parent asserted that the district did not consider the full continuum of services when creating the student's May 2022 IEP (Dist. Ex. 1 at pp. 1-2). The parent also alleged that the district prevented the parent from fully participating in the May 2022 CSE (*id.* at p. 1). The parent disagreed with the May 2022 IEP, asserting it was inappropriate because the student required 10 hours per week of SEIT services or SETSS in a general education classroom in order to make progress (*id.* at p. 2). The parent further alleged that the district failed to provide her with prior written notice (*id.*). Finally, the parent asserted that the district had not provided the student with the SEIT services or SETSS outlined in the February 2022 IEP, nor had the district provided the student with the related services provided in either the February 2022 IEP or the May 2022 IEP (*id.*). The parent stated she was unable to hire a qualified SEIT or SETSS provider at the published session rate set by the district, but that she was able to hire a provider at a higher than standard rate for the student's 2022-23 school year (*id.*). As relief, the parent sought an order establishing the February 2022 IEP as the basis for the student's pendency placement, a finding that the district denied the student a FAPE for the 2022-23 school year, an order awarding the student a SEIT and related services at market rates for the 2022-23 school year and legal fees (*id.*).

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

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). Following a prehearing conference on November 10, 2022 and three status conferences, the parties proceeded to an impartial hearing which concluded on February 21, 2023 after three total days of proceedings (*see* December 15, 2022 Tr. pp. 1-8; January 10, 2023 Tr. pp. 1-9; February 14, 2023 Tr. pp. 1-130; February 15, 2023 Tr. pp. 1-89; February 21, 2023 Tr. pp. 1-65; November 10, 2022 Pre-Hr'g Conf. Sum. and Order).

In a decision dated March 22, 2023, the IHO noted that although both parties followed a Burlington/Carter analysis in their arguments, the IHO did not find this to be a tuition reimbursement case and he declined to follow that standard for his analysis (IHO Decision at p.

9).<sup>3</sup> The IHO found that the district failed to meet its burden of proof and that the student was denied a FAPE for the 2022-23 school year (*id.* at p. 3).<sup>4</sup> The IHO further held that the parent was entitled to compensatory relief (*id.* at pp. 3, 16-17, 21-22). Specifically, the IHO ordered that the district provide the student with a bank of 400 hours of SETSS provided by a licensed provider chosen by the parent at a rate up to \$150 an hour; a bank of 60 hours of group OT provided by a licensed occupational therapist chosen by the parent at a rate not to exceed \$150 an hour, and a bank of 20 hours of individual OT provided by a licensed provider chosen by the parent at a rate of up to \$150 per hour (*id.* at pp. 21-22).<sup>5</sup>

Turning to the IHO's rationale for finding a denial of FAPE, the IHO found that the district had sufficient evaluative information regarding the student and the parent was able to fully participate in the development of the student's IEP; however, the IHO found that the district "did not consider a full continuum of services for the [s]tudent" (IHO Decision at p. 10).<sup>6</sup> In making this finding, the IHO determined that the district school psychologist testimony was credible with regard to the student's evaluation, but she minimized the student's needs with respect to inattention, behaviors, and development needs, and, accordingly, the IHO discounted the portion of the school psychologist's testimony that an ICT class with counseling would have provided the student with an educational benefit (*id.* at pp. 10-11). The IHO agreed with the testimony of the parent and the Special Edge educational director, who testified that the student was unable to function in a class of 15 students during the 2021-22 school year; additionally, the IHO indicated the recommendation for ICT services was contrary to the May 2022 IEP, which noted the student needed support to navigate the classroom and a lot of prompting, modeling, and facilitating for social interactions, as well as the student's 2021-22 progress report, which noted the student was not able to regulate his emotions, transition easily, or accept correction (*id.* at pp. 11-12). Finally, the IHO noted that

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<sup>3</sup> The reason that the parties followed a Burlington/Carter style analysis is because the parent rejected the school district's proposed programming under the May 2022 IEP and then unilaterally obtained private services without the school district's consent for the 2022-23 school year. The parties were correct to do so, and the IHO should have followed a tuition reimbursement analysis as laid out by the parties, despite the fact that the parent or Special Edge may have used terms such as "rate" as opposed to using the word "tuition" with regard to the unilateral services. Thus, in this case the IHO applied the wrong legal test. As a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated cottage industry of independent special education teachers whom parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place. The attempts that do not use a Burlington/Carter analysis have tended to lead to chaos. All IHOs should use a Burlington/Carter style analysis when deciding cases in which a parent requests a school district to directly fund or reimburse costs incurred by the parent on behalf of a student when obtaining private services without the consent of public school officials.

<sup>4</sup> The IHO noted that although he deemed the parent's due process complaint notice to be "internally inconsistent," the district failed to challenge the sufficiency of the due process complaint notice so the IHO did not render a determination on the sufficiency of the parent's due process complaint (IHO Decision at p. 9).

<sup>5</sup> The IHO noted the district's argument that pursuant to Education Law section 4410 the student was no longer eligible for SEIT services as he was a five-year-old student and the testimony of the parent's witness, the financial director of Special Edge, who testified that a SEIT teacher can provide both SEIT and SETSS (IHO Decision at p. 17).

<sup>6</sup> The IHO reasoned that one subtest was incomplete, but that the school psychologist was able to obtain scores.

although the February 2022 CSE increased the student's services from eight hours per week of SEIT services to ten hours per week of SEIT services, the May 2022 CSE decreased the level of services (id. at p. 12). The IHO then noted that the May 2022 IEP indicated the CSE considered "related services only, special class in a community school, or ICT"; however, there was "no consideration of a resource room class, additional Counseling services, or references to a behavior plan," and that therefore the CSE did not consider the full continuum of services for the student (id.). Finally, the IHO noted that only individualized attention from an adult and small group instruction had been successful for the student and without providing for such instruction or a behavior plan for the student, the May 2022 IEP did not provide the student with a FAPE (id. at pp. 12-13).

Regarding the parent's requested relief, the IHO imposed the burden of proof on the district regarding the special education sought by the parent and held that the district failed to meet that burden (IHO Decision at pp. 15-16). The IHO noted that the district argued that the relief sought was inappropriate, but that the district failed to argue what relief would be appropriate in the event that the IHO determined that the district denied the student a FAPE (id. at p. 16). The IHO stated that the parent identified the specific remedy she was seeking and provided documentary evidence and testimony that supported her request for relief (id.). The IHO found that the parent requested reimbursement for 10 hours per week of SEIT services and OT services (id.). The IHO ultimately determined that 10 hours per week of small group instruction and OT services should have been provided to the student and the IHO ordered the district to fund the student's SEIT services under pendency and SETSS for the remainder of the school year (id. at pp. 17-18). Turning to equitable considerations, the IHO determined that the parent failed to notify the district of her disagreement with the May 2022 IEP until the filing of her due process complaint and that there is no record of a ten-day notice having been sent by the parent to the district notifying the district that the student would be repeating prekindergarten for the 2022-23 school year (id. at p. 19). The IHO further found that the parent's requested provider rates from Special Edge of \$75 per hour to the provider and an additional \$100 per hour of overhead were excessive, especially because the parent failed to inform the district that she would seek such services prior to the start of the school year and reduced the provider rates to \$150 per hour (id. at pp. 17, 19).

With respect to pendency, the IHO held that because the parent requested pendency under the February 2022 IEP, and because the district failed to contest the requested pendency, the February 2022 IEP constituted the pendency placement for the student (IHO Decision at p. 21). The IHO ordered the district to implement the program retroactive to the date of the filing of the due process complaint notice, September 2022, by providing: 10 hours per week of group SEIT, three 30-minute sessions per week of individual speech-language therapy services, two 45-minute sessions per week of individual OT, and two 45-minute sessions per week of individual physical therapy (id.).

The IHO determined that the district denied the student a FAPE for the 2022-23 school year and directed the district to provide the student with a bank of 400 hours of SETSS to be provided by a licensed special education teacher of the parent's choosing at a rate not to exceed \$150 per hour, 60 hours of OT in a group provided by a licensed occupational therapist of the parent's choosing at a rate not to exceed \$150 per hour, 20 hours of individual OT provided by a licensed occupational therapist of the parent's choosing at a rate not to exceed \$150 per hour; the IHO also directed that the bank of services would be reduced by pendency services funded by the

district and provided for a method for when the district would fund services and a process for how providers for the awarded services would be identified if the parent was unable to find providers without assistance from the district (IHO Decision at pp. 21-22).

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

The district appeals from the IHO's determination that the district denied the student a FAPE and argues that the IHO's rationale for his determination was based on an allegation not contained in the parent's due process complaint notice, namely the IHO's finding that the May 2022 IEP to address the student's social and behavioral needs. The district asserts that the IHO exceeded his jurisdiction by interpreting the due process complaint notice's claim that the district "failed to consider a full continuum of services for [the] student" as specific enough to raise the district's failure to address the student's social and behavioral needs.

The district submits that it repeatedly objected to the parent's attorney's pursuit of issues related to the student's social and behavioral needs, which the district maintains were outside of the scope of the due process complaint notice. The district argues that the IHO erred when he overruled the district's objection to such testimony and that the parent's testimony regarding the student's social and behavioral needs should be stricken. The district further asserts that had the parent filed a 10-day notice, it could have put the district on notice that she had concerns with the IEP. According to the district, the issue of the student's social and behavioral needs was not raised properly and should not have been considered by the IHO.

The district further argues that the May 2022 IEP would have afforded the student an opportunity to progress and to obtain educational benefit as the CSE considered the student's needs and abilities and recommended a program that it believed was reasonably calculated to address the student's needs, and the school psychologist testified as to how the recommendations would have allowed the student to obtain an educational benefit. Therefore, the district asserts that the IHO erred in determining that the May 2022 IEP denied the student a FAPE. The district further asserts that the IHO gave "undue weight" to the parent's testimony, and improperly discarded most of the district's testimony and documentary evidence regarding the student. The district asserts that the parent cannot fault the district for not reenrolling the student in preschool as the parent unilaterally reenrolled the student in preschool following the May 2022 IEP without notifying the district of her plan to have the student repeat prekindergarten. As relief, the district requests a reversal of the IHO's finding that the district denied the student a FAPE and a reversal of all of the relief awarded.

In an answer, the parent responds to the district's appeal and generally argues that the IHO's decision was proper and should be affirmed. In response to the district's assertion that the IHO addressed an issue that was not properly raised, the parent argues that the IHO was correct in finding that the student's social and emotional concerns were within the scope of the due process complaint. According to the parent, the May 2022 CSE's failure to address social and behavioral issues is tied to the parent's initial allegation that the May 2022 CSE did not consider the full continuum of services for the student and that the district denied the student a FAPE. The parent further asserts that the issue was raised during cross-examination of the district school psychologist in reviewing the teacher report.

## 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>7</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).

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<sup>7</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).

## VI. Discussion

### A. Scope of Impartial Hearing

Initially, the hearing record includes a prehearing conference summary and order dated November 10, 2022 which reflects that representatives for the parties and the IHO discussed the process for how the hearing would be conducted; however, absent from the prehearing conference summary and order is any indication of a discussion regarding the issues the parties intended to address at the hearing (see November 10, 2022 Pre-Hr'g Conf. Sum. and Order). Accordingly, despite the IHO's effort to hold a prehearing conference, the issues to be addressed during the evidentiary hearing were unclear and must be discussed herein. For future cases, it is highly recommended that prehearing conferences be properly utilized as a venue for parties to identify the disputed issues they intend to argue at hearings.

Neither party challenges the IHO's determinations that the district had sufficient evaluative information regarding the student and the parent was able to fully participate in the development of the student's IEP. Accordingly, these determinations have become final and binding on the parties (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]).

As to the scope of the impartial hearing, the district argues that the IHO erred by determining that the district failed to offer the student a FAPE because the May 2022 IEP failed to address the student's social and behavioral needs. Specifically, the district argues that the parent's due process complaint did not raise such an allegation and that the IHO exceeded his jurisdiction in considering this issue when rendering his determination (id. at p. 4).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]).

On appeal, the parties appear to focus on whether the more generic allegations included in the due process complaint notice, such as that the district failed to offer the student a FAPE and that the district failed to consider the full continuum of services for the student, included a challenge to how the May 2022 IEP addressed the student's social and behavioral needs. However, unaddressed by the parties, the due process complaint included an allegation that the parent did not agree with the recommendations included in the May 2022 IEP because the student required 10 hours per week of either SEIT services or SETSS in a general education classroom in order to

make progress (Dist. Ex. 1 at p. 2). Thus, it is apparent that the parent did not agree with the ICT services recommended in the public school IEP.

During the hearing, the IHO noted that neither the parent's attorney nor the district representative, who appeared at the hearing, appeared at the prehearing conference and, therefore, there was a lack of clarity as to the specific issues that the parties were presenting; in order to rectify this, the IHO asked the parties' representatives, in their opening statements to "identify the issues, what remedy is appropriate, what [the IHO's] order should say and what evidence supports that" (February 14, 2023 Tr. pp. 11-13, 115, 124).<sup>8</sup> In the parent's opening statement, counsel for the parent noted that the student's social deficits "were impacting his cognitive and academic functioning" and that the services recommended in the May 2022 IEP were not appropriate because of the impact that the student's "poor social functioning has had on his cognitive and academic abilities" (*id.* at pp. 124-25). The parent's attorney also highlighted the difference between the 10 hours per week of SEIT services recommended in the February 2022 IEP and the program recommended in the May 2022 IEP consisting of ICT services and related services and noted the parent's preference for the 10 hours per week of SEIT services (*id.* at pp. 124-26).

In his decision, the IHO reasoned that the ICT services proposed by the district in the May 2022 CSE denied the student a FAPE because that setting would not sufficiently address the student's social/emotional needs (IHO Decision at p. 12). Based on the above, the IHO's determination was a fair reading of the allegations raised in the parent's due process complaint notice as further described in the parent's opening statement as per the IHO's request for clarification during the hearing. While it would have been better for the parties, and the IHO, to have identified the issues they planned to pursue during the prehearing conference, it was proper for the IHO to accept the parent's argument as presented in the due process complaint notice and clarified in the parent's opening statement so that he could fully address the parent's complaint. As such, the IHO did not exceed his jurisdiction by reviewing and ruling on the issue of the student's social/emotional and behavioral concerns as they related to the ICT services proposed by the CSE in the student's May 2022 IEP.

## **B. 2022-23 School Year**

Having determined that the IHO properly considered the extent to which the May 2022 CSE addressed the student's social needs in reviewing the appropriateness of the May 2022 CSE's placement recommendation, the remainder of this decision regarding FAPE will address whether the IHO erred in determining that the CSE did not include sufficient supports to promote the student's academic and social development. More specifically, while the IHO found that the district had sufficient evaluative information regarding the student and that the parent was able to fully participate in the development of the May 2022 IEP, the IHO determined that the district "did not consider a full continuum of services for the [s]tudent" (IHO Decision at p. 10). The IHO also concluded that the student required individualized or small group instruction in order to benefit from instruction and found the May 2022 IEP did not offer the student a FAPE because it did not include any individual or small group instruction, or a behavior plan for the student (*id.* at pp. 12-13). The district contends that the IHO erred in his findings and asserts that the May 2022 CSE

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<sup>8</sup> The parties opening statements occurred after the testimony of the district school psychologist and the parent in order to accommodate their schedules (*see* Tr. pp. 11-13).

developed a program, including ICT services for math and ELA, counseling services, OT, PT, and speech-language therapy, which, as the district school psychologist explained in her testimony, would have provided the student with an educational benefit.

The evidence shows that the CSE convened on May 6, 2022 to create an IEP for the student's kindergarten (2022-23) school year (Dist. Ex. 2 at pp. 1, 20). The school psychologist, who served as the district representative at the May 2022 CSE meeting, indicated that the CSE had access to the following evaluative information: the April 2022 district psychoeducational evaluation, a classroom observation, a social history update, a progress report completed by the student's general education preschool teacher, reports from the student's SEIT provider, and related service progress reports for OT, PT, and speech-language therapy (Dist. Ex. 14 at ¶ 4; see Dist. Exs. 3-6; 11-13; 14 at ¶ 5).<sup>9</sup> As parts of the present levels of performance in the May 2022 IEP are similar or the same as the present levels of performance in the student's February 2022 IEP, the evidence shows that the May 2022 CSE also had access to the student's February 2022 IEP (compare Parent Ex. C at pp. 3-5, with Dist. Ex. 2 at pp. 1-3).

The IHO favored the testimony of the SEIT supervisor from Special Edge regarding an appropriate setting, but my review of the evidence reveals her testimony and opinion was problematic. For instance, she indicated that

I know that class size can pose an issue for [the student] because the previous year, he was in a school -- a mainstream school \* \* \*. That school had approximately 15 children within the classroom. And that, that, that year was, was a disaster. He didn't learn at all. He was so emotionally dysregulated, there was -- the tantrums were so frequent. And they couldn't stop them, that he literally couldn't learn, and he didn't have any of the skills that he needed at the beginning of the -- of, of the school year, because of, because of that wasted year

(Tr. p. 58-59). Yet the private special education supervisor opined that the services should in essence be repeated for ten hours per week in conjunction with a general education setting at the parochial school which is at odds with her statements during the impartial hearing (Parent Ex. F at pp. 1-2). Her descriptions of the student's experience in the prior year as a disaster and a waste were too harsh and unreliable, which is further discussed below. The contemporaneous evidence of the preceding school year presented a more balanced picture of the student's needs and deficits. For example, CPSE convened just three months prior to the May 2022 CSE meeting, in February 2022, to review the student's educational programming for the remainder of his time in preschool (Parent Ex. C; see Dist. Ex. 2). Related to the issues presented on appeal, the February 2022 preschool IEP indicated that the student had both strengths and weaknesses in the previous setting. For example, the student had recently made progress in his academic readiness skills such as recognizing numbers, counting, and demonstrating one-to-one correspondence and the student was able to recognize many letters, as well as shapes and, colors (Parent Ex. C at p. 3). The IEP stated that the student enjoyed learning and being part of his classroom but was often noncompliant so

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<sup>9</sup> The district school psychologist testified that the April 2022 evaluation was a psychological evaluation; however, the evaluation report indicates it was a psychoeducational evaluation (Dist. Exs. 3; 14 at ¶ 4).

as to avoid tasks that were non-preferred or that he perceived as challenging (id. at p. 3). With regard to receptive language, the student was able to follow one-step directions independently but required significant verbal cues to follow two step directions (id.). The student was able to respond to simple but not complex "wh" questions (id.). The IEP stated that the student had difficulty describing stories or scenarios cohesively using 5-6 word combinations and also demonstrated some articulation difficulties (id.). The student's parent reported that the student's speech was increasing, but that he "still require[d] support to help promote his communication, persevere on tasks, and assert himself in class so he c[ould] share his skills/interests" (id. at p. 4). According to the February 2022 IEP, the student had made "significant progress" in the area of social development since the start of the school year (id. at p. 4). At the beginning of the school year the student reportedly cried often but, at the time the IEP was developed, he actively engaged and participated in classroom activities (id.). The student mostly played alone but would attempt to engage in cooperative play, with adult support (id.). The IEP noted that the student had difficulty accepting disappointment and resisted nonpreferred activities (id.). The student also had difficulty adjusting to new situations or changes in routine and required coaxing, prompting and reassurance to adjust (id.). The student's February 2022 IEP noted that he needed "supports and other strategies to address behaviors that impede [his] learning or that of others," but noted that the student did not need a behavioral intervention plan (id.). With regard to motor development, the February 2022 IEP indicated that the student presented with delays in fine motor skills, sensory processing, attending, self-regulation, gross motor skills, and motor planning (Parent Ex. C at pp. 4-5).

In terms of management needs, the February 2022 IEP noted that the student benefitted from supports, models, verbal reinforcement and encouragement to facilitate communication, interaction with peers, participation in activities, task completion, attending, and turn-taking (id. at p. 5).

Ultimately, the February 2022 CSE recommended that the student receive SEIT services in a group of three for 10 hours per week, as well as the following related services: three 30-minute sessions of individual speech-language therapy per week; two 45-minutes sessions of individual OT per week; one 30-minute session of group (2:1) OT per week; and two 45-minute sessions of individual PT per week (Parent Ex. C at p. 14).

Following the February 2, 2022 CPSE meeting, the district conducted a social history update on February 8, 2022, with the parent serving as informant (Dist. Ex. 6 at p. 1). According to the update, the parent stated that she was unsure whether she would send the student to kindergarten for the upcoming school year (id.). The parent expressed concern regarding the student's ability to socialize but also reported that his cooperative play skills were emerging (id. at p. 2). She also reported that the student "require[d] adult assistance with initiating play and engaging with other children" (id.). According to the social history update, the parent believed the student benefitted from all of his provided services and that he would benefit by having his services continued in kindergarten (id. at p. 2).

The district school psychologist conducted a psychoeducational evaluation of the student in March 2022 that resulted in a report dated April 28, 2022 (Dist. Ex. 3). The evaluation consisted of a student interview as well as the administration of standardized intelligence and achievement tests (id.). A classroom observation was conducted separately (Dist. Ex. 4). Initially, the April 28, 2022 report noted that the student exhibited some expressive and receptive language delays during the evaluation, "did not engage in any spontaneous conversation," and required "some

repetition of questions and redirection" (Dist. Ex. 3 at p. 2). The school psychologist who evaluated the student indicated that he presented with delays in his ability to attend and focus and engaged in self-directed behaviors (*id.*). However, she reported that the student "seemed to respond favorably to the individualized attention, structure and positive reinforcement provided during this assessment" (*id.*).

Although the evaluator reported that the student attained a pro-rated full-scale IQ of 87 (low average), she acknowledged that the student's behavior may have had a negative impact on his performance and cautioned that the student's scores were likely to be an underestimate of his intelligence (Dist. Ex. 3 at p. 3).<sup>10</sup> According to the evaluator, the student's performance on a measure of academic achievement yielded grade level scores in reading but delays in alphabet writing fluency, math problem solving, listening comprehension, and oral expression (Dist. Ex. 3 at pp. 2-4). The evaluator stated that based on interview data and observed behaviors the student was "an immature and energetic youngster" who "[wa]s self-directed and require[d] redirection," and who responded "to individual attention and support at times" (*id.* at p. 3). The evaluator reported that, according to the student's teacher, the student "ha[d] many emotional outbursts when things d[id] not go his way or when he [wa]s asked to perform a non-preferred activity," (*id.*). The evaluator noted that the student "present[ed] with low frustration tolerance and ha[d] a difficult time regulating his emotions" and that "[t]hese challenges impact[ed] [h]im in the classroom" (*id.*).

In conjunction with the psychological evaluation, the school psychologist performed a classroom observation "to determine appropriate program and services for kindergarten," (Dist. Ex. 4 at p. 1). The student was observed while his SEIT was present (*id.*). According to the observation report, the student became upset and needed redirection from his SEIT in order to wash his hands after painting (*id.*). In addition, the student cried when he was called away from a preferred activity by his teacher to complete a classroom project and required support and encouragement from his teacher to complete the project (*id.*). The observation report noted that the student was self-directed and easily distracted (*id.* at p. 2). In addition, the report stated that the student displayed "[a] low frustration tolerance and difficulties socializing with his peers" and that he required "prompting and individual attention" in order to complete some of his tasks (*id.*). The observation report indicated that the student appeared to be developing the readiness skills necessary for kindergarten (*id.*).

In addition to the above, the May 2022 CSE had access to a "T5 Teacher Report (Dist. Ex. 5). The T5 teacher report included a list of activities of daily living (ADL), social/emotional, pre-readiness and readiness, cognitive and academic, and language skills along with a rating scale of "always," "sometimes," "emerging," and "never" (Dist. Ex. 5). The providers who completed the rating scale indicated that the student never: expressed his thoughts or feelings verbally; had a diminished activity level; regulated his own emotions; transitioned easily; or willingly accepted limits and corrections from adults (*id.* at pp. 1, 4-6). They rated the student's skills as emerging in the following areas: behaving appropriately; appropriately relating to peers; appropriately gaining attention from adults and peers; selecting friends for play; displaying concern or sympathy for others; persisting on difficult tasks; engaging in classroom activities willingly; following the rules; understanding turn-taking, appropriately socializing with peers; sharing; and explaining rules to

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<sup>10</sup> The evaluator stated that "[d]ue to inattention, focus, and self-directed behaviors a full cognitive assessment was not completed" (Dist. Ex. 3 at p. 4).

others (*id.*). The providers expressed concern with the student's "many emotional outbursts when things d[id] not go the way that he would have liked or when he [wa]s asked to perform an activity other than his preferred choice" (*id.* at pp. 1, 6). With regard to language skills, the providers reported that the student sometimes followed three-step commands, orally expressed his needs and made requests, understood and used words at an age-appropriate level, and had significant articulation problems (*id.* at p. 14). In terms of motor development, the providers reported that the student's pencil grasp, ability to cut simple shapes, and ability to hop and skip were delayed (*id.* at pp. 8-9).

After considering the above information, the May 2022 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that he receive ICT services and related services (Dist. Ex. 2 at p. 20). The IEP called for a significant increase in time with a special education teacher during the school day while maintaining the student's involvement with nondisabled peers. More specifically, the CSE recommended that the student receive ICT services for 15 periods per week in ELA and 10 periods per week in math, along with one 30-minute session of group counseling per week, four 30-minute sessions of individual OT, two 30-minute sessions of individual PT, two 30-minute sessions of individual speech-language therapy, and one 30-minute session of group speech-language therapy (Dist. Ex. 2 at pp. 15-16).

The May 2022 IEP indicated that student required support throughout the day and addressed his management needs by recommending multisensory techniques to improve skills necessary for participation in classroom activities and timely completion of assignments (Dist. Ex. 2 at p. 3). The IEP also acknowledged the student's need for social and emotional support through the annual goals. The May 2022 IEP included an annual goal designed to address the student's inability to appropriately navigate his classroom, transition between activities, follow class routines, and comply with requests (*id.* at p. 5). The May 2022 IEP recommended the use of multisensory coping strategies, role playing, social stories, and modeling to address his behavioral needs (*id.* at pp. 5-6). The May 2022 IEP also included an annual goal that addressed the student's ability to focus and attend to directions, while maintaining topics and transitioning to related topics participate appropriately in a conversational exchange (*id.* at pp. 9, 11). Furthermore the May 2022 IEP included annual goals for learning to follow two-step directions, answering WH-questions, and improving the student's intelligibility (*id.* at pp. 7-8).

The evidence shows that the continuum of special education services was appropriately considered, and it was not necessary for the district to detail every possible permutation of services during an impartial hearing, but only establish that the programming in the IEP was appropriate to address the student's needs. The May 2022 CSE considered and rejected recommending related services only, because the CSE determined that the student required more support than could be provided through related services alone (Dist. Ex. 2 at p. 22). The CSE also considered recommending placement in a 12:1+1 special class in a community school, but determined that a special class would be too restrictive for the student (*id.*; *see* Dist. Ex. 14 at ¶ 6). It appears from the parent's own due process complaint that she was seeking a general education environment in conjunction with the support of special education services when she contended that "the Student requires 10 hours of SEITS/SETSS services per week in a general ed classroom in order to make meaningful progress in the 2022- 2023 school year" (District Ex. 1 at p. 2 [emphasis added]), and the purpose of ICT services is to provide the support of a special education teacher to the student

in the general education classroom. The hearing record also shows that the CSE considered the continuation of SETSS. Under the management needs section of the May 2022 IEP, the CSE stated that the student's "needs c[ould] be addressed in general education with Special Education Teacher Support Services and Related Service providers employing multi-sensory techniques to develop and improve" the student's language and academic skills, attention and organizational skills, and fine and gross motor skills (Dist. Ex. 2 at p. 3). The May 2022 IEP noted that the student "benefited from direct support throughout the day to complete activities in an accurate and timely manner" and that "[d]ue to his inattention and distractibility, [the student] often need[ed] repetition of directions and redirection back to tasks" and "[h]e benefit[ed] from supports and strategies throughout the day" (*id.* at p. 2). The May 2022 IEP reflected the opinion of the student's SEIT provider's that the student "d[id] best when there [wa]s consistency and structure, and when he kn[ew] the classroom expectations,"(*id.*). It further reflected her opinion that the student required support to navigate the classroom, focus, transition, interact with his peers, and address his sensory needs (*id.*). According to the May 2022 IEP, the student's preschool teacher reported that the student "may become upset and need[] adult support to help him regulate and express what is causing him to be upset" and the student's SEIT provider reported that the student "enjoy[ed] being with his peers although he d[id] not yet have the skills to interact independently with the children in the classroom" (*id.*).

When questioned about the May 2022 IEP and the CSE's recommendations for the student for the 2022-23 school year, the parent testified that the student struggled in a class of 15 students during the 2021-22 school year because his social/emotional issues impacted his academic performance (February 14, 2023 Tr. p. 45). The parent expressed concern regarding the student attending a general education kindergarten class with ICT services, as she stated it would be too large for him to be able "to maintain focus and stability and that he would really struggle with his emotional regulations" (February 14, 2023 Tr. p. 48).<sup>11</sup> However, the parent also agreed that the student had the academic and cognitive abilities to be in a general education classroom, but opined that an ICT classroom was too large of a class and that the student, who has a November birthday, would have been one of the youngest students in the classroom and he would have been lost (February 14, 2023 Tr. p. 52). The parent testified that she had the student repeat prekindergarten for the 2022-23 school year because she believed that "being the youngest would be really detrimental to his future academic success" (February 14, 2023 Tr. pp. 52-53). She explained that given the student's language delays and social/emotional struggles she wanted to give him another year to catch up to his peers (February 14, 2023 Tr. p. 52). In response to questioning by the IHO, the parent testified that she believed that the student's social and emotional functioning was his biggest struggle and that it impacted how he performed academically and when he was being evaluated (February 14, 2023 Tr. pp. 55-56). She testified that she did not believe that an ICT classroom could have addressed the student's issues as well as his then-current placement and she believed that the student's biggest struggle was his language delay (February 14, 2023 Tr. p. 58). The parent testified that the student's 2021-22 SEIT provider and preschool director recommended to her that the student repeat prekindergarten but she did not believe that she informed the district of her decision to have the student repeat prekindergarten prior to the start of the 2022-23 school year (February 14, 2023 Tr. pp. 94-95).

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<sup>11</sup> The parent testified she was told that "on average" there were 15-18 students in an "ICT class" (Tr. p. 48).

In his review of the hearing record, the IHO found that the school psychologist minimized the student's social/emotional needs as she was unable to complete testing due to the student's inattention, poor focus, and self-directed behavior (IHO Decision at p. 11). However, a review of the school psychologist's testimony shows that it was consistent with the above-described information, available to the May 2022 CSE. For example, the IHO noted that during the classroom observation conducted by the school psychologist, the student "became upset, cried, became upset again"; however, this is not an entirely accurate representation of the observation because the IHO omitted the student's positive abilities (IHO Decision at pp. 6-7; Dist. Ex. 4). The observation shows the student was interested in an activity; he became upset when he was unable to participate in that activity because the teacher asked him to complete a project; however, it also indicates the student was able to complete the project with encouragement and support from the teacher (Dist. Ex. 4 at p. 1). Additionally, the student was able to play with another student in and became upset when their block tower fell; however, the student "was able to calm down and pick them back up" (*id.* at p. 2). The IHO contrasted the observation with the school psychologist's testimony, indicating that the school psychologist testified that "she did not see 'any outbursts'" (IHO Decision at pp. 6-7). Contrary to the IHO's impression, the school psychologist testified that she did not witness any "longstanding outbursts" during her observation of the student, and when frustrated the student was easily redirected by his SEIT provider or his other teachers during these times (February 14, 2023 Tr. pp. 18-19).<sup>12</sup>

Turning to the rest of the school psychologist's testimony, she reported that the student exhibited more frustration than his typically developing peers (February 14, 2023 Tr. p. 20). The school psychologist testified that the March 2022 psychoeducational evaluation of the student took about an hour and a half to two hours to complete, and was comprised of a classroom observation, an IQ test, and formal academic testing (February 14, 2023 Tr. pp. 15-16). She opined that the student's difficulties with attention, focus, and self-directed behavior may have had an impact on his performance during the evaluation, resulting in scores that were probably an underestimate of his intelligence (February 14, 2023 Tr. p. 17). The school psychologist was able to complete all sections of the evaluation except processing speed, as the student was distracted when engaging in some fine motor activities (February 14, 2023 Tr. pp. 17-18, 21). She stated that the scores were an underestimate of his abilities because the student had "shut down" during the evaluation, as his attention and focus waned (February 14, 2023 Tr. p. 18). She stated that while she may have been able to encourage the student to complete more of the evaluation and show more of his potential, she ended the assessment as she did not want him to become frustrated (*id.*).

The school psychologist testified that the student's general education teachers reported that his behavior varied as was typical of many four-year-olds, but he displayed more frustration than average, especially when his SEIT teacher was not present (February 14, 2023 Tr. pp. 19-20). The school psychologist opined that the student's social/emotional functioning impacted his performance during the evaluation to some extent, but not to a significant degree (February 14, 2023 Tr. p. 20). She reviewed her evaluation report which revealed grade level scores in the student's word reading, but delays in the student's alphabet writing fluency, math problem solving,

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<sup>12</sup> The hearing record includes other reports of the student exhibiting either outbursts, crying, or tantrums because he is easily frustrated; however, those reports were either approximately a year old at the time of the May 2022 CSE meeting (Dist. Exs. 9 at p. 1; 13 at pp. 10-12), or occurred during the subsequent school year (Parent Ex. I at p. 2).

listening comprehension, and oral expression (February 14, 2023 Tr. p.21). She further reviewed her statement that the student exhibited self-directed behavior, low frustration, and required some redirection and repetition of instruction (*id.*). The school psychologist testified that the team recommended an ICT class for the student, as well as counseling to address his social/emotional concerns (February 14, 2023 Tr. pp. 25-26). She reviewed the student's IEP which stated that the student had the cognitive and academic ability to make progress in a general education environment, and a 12:1 special class was too restrictive as it would have hindered his academic progress with a slower pace of instruction and would have provided fewer opportunities for social role models (February 14, 2023 Tr. pp. 22-23). She opined that a general education class with ICT services would have provided the student with opportunities to interact with peer models with higher cognitive and social skills (February 14, 2023 Tr. p. 27). The school psychologist stated that an ICT setting would have provided the student with a special education teacher throughout the day, as opposed to SETSS, which would have been a pull-out service (February 14, 2023 Tr. p. 28).

The IHO found that the May 2023 CSE's conclusion that the student would be able to make academic progress with ICT services and "just thirty minutes per week of group counseling" was not supported by the hearing record and contrary to the testimony of the parent and educational supervisor of the student's kindergarten program (IHO Decision at p. 11). The IHO noted that both the parent and supervisor testified that the student was unable to function in a classroom with fifteen students during the 2021-22 school year, and in particular that the parent indicated that the entire year was "'chaotic'" and the student "'didn't feel safe'" (*id.*). However, as noted above, the undersigned was not convinced by the private education supervisor's opinion because the hearing record is more nuanced on this issue than the IHO's decision would suggest. While the student's teacher for the 2021-22 school year requested an increase in the student's SEIT services in December 2021, the SEIT's rationale for increased services noted that the student had made "progress in all areas of the classroom expectations," "progress in all areas of classroom functioning," and "significant progress since the beginning of the school year" (Dist. Ex. 10). The educational supervisor for Special Edge testified that she first met the student in November 2022 (February 15, 2022 Tr. p. 75). Although she reported that the 2021-22 school year was a "disaster" for the student, that he "didn't learn at all," had frequent tantrums that staff could not stop, "literally didn't learn," and was "yelling, kicking, and screaming," the source of her information was the parent along with the principal, general education teacher and special education at the student's then-current school (February 15, 2022 Tr. pp. 79, 82). The educational supervisor had not spoken with the district school psychologist or observed the student in his preschool class (February 15, 2022 Tr. p. 74, 79). Moreover, the IEP reflects that at the time of the May 2022 CSE meeting the parent reported to the CSE that she "believed the student ha[d] benefitted from his services" although she had some concern over his ability to socialize (Dist. Ex. 2 at p. 2). The May IEP also indicated that the student had made progress in all areas (*id.*).

The educational supervisor further testified that while the February 2022 IEP accurately described the student's social/emotional needs, the May 2022 IEP did not (February 15, 2022 Tr. p. 65). However, a review of the IEPs shows that the description of the student's social/emotional needs in the two IEPs was similar. With regard to the student's functional performance, the February 2022 IEP stated that the student "may often be non compliant as he seeks to avoid any task that is non preferred or appears to be challenging to him" (Parent Ex. C at p. 3). In addition, the IEP noted that the student "may become upset and needs adult support to help him regulate

and express what is causing him to become upset" (id.). The IEP noted that the student had difficulty sitting and focusing during instruction (id.). With regard to the student's social/emotional development, the IEP stated that the student had made "significant progress since the beginning of the school year" in that at the beginning of the year he "would cry all the time" and at the time of the February CPSE meeting the student was "actively engaging in the classroom and participating in [] activities (id. at p. 4). The IEP indicated that the student had difficulty accepting when things did not go his way and would avoid and resist non preferred activities (id.). In addition, the student "had difficulty adjusting to new situations [] or a change in routine and require[d] coaxing, prompting and reassurance, to be able to adjust (id.). With regard to physical development, the February 2022 IEP indicated that the student continued to demonstrate delays in attending and self-regulation but also noted that he was "learning about self-regulation via the Alert Program and [wa]s responding well" (id.). The IEP stated that the student "presente[ed] with some difficulty with sensory modulation" and "frequently bump[ed] into objects and people" (id.). The IEP further stated that the student "fidget[ed] with his hands and legs frequently" which made it difficult for him to attend and noted that the student required "frequent sensory breaks" (id.). With regard to special factors, the IEP indicated that the student needed strategies, including positive behavioral intervention, supports and other strategies to address behaviors that impeded the student's learning or that of others, but indicated the student did not need a behavioral intervention plan (id. at p. 5).

The May 2022 IEP included similar statements about the student's behavior noting, as above, that the student could be non compliant as he sought to avoid non preferred or challenging tasks (compare Parent Ex. C at p. 3 with Dist. Ex. 2 at p. 1). The May 2022 IEP indicated that the student became upset and needed adult support to help him regulate and process what was making him upset (Dist. Ex. 2 at p. 2). The IEP indicated that the student still had difficulties sitting and focusing (id.). The IEP did not state that the student had difficulty accepting when things did not go his way or indicate that he had difficulty adjusting to new situations or changes in routine but the IEP did state that the student required support to navigate the classroom, focus during circle time, deal with transitions, interact with peers, and address his sensory needs (id.). The IEP also indicated that the student did best when there was consistency and structure and when the student knew classroom expectations (id.). It further stated that the student required prompting, modeling and facilitating for social interactions (id.). With regard to physical development it noted the student's difficulty with sensory modulation and his tendency to bump into things as well as his fidgeting and need for frequent sensory breaks (id. at p. 3). The May IEP also noted the student's positive response learning about self-regulation using a specific identified program (id.). The May 2022 IEP indicated that the student did not need strategies, including positive behavioral interventions, supports or other strategies to address behaviors that impeded his learning or that of others or a behavioral intervention plan (id. at p. 4). I find that this was a minor flaw in that the student did require positive strategies to address his social emotional needs, but it is not fatal because but that is what the IEP is designed to provide.

While the IHO concluded that ICT services with once weekly counseling were insufficient to meet the student's social/emotional needs, he also neglected to consider the other related services recommend by the CSE that were designed to address other aspects the student's social/emotional needs, such as speech-language therapy and OT (see Dist. Ex. 2 at pp. 9, 11, 16). Along with the total of 25 periods per week of ICT services, the May 2022 CSE also recommended two hours per week of OT, one hour per week of PT, one and one-half hours per week of speech-language therapy, and 30 minutes of counseling services (Dist. Ex. 2 at pp. 15-16). Review of the IEP shows

that the recommended services matched up with the recommended annual goals, as the IEP featured 13 measurable annual goals to address the student's needs in the areas of academic readiness, social/emotional development, speech-language, fine motor, and self-help (id. at pp. 5-14).

Additionally, the IHO factually erred in finding that the ICT services recommended in the May 2022 IEP were a reduction in services from the recommendation for 10 hours per week of SEIT services contained in the February 2022 IEP, a CSE recommendation of ICT services for a student who was receiving SEIT services and was aging from preschool to school-age services is not a decrease in services, as the recommended ICT services would have provided the student with small group special education support for the entire time the student received instruction in ELA and math for 25 periods per week, with the student's related services taking up a substantial portion of the rest of the student's school week. Accordingly, based on the above, the hearing record as a whole supports finding that the May 2022 CSE recommended programming that was reasonably calculated to enable the student to receive educational benefits and included supports directed at the student's social/emotional areas of need, as well as the student's needs in the area of communication and in academics and related services. The IHO's decision to the contrary regarding the district's failure to offer a FAPE must be reversed.

## **VII. Conclusion**

As discussed above, having reviewed the hearing record in its entirety, the evidence supports finding that the district offered the student a FAPE for the 2022-23 school year by offering a program consisting of ICT services, counseling, OT, PT, and speech-language therapy to address all of the student's identified needs. Additionally, having determined that the district offered the student a FAPE for the 2022-23 school year, the IHO's award of relief based on the denial of FAPE was in error and must be reversed.

I have considered the parties' remaining contentions and I need not address them in light of my determinations above.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated March 22, 2023 is modified by reversing that portion which found that the district did not offer the student a FAPE for the 2022-23 school year and which granted the parent relief for the denial of FAPE.

**Dated: Albany, New York  
July 3, 2023**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**