



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-153

**Application of a STUDENT WITH A DISABILITY, by his parents, 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 Office of Steven Alizio, PLLC, attorneys for petitioners, by Steven J. Alizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. Macleod, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the respondent (the district) met its child find obligations for the 2020-21 and 2021-22 school years and denied their request to be reimbursed for the full cost of their son's unilaterally obtained private services during the 2020-21, 2021-22, and 2022-23 school years. Respondent cross-appeals from the IHO's determination that the district failed to demonstrate that it offered the student a free appropriate public education (FAPE) for a portion of the 2021-22 school year and the 2022-23 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student attended The Ramaz School (Ramaz) for the 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. A at pp. 1-2; Parent Ex. T ¶¶ 3, 8, 17). In April 2021 (prekindergarten) the parents became aware that the student had been spending much of his school day in the principal's office due to behavior problems (Parent Exs. H at p. 2; T ¶ 4). The parents hired a behavioral specialist to observe the student and provide guidance to his teachers (Parent Exs. H at p. 2; T ¶ 5).

In October 2021, the parents obtained a private occupational therapy (OT) evaluation and, in January 2022, the student began receiving private OT services one to two times per week for 45-minutes to address his sensory processing needs (Parent Exs. T ¶ 9).<sup>1,2</sup> In addition, the parents arranged for a private special education itinerant teacher (SEIT)/behavior specialist to work with the student in his classroom, full-time for the first two weeks of January 2022 and for several follow-ups in February 2022 (Parent Exs. H at p. 2; T ¶ 10). At the end of the 2021-22 school year, the parents "worked with the administrators at [Ramaz] to ensure [the student] would be paired with a supportive team of teachers for the following school year" (Parent Ex. H at p. 2). In early 2022, due to the student's continued struggles in the classroom, Ramaz suggested that the student be evaluated by the district to determine his eligibility for special education services (Parent Ex. A at pp. 2; Parent Ex. T ¶ 12).

In response to the parents' request, the district conducted evaluations of the student between February and March 2022 including a classroom observation, a psychoeducational evaluation, an OT evaluation, and a speech-language evaluation (see Parent Exs. A at p. 2; T ¶ 13; Dist. Exs. 2; 4).<sup>3</sup>

The CSE convened on April 5, 2022, and found the student eligible for special education as a student with an emotional disturbance (Parent Ex. C at p. 1). The April 2022 CSE created an IESP for the student with an implementation date of May 3, 2022 and a projected date of April 5, 2023 for the student's annual review (Parent Ex. C at p. 1).<sup>4</sup> The April 2022 CSE recommended

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<sup>1</sup> The parent affidavit states that that student began receiving OT services in January 2021; however, it also states that the private OT services began after the October 2021 private OT evaluation, therefore the January 2021 OT start date referenced in the affidavit is presumably an error and the correct date should be January 2022 (see Parent Ex. T ¶ 9).

<sup>2</sup> Both the district and the parents submitted copies of the October 2021 private OT evaluation (see Parent Ex. B; Dist. Ex. 3). For purposes of clarity, only the parent exhibit will be cited to.

<sup>3</sup> The only district evaluation reports included in the hearing record are a February 23, 2022 OT evaluation report, an April 5, 2022 functional behavioral assessment (FBA), and an undated OT teacher report of function and participation (see Dist. Exs. 2; 4; 5).

<sup>4</sup> The hearing record includes duplicate copies of the April 2022 IESP with different page formatting (compare Parent Ex. C with Dist. Ex. 1). For clarity, only the parent exhibit will be cited.

that the student receive three 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual counseling services (*id.* at p. 14). The April 2022 CSE also recommended supplementary aids and services consisting of a full time 1:1 paraprofessional for behavior support (*id.*). A functional behavioral assessment (FBA) was completed during the April 5, 2022 IESP meeting (Parent Ex. C at p. 6; *see* Dist. Ex. 5).

In October and November 2022, the parents had the student privately evaluated as part of a "comprehensive neuropsychological evaluation to address concerns with regard to [the student's] behavior regulation and engagement in learning in the classroom," which resulted in a December 2022 neuropsychological evaluation report (Parent Ex. H at p. 1).

In a due process complaint notice, dated April 3, 2023, the parents alleged that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (*see* Parent Ex. A). More specifically, the parents alleged that the district: failed in its child find obligations for the 2020-21 school year and for a portion of the 2021-22 school year; failed to provide them with a copy of their procedural safeguards for the school years at issue; failed to provide timely and valid prior written notices during the school years at issue; and failed to thoroughly evaluate the student in all areas of suspected disability (Parent Ex. A at pp. 9-10). As for the April 2022 CSE meeting and IESP, the parents alleged that the CSE did not allow the parents a meaningful opportunity to participate in the creation of the April 2022 IESP, the IESP was procedurally and substantively invalid; and the IESP was not reasonably calculated to confer an educational benefit on the student (*id.* at p. 10). For relief, the parents requested an order directing the district: to fund a 1:1 behavior support professional; to fund an independent FBA and BIP; to reimburse the parents for all out-of-pocket expenses for SEIT services, private tutoring and private OT they obtained for the student during the school years at issue; to reimburse them for the December 2022 private neuropsychological evaluation; and to fund compensatory services with the "amount and type of compensatory services to be determined according to proof" (*id.* at p. 11).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 26, 2023 and concluded on June 7, 2023 after two days of proceedings (May 26, 2023 Tr. pp. 1-9; June 7, 2023 Tr. pp. 1-40).<sup>5, 6</sup> In a decision dated June 23, 2023, the IHO determined that the district met its child find obligations for the 2020-21 and 2021-22 school years, but that it failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 3, 6-14). As relief, the IHO directed the district to implement the April 2022 IESP until a new IESP is developed for the student; ordered the district to reimburse the parents for the cost of the student's unilaterally obtained services in the areas of OT, private tutoring, and 1:1 behavior support from May 3, 2022 through the end of the 2022-23 school year, as well as for an October 2021 OT evaluation; and directed the district to fund compensatory education consisting of 72 hours of individual OT and 48 hours of individual counseling (*id.* at p. 15).

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<sup>5</sup> The transcripts were not paginated consecutively. Therefore, for purposes of this decision, citations to the transcript will be preceded by the hearing date.

<sup>6</sup> The parties also convened for a pre-hearing conference on May 4, 2023 (*see* May 4, 2023 Tr. pp. 1-13).

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

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer with cross-appeal, and the parent's answer to the district's cross-appeal is also presumed and, therefore, the allegations and arguments will not be repeated. In review of the pleadings, the following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the IHO erred in determining that the district met its obligations under the "child find" provisions of the IDEA for the 2020-21 and 2021-22 school years;
2. whether the IHO erred by not awarding full reimbursement for the parents' out-of-pocket expenses for the 2020-21 and 2021-22 school years;
3. whether the IHO erred by not addressing the parents' request for reimbursement for the December 2022 private neuropsychological evaluation in the amount of \$6,500;
4. whether the IHO erred by ordering the district to reimburse the parents for the cost of the privately obtained 2021 OT evaluation; and
5. whether the IHO erred in determining that the student was entitled to a compensatory remedy consisting of 72 hours of 1:1 OT.<sup>7</sup>

#### 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.

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<sup>7</sup> The parents also allege that the IHO erred by failing to address their claims relating to Section 504 of the Rehabilitation Act of 1973 (Section 504). Generally, an SRO lacks jurisdiction to consider challenges to an IHO's rulings, or failures to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]).

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>8</sup>

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

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

## **VI. Discussion**

Prior to addressing the merits of the parties' individual claims, both parties request that the IHO's order for the district to implement the April 2022 IESP until a new IESP was developed for the student be reversed (see IHO Decision at p. 15). The district alleges that a new IESP was created for the student prior to the IHO issuing his decision and thus the IHO's order is now moot (Answer with Cross-Appeal ¶ 18). The district did not submit a copy of the new IESP with its answer with cross-appeal; however, because both parties agree that the IHO's award was in error and the district alleges a new IESP was already created, I will reverse the IHO's determination on this issue.

### **A. Child Find**

The parents contend that the IHO erred in determining that the district satisfied its child find obligations during the 2020-21 and 2021-22 school years because the IHO failed to address the parents' assertion that the district did not have appropriate child-find procedures in place. According to the parents, they asserted in their due process complaint notice that the district did not have appropriate procedures in place to locate, identify, and evaluate the student during the

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<sup>8</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).

2020-21 and 2021-22 school years and, on appeal, they contend that the IHO erroneously shifted the burden to the parents to prove what information the district knew about the student's potential disability and need for evaluation and when the district obtained such information.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).



Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

The district alleges that the parents' decision to unilaterally obtain services for the student in 2021 caused Ramaz to delay its recommendation to the parents that the student be evaluated by the district to determine his eligibility for special education services. Further, the district alleges that because the student had never been enrolled in a public school, it was the parents or Ramaz who were obligated to refer the student for evaluation.

As noted above, a district's child find obligation arises when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii, 158 F. Supp. 2d at 1194). "A school district must begin the evaluation process within a reasonable time after the district is on notice of a likely disability" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 144 [2d Cir. 2019]). In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at \*8, quoting J.S., 826 F. Supp. 2d at 652; see, e.g., Application of the Dep't of Educ., Appeal No. 21-113 [rejecting the parent's argument that a child find violation occurred between September and November and upholding the IHO's finding that a district had reason to suspect a disability in March of the same school year when the district had taken some interventive steps, but the difficulties persisted]).

According to the parents, the student has never attended a district public school (see generally Parent Ex. A ¶¶ 4, 10). When the student was approximately three and a half years old and midway through the 2020-21 school year, he transferred to Ramaz where he "immediately" struggled to manage his impulses and regulate his behaviors (id. at ¶ 10). The parent testified that she obtained tutoring for the student during the 2020-21 school year that began "roughly in the beginning" of the school year because she "felt that [she] didn't see him learning anything"; she further testified that when she questioned the teachers about the student's lack of learning "no one

said anything to [her]" (June 7, 2023 Tr. pp. 30-31; see Parent Ex. T ¶¶ 4, 7).<sup>9</sup> The parent also testified that in April 2021, Ramaz notified her for the first time that the student was having behavior issues and spending more time in the principal's office than in class (June 7, 2023 Tr. p. 29-30). Due to behavior issues, the parents paid out-of-pocket for a behaviorist to observe the student in the classroom (Parent Ex. T ¶ 5).

According to the student's mother, for the 2021-22 school year, due to the student's continued struggle with his behavior and self-regulation, the parents began to pay out-of-pocket for a SEIT provider/behavior specialist to push-in to the student's classroom (Parent Ex. T ¶ 10). The parent testified that the provider was on a "full-time basis for the first two weeks of January 2022 and then for several follow-ups in February 2022" (id.). The parent also indicated that these services were provided in addition to the outside tutoring services the student was receiving during the 2021-22 school year (id. ¶ 11).

Then, in "early 2022" Ramaz recommended that the parents contact the district to have the student evaluated for special education services (Parent Ex. T ¶ 12). There is no evidence in the hearing record regarding when the parents contacted the district to request that the student be evaluated for special education (see Parent Exs. A-T; Dist. Exs. 1-2, 4-5). However, the evidence does show that between February 2022 and April 2022, the district conducted assessments and evaluations to determine if the student was eligible for special education (see generally Parent Ex. C at pp. 1-6; Dist. Exs. 1; 2; 5).

A review of the foregoing course of events leading up to the parents' referral of the student in early 2021 might suggest that the district did not "overlook clear signs of disability"; however, during the impartial hearing the district did not present any evidence that it followed its own child-find procedures, thus the district did not meet its burden for this issue and, as discussed below, the IHO's determination must be reversed as it relates to the 2021-22 school year.<sup>10</sup>

Specifically, the parents alleged in their due process complaint notice that the district did not have appropriate procedures in place to locate, identify, and evaluate all nonpublic school students located in the district during the 2020-21 and 2021-22 school years (Parent Ex. A at p. 4).

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<sup>9</sup> The parents submitted a document titled "Summary of Tutoring Expenses," which covers the time period from June 2020 to February 2023 (see June 7, 2023 Tr. p. 8; Parent Ex. M). The document includes the frequency of services provided and rate charged for each month and year, as well as the total expense for each month and year (Parent Ex. M). The document does not indicate who provided the tutoring services, where the services were provided, or if the parents paid any amount toward the total expenses (see generally Parent Ex. M). According to the summary of tutoring expenses, the student received tutoring beginning in July 2020; in total, the student received 14.75 hours of tutoring in 15-minute to 30-minute sessions at a rate of \$50 per 15-minutes for a total of \$2,950 (Parent Ex. M).

<sup>10</sup> It should be noted that the private October 2021 OT evaluation indicated that if the student needed classroom support, his parents could contact the school district for a special education evaluation and possibly obtain CPSE services in school (Parent Ex. B at p. 6). The district puts forth an argument that the parents were aware that a referral to the CPSE was an option that the parents did not undertake "for several months" and thus its child-find obligations did not accrue until the parents referred the student in "early 2022" (Answer with Cross-Appeal ¶ 13). However, it is the district who carries the obligation to identify, locate, and evaluate the student, not the parents, and I find this argument is an attempt to shift its burden of showing that it had appropriate child-find procedures in place to the parents.

Accordingly, this assertion placed the district on notice that it would have to defend its child-find procedures during the impartial hearing, which it failed to do (see May 4, 2023 Tr. pp. 1-3; May 26, 2023 Tr. pp. 1-9; June 7, 2023 Tr. pp. 1-40; Dist. Exs. 1-5).

The hearing record demonstrates that in April 2021, the parents were notified by Ramaz that the student was having behavior problems and was spending most of his time in the principal's office (Parent Ex. T ¶ 4). The parents allege that this April 2021 event should have triggered the district to suspect that the student had a disability that the district may need to address through special education (Req. for Rev. at pp. 4-6). The district never presented evidence of its child find procedures, and, thus, the district cannot rebut the allegation that with proper procedures in place, the district would have suspected the student had a disability requiring special education, which would have started the process of referral of the student for an initial evaluation; for instance, if the district had in place proper procedures regarding the identification of students suspected of having a disability in or around April 2021, Ramaz would have had the opportunity to inform the district, as it did the student's parents, that he was having behavior problems and the district would have started the referral process. Given that the hearing record is silent on the exact date Ramaz notified the parent in April 2021 of the student's behavior problems, for the sake of this argument, it is assumed that the earliest date the student may have been referred to the district for an initial evaluation would have been April 1, 2021.

Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Once a referral is received by the CSE chairperson, the chairperson must provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).<sup>11, 12</sup>

Based on the April 1, 2021 date and the above-cited applicable State regulations, the 2020-21 school year would have ended at approximately the same time as the date on which the district

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<sup>11</sup> A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

<sup>12</sup> In April 2020, the New York State Office of Special Education issued a guidance document, which reflected, in relevant part, that State regulation "**section 200.4(d)** was amended so that when a Board of Education [wa]s arranging for appropriate special education programs and services to be provided to a student with a disability within 60 school days of the receipt of consent to evaluate or referral for review, the 60 day period w[ould] not include any days that the school [wa]s closed pursuant to an Executive Order of the Governor issued in response to a State of Emergency for COVID-19" ("Emergency Regulations for the Provision of Special Education Programs and Services and Due Process Procedures in Response to the Novel Coronavirus (COVID-19) Outbreak in New York State," Off. of Spec. Educ. [April 2020], p. 2 [emphasis in original], available at <https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-emergency-regulations-covid-19-response-april-2020.pdf>). The hearing record does not include information regarding the days that the school may have been fully closed at the onset of the pandemic.

was obligated to have evaluated the student within 60 calendar days and to have implemented a recommended special education program within 60 school days from the receipt of parental consent. However, the district would have been obligated to arrange for appropriate services for the student prior to the beginning of the 2021-22 school year (see 8 NYCRR 200.4[e][1]).

The IHO determined that the district met its child-find obligations but failed to provide the student a FAPE from May 3, 2022, the date of implementation of the April 5, 2022 IESP, until the end of the 2021-22 school year (IHO Decision at p. 10). However, based on the above discussion, the IHO erred in finding that the district denied the student a FAPE beginning May 3, 2022 by failing to implement the student's IESP and the determination must be reversed as the district failed to prove it satisfied its obligations under child find and, therefore, did not demonstrate that it offered the student a FAPE for the entirety of the 2021-22 school year.

### **B. Relief - Unilaterally Obtained Services**

Prior to discussing the issue of relief, I will first address the district's cross-appeal of the IHO's determination that the district failed to offer the student a FAPE. Specifically, the district requests that the IHO decision be modified to state that the district failed to offer the student services from May 3, 2022 through the end of the 2022-23 school year on an equitable basis rather than phrasing the district's failure to do so as a denial of FAPE (Answer with Cross-Appeal ¶ 23). The district acknowledges that this request has "no practical effect on the substantive relief awarded in the present matter" (*id.*). The district does not allege it was aggrieved by this aspect of the IHO's decision and essentially concedes it did not provide the student with mandated special education services during a portion of the 2021-22 school year and the entire 2022-23 school year. I note that there is no practical difference between a finding that the district did not provide the student with a FAPE and that the district did not provide the student services on equitable grounds. Both outcomes would lead to the same considerations as to relief to be awarded. As such, the district's requested modification will not be further discussed on appeal and the IHO's determination that the district did not offer the student a FAPE for the entire 2022-23 school year is final and binding on the parties and will not be further discussed (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]).

Having determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, the next inquiry focuses on whether the parents' unilaterally obtained services during these school years were appropriate. Here, the IHO did not determine whether the parents' unilaterally obtained services were appropriate but still awarded the parents "out-of-pocket expenses for private occupational therapy, private tutoring, and SEIT/Behavior services beginning May 3, 2022" (see IHO Decision pp. 11-15). Accordingly, as the IHO awarded reimbursement for the parents' unilaterally obtained services for the 2022-23 school year, and the district has not appealed from that finding, relief for the 2022-23 school year need not be further addressed. However, due to my ultimate determination that the district denied the student a FAPE for the entire 2021-22 school year and given the fact the IHO did not award relief for the 2021-22 school year, prior to May 2022, a full analysis concerning the appropriateness of the parents' unilaterally obtained services for the 2021-22 school year is necessary in order to determine the appropriate relief.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement for the cost of the student's attendance there. The parents alleged that they unilaterally obtained private services in the form of OT, tutoring, and SEIT/behavior support services and then commenced due process to obtain remuneration for the unilaterally obtained services provided by various agencies. Accordingly, the issue in this matter is whether the OT, tutoring, and SEIT/behavior support services obtained by the parents were appropriate services for the student such that the cost is reimbursable to the parents or, alternatively, should be directly paid by the district to the providing agency upon proof that the parents have paid for the services or are legally obligated to pay but do not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Accordingly, the parents' request for reimbursement for out-of-pocket expenses for the privately obtained services at issue must be assessed under this framework.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale

Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction<sup>201</sup>.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Student's Needs**

Before reviewing the evidence of the adequacy of the special education and related services unilaterally obtained by the parents, it is necessary to review the evidence in the hearing record describing the student's special education needs.

The hearing record contains two OT evaluations, a private evaluation obtained by the parent and a subsequent evaluation performed by the district (Parent Ex. B, Dist. Ex. 2). The private OT evaluation, conducted by Kinetic Kids Occupational Therapy, PLLC, (Kinetic) in October 2021, focused primarily on the student's sensory processing abilities (Parent Ex. B). According to the private therapist, the student exhibited vestibular discrimination issues, poor postural control, poor coordination, decreased balance skills, difficulty with functional vision, and engaged in excessive risk-taking behaviors (id. at pp. 1-2). The private therapist explained that the vestibular system "gives the trust that we are firmly connected to the earth" and that "[t]his security is one of the foundations on which we build interpersonal relationships" (id. at p. 2). She reported that since the student's vestibular system misinterpreted environmental signals it made sense that he could have difficulty with emotional and behavioral responses (id.). She opined that the student had "missed many of the building blocks that [we]re necessary for mature emotions and behavior" (id.). The private therapist noted that the student had difficulty with transitions and changes in routine, was easily frustrated, and had difficulty getting along with others; was impulsive, moody, and engaged in tantrums, which worsened later in the school day and when he was overstimulated; and had difficulty attending to tasks which were not self-chosen and self-directed (id.). She indicated that the student presented with inadequate proprioceptive processing and had difficulty discriminating input and grading force (id.). In addition, the student had difficulty keeping his hands to himself and his teachers reported a history of unprovoked

aggression resulting in hurting others (id.). According to the private therapist, the student's teacher indicated that the student was a danger to himself and others, as he threw hard objects and climbed on and jumped off furniture (id.).

The private therapist reported that the student exhibited hyperactivity, distractibility, frequent out of seat behavior, excessive movement while seated, and was louder than others in his classroom (Parent Ex. B at p. 3). Additionally, the student lacked motor planning and coordination skills; avoided tasks and was easily frustrated and tended to overrespond to sudden movements and noises (id. at pp. 3, 5). The private therapist reported that the student exhibited primitive and postural reflexes that affected his ability to function in school (id. at pp. 3-4).

A second OT evaluation, conducted by the district on February 23, 2022, examined the student's abilities related to access/movement, activities of daily living (ADLs), management of classroom tools and materials, pre-writing and writing, and sensory skills for learning (Dist. Ex. 2 at pp. 4-8). The evaluation report identified the primary school-based concerns regarding the student, specifically that he exhibited low frustration tolerance and was often reactive, impulsive, aggressive, and had difficulty regulating his emotions (id. at pp. 1-3). The evaluation report indicated that based on teacher report the student exhibited disruptive behaviors, tantrums, and outbursts during the school day especially during transitions and activities he did not choose and that he took excessive physical risks that compromised his safety and that of others (id.). The OT evaluation report reflected the parents' concerns that the student exhibited difficulties with self-regulation, executive functioning, and sensory processing, and that his visual motor skills were below average and he exhibited an immature, awkward grasp on writing tools (id. at pp. 2, 5).

The district therapist reported that, based on clinical observation and teacher feedback, she "suspected" that the student had poor self-regulation which adversely affected his ability to monitor and manage his emotions, energy, impulses, and behavior in accordance with his environment (Dist. Ex. 2 at p. 3). With regard to work behaviors the district therapist reported that the student engaged in destructive behavior with school materials and demonstrated an overall lack of self-control that resulted in an inability to engage in learning (id.). In terms of movement, she indicated that the student appeared to have difficulty coordinating visual information from his eyes with his hands due to possibly retained primitive reflexes (id. at pp. 4-5, 9). The district therapist reported that there were "[n]o significant difficulties" with the student's ADLs; however, she noted inconsistencies in the student's spatial organization (id. at p. 5). She also noted that although the student's "hand strength was good and in-hand manipulation skills were age appropriate [the student] consistently utilized [an] immature and awkward grasp on writing utensils" and "applied heavy manual control" (id. at pp. 5-6). She indicated that the student was unable to isolate his hand movements from his arm or use controlled finger and thumb movements (id.).

According to the district therapist, the student's performance on the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI full subtest) indicated that his visual motor skills were in the below average range (Parent Ex. C at p. 3; Dist. Ex. 2 at p. 6). The student demonstrated difficulty with letter sizing, spacing, and the ability to remain within borders, although he benefited from verbal cues and being presented with a model (Dist. Ex. 2 at p. 6). With regard to sensory processing, the district therapist concurred with the private therapist that the student had vestibular modulation difficulties and difficulty discriminating proprioceptive input (id. at p. 7).



The April 2022 IESP included provider observations and the results of additional testing conducted by the district that also shed light on the student's needs (Parent Ex. C at pp 1-6). The IESP reflected information from a January 2022 teacher report that indicated the student's academic skills were at a pre-kindergarten level (id. at pp. 3-4). According to the IESP, the student's teachers noted that his emergent literacy skills were good, that he was not engaging in formal writing but would occasionally attempt inventive spelling, and that his early numeracy skills were developing and he showed an interest in mathematics (id. at p. 4). The teachers also indicated that the student had good receptive and expressive language skills; however, consistent with the OT evaluations, reported that the student was unable to control his emotions or adapt his behavior as needed throughout the school day (id. at pp. 4, 5). The April 2022 IESP also reflected the results of a March 8, 2022 speech-language evaluation, which indicated the student exhibited strong language skills needed for success in the classroom, but that his behavior impaired his ability to consistently demonstrate them (id. at p. 2). The IESP indicated that based on the student's performance on administered assessments he did not qualify for speech-language services (id. at p. 3).

Next, the April 2022 IESP included the results of a district psychoeducational evaluation (Parent Ex. C at p. 1). According to results from testing using the Reynolds Intellectual Assessment Scale, Second Edition (RIAS-2), the student's cognitive functioning scores fell in the superior range in verbal intelligence; high average range in nonverbal intelligence, composite memory, and composite intelligence; and average range in speeded processing (id.). With regard to academic functioning, according to the Woodcock Johnson Test of Achievement - Fourth Edition (WJ IV-ACH), the scores attained by the student fell in the superior range in calculations; high average range in mathematics; and average range in letter word identification, passage comprehension, reading, applied problems, and spelling (id.).

According to the April 2022 IESP, the results of the RIAS-2 indicated that the student's intellectual functioning was better developed than expected for his age but the IESP also noted that the student presented with significant behavioral difficulties during the assessment and suggested that the some of the variation in his scores was likely due to deficits in attention, motivation, and sustained effort rather than discrete ability (Parent Ex. C at p. 2). In addition, although the student's overall academic performance fell in the average range, the IESP indicated that the student required a high level of prompting and redirection to stay on task (id.).

As noted above, as part of the CSE process, the district also conducted an FBA which provided more specific information regarding the student's interfering behaviors (Dist. Ex. 5). The FBA identified the student's targeted problem behavior as "[o]ppositional/aggressive behaviors" that consisted of physically aggressive behaviors including hitting, kicking, ripping materials, breaking things, outbursts, and tantrums (id. at p. 1). The FBA indicated that physical/health/medical issues served as influencing factors including the student's sensory processing disorder, sensory-based motor disorder/sensory discrimination disorder (id. at p. 3). According to the FBA, antecedents, or situations that seemed to trigger the targeted problem behavior included "[d]emand of or request to student" and "non-preferred social interaction" (id. at p. 4). The FBA indicated that the targeted problem behavior occurred across classes and with various adults (id.). In terms of consequences, the FBA indicated that the student was provided with 1:1 attention and removal from the setting if his behaviors escalated (id.). In addition, the student received verbal reprimands and was often sent to the principal's office (id.). In response



to his behavior, the student gained teacher/adult attention, peer attention, and sensory stimulation and avoided non-preferred activities and tasks (id. at pp. 4-5). With regard to baseline data, the FBA indicated that the student's behavior occurred several times a day, lasted 40-60 minutes, and varied in intensity (id.). The behavior typically began 30 seconds after a demand or event (id.).

According to the April 2022 IESP, the student's management needs included access to therapeutic equipment and activities, a multi-sensory approach and sensory diet, movement breaks, dynamic and preferential seating, "choice time," prompts and reminders, a visual regulation chart, presets, visual supports, charts, modeling, an FBA/BIP, a behavior paraprofessional, and self-regulation tools such as "fidgets" (Parent Ex. C at p. 8).

## **2. Appropriateness of Unilaterally Obtained Services**

After an independent review of the hearing record, I find the evidence therein demonstrates that the parents met their burden to show that the privately obtained OT services were appropriate, but failed to meet their burden to show that the privately obtained SEIT and tutoring services were appropriate. Therefore, as explained below, the parents are entitled to reimbursement for their out-of-pocket expenses incurred for OT services during the 2021-22 school year, but the parent is not entitled to reimbursement for out-of-pocket expenses incurred for SEIT and tutoring services.

### **i. Private Occupational Therapy**

As identified above, Kinetic evaluated the student in October 2021 after he was referred for evaluation by his preschool and pediatrician (Parent Ex. B at p. 1). As described above in detail, the private evaluation identified the student's sensory needs as they related to OT (see Parent Ex. B).

The October 2021 OT evaluation report noted that the student would benefit from OT and recommended that the parents engage a behavioral support specialist to help develop a plan for the student (Parent Ex. B at p. 6). The student began receiving private OT services in November 2021 twice a week for 45 minutes (Parent Ex. E at p. 1).<sup>13</sup> A June 2022 private OT reassessment and progress note, completed by the same private therapist who evaluated the student in October 2021, described the student's progress as "incredible" (id.).

Specifically, the private occupational therapist reported that the student had made "great progress" in vestibular discrimination issues, improvement in his "post rotary nystagmus" and was better able to interpret information about his body "in space" (Parent Ex. E at p. 1). The private therapist noted that the student was able to "move through space" easier, showed "less postural fixing," was now able to "hold his body upright while moving," his nervous system responses had decreased "dramatically," and he was now able to more quickly "return to a regulated state" (id.). According to the therapist, the student was no longer taking excessive safety risks and showed improved control over his body and impulsivity (id.). The student also demonstrated improved head righting and equilibrium responses in several positions, improved primitive/postural reflexes, better coordination, improved antigravity responses, improved balance, and improved functional

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<sup>13</sup> The report indicated that, at times, therapy was inconsistent due to sickness and scheduling conflicts (Parent Ex. E at p. 1).

vision (*id.*). Further, the private therapist reported that the student demonstrated progress in emotional regulation, dealing with transitions and changes in routine, frustration tolerance, and attending to activities that were not self-directed (*id.* at pp. 1-2, 3). The private therapist noted that the student's proprioceptive processing had improved, as he was now able to draw without using excessive pressure, play less roughly with toys and peers, and keep his hands to himself (*id.* at p. 2). The student still exhibited a high activity level but was better able to regulate himself and was now able to stay seated for fine motor activities (*id.*). The private therapist noted that the student also showed decreased hyperactivity and distractibility, improved motor planning, coordination, body awareness, and sequencing skills (*id.* at p. 2-3). She also indicated that the student's fine motor skills had improved as he was now able to demonstrate a proper grasp using a "twist n' write pencil" and slant board and the student's writing, drawing, scissors, and puzzle skills were now age appropriate (*id.* at p. 2).

Based on the above, the evidence in the hearing record shows that Kinetic identified the student's needs and provided appropriate OT services during the 2021-22 school year such that the parents are entitled to reimbursement for all of their out-of-pocket expenses related to those services and no equitable considerations that would disfavor an award to the parent are reflected in the hearing record. As such, the IHO's order is modified to award reimbursement for all out-of-pocket expenses related to OT services for the entire 2021-22 school year.

## **ii. Private Tutoring & SEIT Services**

According to the parent, for the 2021-22 school year the student continued to receive tutoring once per week from the same tutor who had provided him with instruction during the 2020-21 school year (Parent Ex. T at ¶¶ 7, 11). In addition, the student received tutoring services through the Kumon Learning Center (Kumon) (Parent Ex. T ¶ 11). During the Kumon sessions, the student would work on building his "fundamental skills in reading, writing, and math" (*id.*). The parent reported the student made progress with tutoring and could "keep up" with his class curriculum (*id.*).

As for the private SEIT services, the parents alleged that they began to pay out-of-pocket for a SEIT and behavior specialist to push-in to the student's classroom on a full-time basis for the first two weeks of January 2022 and then "for several follow-ups in February 2022" (Parent Ex. T ¶ 10). According to the student's mother, the SEIT/behavior specialist provided individual academic instruction to the student and behavior support to him and his teachers and staff at Ramaz (*id.*).

However, as described above, the student's intellectual and academic skills were average or above average in most areas and there was no indication in the hearing record that the student required academic tutoring to address his needs related to his disability (see generally Parent Ex C). Overall, the district's April 2022 psychoeducational evaluation indicated that the student's intellectual functioning was better developed than expected for his age and his academic performance fell in the average range (see Parent Ex. C at pp. 1-2). The student's verbal abilities were an area of strength, as his ability to complete tasks of verbal analytical reasoning fell in the superior range (Parent Ex. C at p. 2). The student's verbal memory skills fell in the average range and his nonverbal memory skills fell in the superior range (*id.* at p. 2). The student's reading, sight word identification, spelling, and reading comprehension fell in the average range, his calculation

abilities fell in the superior range, and he was able to form letters and write some basic words, but his handwriting was slow and difficult to read (*id.*).

As for SEIT services, although there is evidence in the hearing record that the student had substantial social, emotional, and behavior needs that affected his ability to learn in the classroom (*see* Parent Exs. C; I; S), there is not enough evidence to support a finding that the SEIT services obtained by the parents were appropriate as there is no information concerning what the SEIT provider worked on with the student during the 2021-22 school year or how the provider functioned in the student's classroom. The only information regarding what the student worked on during his SEIT sessions was presented by the parent through affidavit testimony and in the due process complaint notice (*see* Parent Exs. A; T ¶ 10). The same applies for his private tutoring sessions for the 2021-22 school year (Parent Ex. T ¶ 11). According to the parent the student responded well to "intensive 1:1 support he receive[d] from the SEIT and private tutoring" (*id.* ¶ 25). Further, in December 2022 the parents sought an independent neuropsychological evaluation and the resultant report indicated that, "[r]ecently and during the evaluation process," the student began to receive daily full-time support from a behaviorist in the classroom (Parent Ex. H at p. 3). The December 2022 neuropsychological report noted that the student received behavior support in early spring of 2022 for six weeks in which the student "demonstrated notabl[e] improvement" but did not elaborate further on what the student worked on during those six weeks (*id.* at p. 2). Progress alone does not establish that the private services offered were adequate and appropriate education under the IDEA (*see* *Berger v. Medina*, 348 F.3d at 522). There is no evidence that the SEIT and private tutoring services identified the student's needs and then provided services specially designed to address his identified needs (*see* 20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; *Hardison*, 773 F.3d at 386; *C.L.*, 744 F.3d at 836; *Gagliardo*, 489 F.3d at 114-15; *Frank G.*, 459 F.3d at 365). Moreover, the hearing record lacks sufficient information about the services the student received (*see* *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 490–91 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; *L.K.*, 932 F. Supp. 2d at 490 [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; *R.S. v. Lakeland Cent. Sch. Dist.*, 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], *aff'd*, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Based on the following, the parents did not meet their burden to prove that the private tutoring and SEIT services were appropriate for the student during the 2021-22 school year.

### **3. Independent Educational Evaluations**

The parents assert that the IHO failed to address their request for reimbursement of the cost of the private December 2022 neuropsychological evaluation. The district argues that the IHO did address this request when he denied all relief not awarded even if the decision did not explicitly

state that reimbursement for the private December 2022 neuropsychological evaluation was denied.

At the outset, the IHO should have specifically addressed the parents' request for reimbursement for the December 2022 neuropsychological evaluation especially considering that the IHO did address the parents' request to be reimbursed for their privately obtained 2021 OT evaluation (see IHO Decision at pp. 12, 15). The IHO determined that because the April 2022 CSE relied on the 2021 OT evaluation when it formulated the student's April 2022 IESP that the parents were entitled to reimbursement for such evaluation (IHO Decision at p. 12).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

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

According to the parent, the district conducted an OT evaluation on February 23, 2022, a psychoeducational evaluation on March 3, 2022, a speech-language evaluation on March 8, 2022, a classroom observation on March 9, 2022, and an FBA on April 5, 2022 (Parent Ex. A ¶ 4). The student was evaluated by a pediatric neurologist on October 10, 2022, October 24, 2022, November 2, 2022, and November 22, 2022, which resulted in an independent neuropsychological evaluation that was completed in December 2022 (Parent Ex. H at p. 1). There is evidence that staff at Ramaz and the parents were concerned about the student's behavior regulation and his engagement in learning in the classroom and that the December 2022 neuropsychological

evaluation was obtained to seek more information about the student in these areas (see generally Parent Exs. A ¶¶ 2-3, 5, 11; H at p. 1; T ¶¶ 4-7, 13, 22).

In a March 24, 2023 email to the district, the parents noted that the district conducted an evaluation of the student in the spring of 2022 and stated "[d]ue to our disagreement with this evaluation, my husband and I obtained an independent neuropsychological evaluation of [the student] at our own expense" (Parent Ex. K). In their April 2023 due process complaint notice, the parents alleged that the district failed to evaluate the student in all areas of suspected disability and identified the FBA as an evaluation they disagreed with and requested reimbursement for the December 2022 neuropsychological evaluation (Parent Ex. A at p. 8).

In this case, the parents obtained the December 2022 neuropsychological evaluation prior to making a written request to the district for an IEE at public expense (see Parent Exs. A; K; H). The parent stated in her affidavit testimony that the district evaluated the student in March and April 2022 after the parents had requested a district evaluation and that, at the time of the March 2022 district evaluations and the April 2022 FBA, the parents believed that the district evaluations failed to thoroughly assess the student in all areas of his suspected disability (Parent Ex. T ¶ 13). There is no indication in the parent's testimony that the parents contacted the district regarding an IEE prior to the March 2023 email; instead, the parent testified that she was not aware she could request that the district fund an IEE (id. at ¶ 22).

Reviewing the parents' March 24, 2023 email to the district, the parents disagreed with the district's evaluations, but the email did not specifically request the district to fund an IEE at public expense (Parent Ex. K). Instead, the email noted that the parents obtained an evaluation "at our own expense" and attached a copy of the evaluation report for the CSE to consider (id.). Accordingly, the email did not put the district on notice that the parents were requesting district funding for the December 2022 neuropsychological evaluation and instead the district was notified for the first time of the parents' intent to seek district funding for an IEE in the April 2023 due process complaint notice. Additionally, I have concerns with the parents' inclusion, for the first time, of a request for district funding of the December 2022 neuropsychological evaluation in the due process complaint notice.

In past decisions issued by SROs in this office, they have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, they have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) including the observation that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]).

The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist.,

849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at \*2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at \*14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at \*18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];<sup>14</sup> Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]).

As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).<sup>15</sup> My continued study of the judicial and administrative guidance on the topic has confirmed for me that adoption of a change from the previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first) is often warranted. However, in this instance, the parents' March 24, 2023 letter, even without a specific request for district funding, was sufficient to put the district on notice that the parents disagreed with its evaluation and is minimally sufficient to allow the request for funding to be raised in the due process complaint notice in the first instance. Given the lack of any requirement to express disagreement through formal words or phrases, as long as the parents' dissatisfaction with the district's assessment of the student was conveyed to the district in order to give the district an opportunity to defend its evaluation, I find that the parents' March 24, 2023 letter in addition to the parents' due process complaint notice suffices for purposes of the relevant regulations and, given the district's failure to defend its evaluation of the student, the parents are entitled to reimbursement of the costs of the December 2022 neuropsychological evaluation.

In their due process complaint notice, the parents specified that the cost of the evaluation was \$6,500 (Parent Ex. A at p. 11). During the impartial hearing, the district made no argument that the \$6,500 was outside of district cost criteria or that the \$6,500 was excessive.<sup>16</sup> If the district

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<sup>14</sup> The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

<sup>15</sup> The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

<sup>16</sup> When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district

has cost criteria policies with respect to IEEs, it is incumbent on the district to share such policies with parents who seek IEEs and offer such policies as evidence. Thus, because the issue of the cost was not raised by the district, I find that the parents are entitled to be reimbursed for the cost of the independent neuropsychological evaluation in the amount of \$6,500.

Regarding the 2021 OT evaluation, the district argues that the IHO's determination that the parents were entitled to reimbursement for the cost of the 2021 OT evaluation on the sole basis that the April 2022 CSE relied on the evaluation when it formulated the student's April 2022 IESP was in error. The district argues that the parents never disagreed with a district OT evaluation that would require the district to provide or fund an IEE at a public expense. Consistent with the district's argument, there is no indication that the parents disagreed with a district evaluation prior to obtaining the 2021 OT evaluation of the student. However, this does not end the inquiry as the parent's due process complaint notice demonstrates that the parent did not request an OT IEE through the statutory framework but requested reimbursement for all costs incurred in obtaining OT services for the student due to the district's child find violations (see Parent Ex. A at p. 11). This type of relief has been granted in at least one other administrative proceeding at this level (see Application of a Student with a Disability, Appeal No. 20-049 [granting reimbursement for a neuropsychological evaluation based on equities where "the district ha[d] not taken its obligation to evaluate the student seriously for a long period of time"]). As the district does not cite to anything in the hearing record that indicates reimbursement for the OT evaluation was not an appropriate remedy to make up for the district's child-find violation during the 2021-22 school year, the district's appeal must fail. Given the fact that my ultimate determination is that the district did not offer the student a FAPE for the 2021-22 and 2022-23 school years and that there was ample evidence that the private OT the parents obtained for the student was appropriate given the student's unique needs, there is no evidence in the hearing record on this issue that would warrant reversal of the IHO's determination. Accordingly, the IHO's determination will not be disturbed, and the parents are entitled to reimbursement for the 2021 OT evaluation as relief for the district's denial of FAPE for the 2021-22 school year.

#### 4. Compensatory Education

The district appeals from the IHO's determination that the student is entitled to compensatory education in the form of 72 hours of 1:1 OT.<sup>17</sup> The district argues the parents

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has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]; Letter to Petska, 35 IDELR 191 [OSEP 2001]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

<sup>17</sup> The district has not cross-appealed from the IHO's determination that the student was entitled to 48 hours of compensatory individual counseling services (see Answer with Cross-appeal; IHO Decision at p. 15). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (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]).

already unilaterally obtained OT as relief and that the award should be modified to not exceed 54 hours.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at \*5-7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]). One court has recently endorsed a combined award of tuition reimbursement—or in this matter, an award of reimbursement for unilaterally obtained services—



and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at \*5-\*6).

Here, putting aside for a moment the propriety of a combined award, the evidence in the hearing record supports the IHO's determination that the student is entitled to 72 hours of compensatory OT in addition to reimbursement for the private OT obtained.

When calculating the compensatory education award, the IHO determined that the student was entitled to 8 weeks of compensatory education for the 2021-22 school year and 40 weeks of compensatory education for the 2022-23 school (IHO Decision at p. 13). It appears the IHO then used the April 2022 IESP recommendation for three 30-minute sessions per week of OT to determine that the student would have received 72 hours of compensatory OT services during the period for which the IHO found a denial of FAPE (id.; see Parent Ex. C at p. 16). The district correctly argues that the 40-week school year the IHO used for the 2022-23 school year was incorrect and the IHO's calculation should have been based off of a 36-week school year. A 10-month school year consists of 36 weeks (180 school days divided by 5 days per week); if a student attended 12-month programming, then the school year would consist of 42 weeks (i.e., 36 weeks plus 6 weeks during summer) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]). However, considering the determination above that the district did not offer the student equitable services for the entire 2021-22 school year, the student would be entitled to additional OT services, consisting of 72 weeks of services, or 108 hours, for the two-year denial of equitable services less any OT services that the parents unilaterally obtained for the student. While there is evidence that the parents initiated self-help and unilaterally obtained OT services for the student beginning in November 2021 for 45-minutes twice a week, (see Parent Exs. A ¶ 15; B; E; P), and that the student made progress once he began receiving OT (Parent Ex. E at p. 2), it does not negate the fact that if the student was found and referred for special education and the IESP was created prior to the start of the 2021-22 school year, he would likely have been provided with more than the 72 hours of additional 1:1 OT awarded by the IHO. Thus, the IHO determination that the student is entitled to an award of 72 hours of compensatory education to remedy the district's failures, in addition to an award for reimbursement for unilaterally obtained services, is upheld.<sup>18</sup>

## **VII. Conclusion**

As discussed above, the evidence supports a finding that the district did not meet its child find obligations for the entire 2021-22 school year, neither party appealed from the IHO's finding that the district did not implement an appropriate educational program for the student for the 2022-23 school year, and the IHO's awarded relief must be modified in accordance with the discussion above. Additionally, having determined that the district did not meet its burden to defend its evaluation during the impartial hearing, the parents are entitled to reimbursement for the December 2022 independent neuropsychological evaluation.

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<sup>18</sup> Moreover, the parents in their request for review do not allege that the IHO's calculations are erroneous, nor did they put forth an argument that the student needed more compensatory education than what was awarded (see Req. for Rev. at p. 10).

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

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated June 23, 2023, is modified by vacating those portions that ordered the district to implement the student's April 5, 2022 IESP and provide a behavior paraprofessional prospectively until a new IESP is developed for the student; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated June 23, 2023, is modified by reversing the portion which found that the district met its child find obligations during the 2021-22 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the payments made to Kinetic Kids Occupational Therapy, PLLC for the student's 2021-22 private occupational therapy; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents in the amount of \$6,500 for the December 2022 independent neuropsychological evaluation.

**Dated:**            **Albany, New York**  
                         **August 30, 2023**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**