



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-260

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

Appearances:

Gutman Vasiliou, LLP, attorneys for petitioner, by Anthoula Vasiliou, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) did not deny her son an appropriate educational program for the 2021-22 or 2023-24 school years and denied in part her request for compensatory education and an order for independent educational evaluations (IEEs). The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

According to the parent, the student was first evaluated through the Early Intervention Program (EIP) due to concerns regarding his speech development but was not found eligible to receive special education services (Tr. pp. 24-25). The student began attending a general education preschool program in September 2021 at four years of age, and, in November or December 2021, the preschool program contacted the parent due to concerns about the student's behavior, focus, and communication skills (Tr. pp. 24-28).

On April 5, 2022, the parent provided written consent for the district to evaluate the student (Dist. Ex. 1). The resulting evaluations included an April 05, 2022 psychological evaluation, an April 26, 2022 educational evaluation, an April 26, 2022 classroom observation, an April 26, 2022

speech-language evaluation, a May 20, 2022 physical therapy (PT) evaluation, and a May 21, 2022 occupational therapy (OT) evaluation (see Dist. Exs. 3-8).

The Committee on Preschool Special Education (CPSE) convened on June 23, 2022 and found the student eligible for special education services as a preschool student with a disability (Dist. Ex. 9 at p. 2). The June 2022 CSE recommended a 12:1+2 special class placement with the related services of two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and two 30-minute sessions of individual PT per week (id. at p. 21). The June 2022 CSE recommended that the same special education services be provided over the 12-month extended school year during summer 2022 (id. at pp. 1, 22).

The student began the 2022-23 (kindergarten) school year in a 12:1+1 special class at a district public school (Tr. pp. 28-29; see Dist. Ex. 12 at p. 1). According to the parent, at the start of the 2022-23 school year the student's teacher communicated to the parent that the student was struggling with behaviors including screaming and lack of focusing (Tr. pp. 29-30).

Over the months of November and December 2022 and January 2023, the district conducted further evaluations of the student which included a November 14, 2022 OT evaluation of function and participation, a December 1, 2022 psychoeducational evaluation, a December 2, 2022 PT school function evaluation, and a January 4, 2023 speech-language evaluation (see Dist. Exs. 12; 13; 14; 15). The CSE convened on January 13, 2023 and found the student eligible for special education services as a student with autism and recommended a 12-month program consisting of a 6:1+1 special class placement in a district specialized school (Dist. Ex. 16 at pp. 21, 22, 26). The January 2023 CSE also recommended the student receive one 30-minute session of individual counseling per week, one 30-minute session of group counseling per week, two 30-minute sessions of group OT per week, and two 30-minute sessions of individual speech-language therapy per week (id. at pp. 21-22). The CSE further recommended four 60-minute sessions of parent counseling and training per year (id. at p. 22). According to the parent, he remained in his then-current 12:1+1 program while the district sought a placement for him, and he began attending a district 6:1+1 special class in a different public school in March 2023 (Tr. pp. 31, 36). The student attended a district program during summer 2023 (Tr. pp. 33, 38-39).

The parent attempted to enroll the student in a charter school for the 2023-24 school year, however the charter school did not have a 6:1+1 classroom (Tr. pp. 32-33). The district subsequently placed the student in a 6:1+1 program in a district specialized school in a different location than the 2022-23 school year (Tr. pp. 33-35).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 2, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years, raising issues regarding the delay in the district's initiation of evaluations and convening of the CSE during the 2021-22 school year, the sufficiency of evaluations conducted by the district, the district's failure to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), the appropriateness of the present levels of performance and annual goals contained within the June 2022 and January 2023 IEPs, and the district's failure to implement related services during the 2022-23 school year and

delay in implementing the 6:1+1 special class recommended in the January 2023 IEP (*see* Parent Ex. A at pp. 1-5). For relief, the parent requested an interim order for IEEs at public expense, a new IEP for the student with recommendation for a State-approved nonpublic school, district funding of home-based services and assistive technology, and compensatory education (*id.* at pp. 5-6).

B. Impartial Hearing Officer Decision

After a prehearing conference on September 12, 2023, an impartial hearing took place on September 28, 2023 before the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-51; IHO Ex. I). In a decision dated October 16, 2023, the IHO determined that the district failed to implement the student's related services and, therefore, failed to provide the student a FAPE for the 2022-23 school year but found that the district did not deny the student a FAPE during the 2021-22 or 2023-24 school years (IHO Decision at pp. 8-12). The IHO denied the parent's requests for IEEs and prospective placement in an approved nonpublic school but, as relief to remedy the district's failure to fully implement related services for the student during the 2022-23 school year, ordered the district to provide the student with compensatory education (*id.* at pp. 12-18).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and, therefore, the allegations and arguments contained therein will not be recited here in detail. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the district violated its child find obligations or otherwise failed to timely evaluate the student and consider identifying the student as a student with a disability during the 2021-22 school year;
2. Whether the IHO erred in determining that the June 2022 and January 2023 IEPs offered the student a FAPE for the relevant school years;
3. Whether the IHO's order for compensatory education was appropriate; and
4. Whether the IHO erred in failing to order IEEs.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; *see generally* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹

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

VI. Discussion

A. 2021-22 School Year—Timing of the Evaluations and CSE

The parent alleges that the district knew of the student's possible disability during the 2021-22 school year and unacceptably delayed evaluating the student and developing a program for the student within the timeframes set out in State regulations. The district contends that the IHO did not err, arguing that the district did not overlook any clear signs of disability, but rather alerted the parent to concerns within the preschool and timely evaluated the student after receiving consent to evaluate from the parent.

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 or a student's private school 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

¹ 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).

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]). 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]).

Here, the district offered no testimonial evidence during the impartial hearing. The district also did not offer evidence of the referral of the student for special education or a copy of prior written notice provided to the parent. Accordingly, it is unclear when or by whom the student was referred for an evaluation.

The parent testified that the student began attending a general education preschool in September 2021 (Tr. pp. 24-25). The parent stated that "after a couple of months" in November or December 2021 the student was "showing some behaviors in class" and the preschool contacted her and asked if the student "had any kind of problem," to which the parent responded no (Tr. pp. 25, 27). The parent indicated that she had been concerned that the student was delayed in his speech but that, after he was evaluated by the EIP, she was told "once he start[ed] preschool, he w[ould] start speaking" (Tr. pp. 25-26).² However, the parent indicated that the preschool described that the student was engaging in several disruptive behaviors (id.).

While the timing is unclear, the parent testified that the preschool told her that it would send her "some papers" for her to sign so an evaluation could be conducted (Tr. p. 26). The parent reported that she signed the papers and that "it took some time for [the evaluation] to be done[, and [she] kept on calling the school, to see where things [we]re" (Tr. p. 26). She related that the preschool told her that the student's "file was at the [district], that it was not moving a lot, that . . . it was very slow" and that the parent had to be patient (Tr. pp. 26-27).³

The hearing record contains a "consent for evaluation" document signed by the parent dated April 5, 2022 (Dist. Ex. 1).

It appears that in November or December 2021 the exchange the parent had with the preschool precipitated a referral of the student for special education, either from the parent or from the preschool. The delay between this timeframe and the district obtaining the parent's consent for evaluations in April 2022 is unexplained in the hearing record. Further, language in the consent form, directing the parent to not "sign this letter before asked to do so at your first evaluation

² The IHO characterized the parent's testimony as "arguably mitigate[ing]" the concerns raised by the preschool (IHO Decision at p. 10); however, I disagree. The parent explained why she did not have concerns about the student's functioning prior to being contacted by the preschool. There is no evidence that the referral of the student for special education was not pursued or was delayed because of the parent's understanding or explanation of the student's speech related needs.

³ In testifying that she signed papers sent by the preschool, it seems likely that the parent signed a referral form; given the parent's testimony about the delay after she signed the papers, it does not appear that the parent was referring to signing the consent for evaluation because, once that consent form was signed in April 2022, evaluations were conducted almost immediately thereafter (compare Dist. Ex. 1, with Dist. Exs. 3-8).

appointment" (Dist. Ex. 1 at p. 1), could be deemed an attempt by the district to artificially expand its timeline for completing evaluations and developing a program for the student. That is because, 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]).⁴

While the district's consent for initial evaluation form shows that the parent provided consent for the student's initial evaluation on April 5, 2022 (Dist. Ex. 1) and that, therefore, the district timely completed the student's initial evaluation on May 21, 2022, within 60 days of the parent providing consent (Dist. Exs. 3-8), and timely convened the CPSE on June 23, 2022 to determine the student's eligibility for special education services and developed an IEP for the student with an implementation date of July 1, 2022 (Dist. Ex. 9 at p. 2), within 60 school days of the parent providing consent, the district failed to meet its burden to prove when the referral or request for referral of the student took place and whether it obtained the parent's consent in a timely manner after the referral. The district did not rebut the parent's testimony describing her exchange with the preschool and submission of documents in November or December 2021 and, therefore, failed to establish what occurred for approximately four to five months between November or December 2021 and April 2022. The district also did not argue or demonstrate that such a delay did not affect the student's right to a FAPE. Accordingly, I find that the IHO erred in finding that the district did not deny the student a FAPE for the 2021-22 school year.

B. June 2022 and January 2023 IEPs

The district does not appeal the IHO's determination that the district failed to implement the student's IEP, which resulted in the denial of a FAPE for the 2022-23 school year (IHO Decision at p. 8). 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]). However, the parent contends that the IHO erred in failing to find substantive flaws with the IEPs at issue for both the 2022-23 and 2023-24 school years that contributed to the denial of FAPE and support relief beyond that ordered by the IHO. In particular, the parent argues that the IEPs lacked management and behavioral supports for the student or recommendation for a BIP and that the January 2023 IEP included inadequate annual goals and did not include a recommendation for PT.

1. Special Factors—Interfering Behaviors

I first turn to the parent's allegations that the IEPs did not address the student's behavioral needs. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa

⁴ 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]).

Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Speaking to the student's behavior, the parent testified that, during the 2021-22 school year, the student's preschool teacher reported that the student "scream[ed] a lot," didn't follow directions, ripped everything he touched, ran around, left the classroom, and when outside, "tend[ed] to just run away" (Tr. pp. 25, 26). According to the parent, the student could not focus in school, could not have quiet time, ran around all the time, ripped papers and things off the wall, and "couldn't talk" (Tr. pp. 27-28). When the student got mad, "he [threw] himself on the floor, and it [was] very hard for the teachers to make him get up . . . and when they tr[ie]d to do that, he bec[ame] aggressive" (Tr. p. 28). The parent testified that the student scratched one of his teachers, and the teacher told the parent that "his situation [was] serious" (Tr. p. 28).

The April 2022 educational evaluation report related that, based on parent report, the student could not focus, when upset he threw himself on the floor, threw objects, made a mess, hit, bit and spit, and "this behavior last[ed] up to 20 minutes and it occur[ed] throughout the week" (Dist. Ex. 5 at p. 6). The April 2022 educational evaluation report noted that according to the student's teacher the student did not participate in circle time, left the area, walked around the room, and hummed like a train (*id.*). According to the April 2022 educational evaluation report, during center time the student only played with "Magnatiles" and a train at the same table in the morning and afternoon, "engage[d] in repetitive play" and if the teacher attempted to have him play with something different, the student "knock[ed] it over and [threw] himself to the floor" (*id.*). The student had tantrums "during which he [threw] materials, [fell] to the floor, crumble[d] and rip[ped] up papers, scream[ed], and attempt[ed] to leave the classroom," and "this behavior last[ed] up to 25 minutes and it occur[ed] at least three times a day" (*id.*).

The student's June 2022 IEP reflected the teacher's report that the student did not participate during circle time and would leave the area and walk around and hum like a train but did not otherwise describe the student's then-current level of social/emotional development and performance (Dist. Ex. 9 at p. 3). The June 2022 IEP included an annual goal which focused on the student engaging in peer social activities and included taking turns, sharing, interacting appropriately during games, gaining peer attention appropriately, and asking before using another person's belongings (*id.* at p. 15). The June 2022 IEP also included an annual goal for the student to demonstrate age-appropriate skills in a classroom setting, which included making transitions, following directives, quieting after active play, volunteering for tasks in the classroom, cleaning up after play, and expressing anger/frustration in a "non-aggressive manner" (*id.* at pp. 15-16).

Despite the student's behavioral difficulties in his preschool classroom, the June 2022 IEP did not identify any management needs of the student or indicate that the student required strategies, including positive behavioral interventions, to address behaviors that impeded his learning or that of others (Dist. Ex. 9 at p. 4). Regarding the student's need for a BIP, the June 2022 IEP had both the "yes" and "no" boxes checked; however, there is no evidence that a behavior plan was developed (*id.*). When asked if she was aware of a behavior plan in place for the student, the parent responded "no," and added that "[t]here wasn't anything that they showed me that we needed to work on" (Tr. p. 32).

During the 2022-23 school year the student exhibited similar behaviors. According to the November 2022 OT evaluation report, the student was "unable to regulate his emotions," and refused to leave the library with his class, at which time security was called in order to return the student to his classroom (Dist. Ex. 12 at p. 2). Reports from classroom paraprofessionals indicated that the student yelled and ran around the classroom (*id.*). The December 2022 psychoeducational evaluation report reflected that during the evaluation the student exhibited self-directed behavior, struggled to complete non-preferred tasks, was unable to sit for more than 30 seconds, walked around the room, and ran for the door (Dist. Ex. 13 at p. 1). Teacher reports included in the December 2022 PT evaluation report indicated that the student became aggressive with adults when "agitated" and did not follow routine (Dist. Ex. 14 at p. 1). During the January 2023 speech-language evaluation, the student was easily distracted and self-directed, and did not remain seated for more than two to three minutes (Dist. Ex. 15 at p. 1).

The parent testified that the student's teacher communicated that the student was not quiet, did not focus, screamed, and got mad, and according to the parent, "it was a little bit more intense . . . than the previous school year" (Tr. p. 29). The parent further testified that "security had to come, sometimes, to calm [the student] down and put him in a separate classroom, and they had to call [her]" (*id.*). The parent testified that school staff "were telling [her] that they couldn't control [the student]," and that he needed a smaller class (*id.*). According to the parent, "each time, they kept on calling [her] to come and get [the student], because they couldn't control him" (Tr. pp. 29-30). The parent further testified that she had to pick the student up "countless times," and "starting [in] January, February, March, at least two or three times, [she] had to get [the student] from school and take him home" because school staff said that "they could not control him" (Tr. p. 30).

With regard to the student's behaviors, the student's January 2023 IEP related that "due to his volatile behavior" the student was unable to participate in the mid-year i-Ready assessment (Dist. Ex. 16 at p. 3). The January 2023 IEP described that the student needed preferential seating "in close proximity" to the teacher or paraprofessional to allow for redirection, often "talk[ed] to himself and [ran] around while growling," and tended to "throw himself on the floor or into furniture while yelling swear words" (*id.* at pp. 3, 4). The January 2023 IEP noted that the student was "exceptionally attention-seeking" in his then-current 12:1+1 classroom and disrupted the class by repeatedly yelling "shut up" while the teacher was speaking (*id.* at p. 4). The January 2023 IEP noted that the student's teacher had tried "different strategies such as ignoring the behavior, redirection, giving [the student] warnings, placing his behavior card on yellow then moving it to red and using a daily behavior point sheet; however, "these interventions . . . had no impact on [the student's] conduct" (*id.*). When the student "ignored warnings," his teacher called the parent so she could speak to him (*id.*). According to the January 2023 IEP, "when [the student's] mother [was] on the phone, [the student] respond[ed] by crawling underneath desks and hid[ing] behind tablecloths" (*id.*). When the call was over the student's "attention-seeking behavior" would temporarily stop, however "within five minutes [the student] disregard[ed] consequences and continue[d] to interrupt his class" (*id.*). The January 2023 IEP related that "as a last resort, members of the school crisis team [were] called to remove [the student] from his classroom so that others [could] learn. [The student] respond[ed] by hitting staff, throwing furniture, running away, hiding underneath desks and tearing off decorations on the door" (*id.*). He would yell "Help me! Help me!" while being "safely restrained" (*id.*). The student's behavior disrupted learning in his class and neighboring classrooms (*id.*).

The January 2023 IEP noted that "[the student] need[ed] support with positive adult attention when he [was] doing the right things in the classroom such as looking at the teacher when she [was] speaking, being quiet while the teacher [was] speaking and remaining in his seat" (Dist. Ex. 16 at p. 4). According to the January 2023 IEP the student "require[d] frequent positive attention from adults in his classroom to get him to stay engaged without becoming disruptive" (*id.*). The January 2023 IEP noted that the student would receive positive attention every five minutes when he behaved appropriately, gradually increasing the time between reinforcement to every ten minutes (*id.*).

The January 2023 IEP identified the student's management needs, which included behavioral supports such as a highly structured instructional environment with established routines, preferred positive reinforcers, a personalized daily schedule, a personalized communication system to use through the day, transition cues, a token economy and individualized

token board, verbal praise, clear expectations and modeling of expected behavior, and visual supports (Dist. Ex. 16 at pp. 7-8). Despite the student's significant behaviors which resulted in being removed from his classroom and sent home from school, the January 2023 IEP did not identify that the student needed positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others, nor did it indicate that the student required a BIP (id. at p. 8).

While the district asserts that the January 2023 CSE had sufficient information about the student's behaviors to develop the January 2023 IEP, State regulations require that a district conduct an FBA in an initial evaluation for a student who engages in behaviors that impede their learning or that of other students (8 NYCRR 200.22[a]). There is no evidence in the hearing record that this requirement was met for either the May 2022 initial CPSE evaluation or the January 2023 initial CSE evaluation (see Dist. Exs. 2-8; 11-15). Further, until the January 2023 IEP was developed, the student was attending a kindergarten program with an IEP that did not contain any management needs of the student or include behavioral supports for the student (see Dist. Ex. 9). And the January 2023 IEP detailed behaviors that were disruptive and at time resulted in the removal of the student from the school or use of physical restraint (Dist. Ex. 16 at pp. 3-4).. These situations required the district to complete an FBA and develop a BIP for the student (Tr. pp. 30-32; Dist. Exs. 9; 16 at p. 4). In addition, the purpose of completing an FBA is to determine why a student engages in behaviors that impede learning and identify how the student's behavior relates to the environment (8 NYCRR 200.22). In this case, neither the June 2022 IEP, January 2023 IEP nor the evaluative information available to the January 2023 CSE reflected analysis of the function of the student's behavior or how it related to the environment (see Dist. Exs. 9, 11-16).

In light of the above, I agree with the parent that the failure to address the student's interfering behaviors in the June 2022 and January 2023 IEPs resulted in a denial of FAPE to the student for the 2022-23 and 2023-24 school years. Relief is discussed further below but, briefly, because the parent has not requested compensatory education that is tied to her allegations that, during the 2022-23 school year, the student missed instruction due to behavioral issues and removal from the classroom, such as compensatory tutoring to remedy the missed academic instruction (see Tr. pp. 29-32), I will order the district to provide the parent with an IEE in the form of an FBA to evaluate the student's current interfering behaviors and to enable the parent's chosen evaluator to develop a BIP for the student if warranted.⁵

2. Annual Goals

Regarding the parent's argument that the annual goals recommended in the January 2023 IEP were inadequate and failed to include goals related to the student's speech-language needs, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to

⁵ The parent asserts that the IHO also erred in failing to address the parent's concerns about the student's assistive technology needs and request for an assistive technology IEE (Req. for Rev. ¶9). In contrast to the student's need for additional behavior supports in the hearing record and therefore support for an order for an FBA IEE and potentially a BIP, there is little specific evidence in the hearing record showing that the student's AT needs were not addressed by the June 2022 and January 2023 IEPs by, for example the use of a "personalized communication system" (Dist. Ex. 16 at pp. 7-8).

enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the January 2023 IEP shows that the CSE developed approximately 12 annual goals designed to improve the student's ability to: write his first and last name; attend to a table top activity; cut with scissors; use self-regulation strategies; attend to tasks during instruction; remain in his seat; begin a task; raise his hand and wait to be called on; follow one and two step directions; identify and count objects to 20; and add and subtract sets using manipulatives (Dist. Ex. 16 at pp. 10-20). Review of the annual goals shows they relate to the student's areas of need and contain criteria for measurement, methods of measuring progress, and schedules of when they would be determined (id. at pp. 1-7, 10-20).

Speaking specifically to the parent's assertion that the January 2023 IEP lacked speech-language goals, a review of the January 2023 IEP showed that the CSE identified the student had "extreme difficulty understanding receptive language" (Dist. Ex. 16 at p. 3). The January 2023 IEP noted that during the speech-language evaluation, the student was "easily distracted and self-directed . . . could not remain seated for more than [two to three] minutes and did not initiate or engage in conversation" (id.). Additionally, the IEP reflected that "rapport was difficult to establish as the student sat with his back to the examiner" (id.). The student "did not respond to 'wh-' questions and did not follow one and two-step directions" (id.). The January 2023 IEP noted that standardized testing "was attempted and discontinued," and when a speech sample was attempted, the student's responses were "repetitive, out of context and perseverative" and he repeated the same phrase throughout the testing session (id.). The January 2023 IEP specified that speech-language therapy was recommended to target increasing the student's vocabulary and mean length of utterance, labeling and naming skills, play and attending skills, and responses to "wh-" questions about objects, pictures, and routines (id.). The January 2023 IEP identified that speech-language therapy "should help support and increase pragmatic and social skills, and [the student's] communication and language skills to make requests and to be able to communicate effectively to get his needs and wants known and met" (id.).

The district asserts that the annual goals contained in the January 2023 IEP were relevant to the student's expressive and receptive needs. However, the January 2023 IEP did not include annual goals focused on skills identified as areas that speech-language therapy was recommended to address (see Dist. Ex. 16 at pp. 3, 10-20). While many of the goals in the January 2023 IEP required the student to use receptive and expressive language, none of the goal address improving the student's expressive and receptive language or pragmatic language skills.

Nevertheless, courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be

measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Here, I do not find that the annual goals in the January 2023 IEP were so deficient that standing alone they would have prevented the student from making educational progress. Further, as I have already determined that, due to the failure to address the student's behavioral needs, the January 2023 IEP did not offer the student a FAPE, it is not necessary to determine the degree to which the deficiency in the annual goals would otherwise have contributed to such a finding.

3. Physical Therapy

Next, I turn to the parent's assertion on appeal that the IHO erred in determining that the January 2023 CSE appropriately removed PT from the student's recommended services, despite contradicting information in the hearing record. The parent asserts that the IHO "inexplicably credited the [d]istrict's switch in position" and declined to order a PT IEE.

A PT evaluation of the student was conducted on May 20, 2022 as part of his initial CPSE evaluation (Dist. Ex. 7 at p. 1). The May 2022 PT evaluation report described that the evaluation took place in an office at the student's school where there was "enough space for [the student] to move," and his teacher was "present and provided all pertinent information" (id.). The May 2022 PT evaluation report related that the evaluator was able to engage the student "briefly" and he "was able to throw the ball and touched the ball but after that, he did not follow commands" (id.). According to the May 2022 PT evaluation report, the evaluator showed the student how to jump and he "only jump[ed] in place and forward," and "[could not] perform static skills" (id.). The student needed both hands for support to go up and down the stairs and could not alternate feet (id. at pp. 1-2). The May 2022 PT evaluation report reflected the teacher's report that "this was [the student's] normal behavior" and the results "seem[ed] to reflect a valid and optimal estimate of his functioning" (id. at p. 2).

The May 2022 PT evaluation report included gross motor scores from an administration of the Peabody Developmental Motor Scales-Second Edition (Dist. Ex. 7 at pp. 1, 2). The student's gross motor quotient of 57 was below the first percentile (id. at p. 2). According to the May 2022 PT evaluation report, the student could not jump from higher surfaces or over objects, negotiate the stairs without hand support, stand on the tips of his toes without moving, hit a target on the wall with a ball, hop, skip or gallop (id. at p. 3). The May 2022 PT evaluation report indicated that the student would benefit from PT to work on "improving his stability so that he [could] feel more confident to start moving better" (id.).

The student's June 2022 IEP did not report the results of the May 2022 PT evaluation and did not reflect the student's gross motor needs other than noting a gross motor score from the student's educational assessment (see Dist. Ex. 9 at pp. 2-5). Nevertheless, the June 2022 CSE recommended that the student receive two 30-minute sessions of individual PT per week (id. at p. 21). The June 2022 IEP included annual goals and short-term objectives to improve the student's ability to go up and down stairs using a step-over-step pattern without hand support and jump

different surfaces and heights (*id.* at p. 14). As noted above, the PT services recommended in the June 2022 IEP were never implemented (Dist. Exs. 9 at p. 21; see Dist. Ex. 17).

The December 2022 PT school function evaluation, completed as part of the student's initial CSE evaluation, noted that the parent was interviewed by phone and "[had] no concerns regarding [the student's] gross motor skills" (Dist. Ex. 14 at pp. 1, 2). According to the December 2022 PT school function evaluation report, the parent relayed that the student was "very strong" and "[did] not trip or fall at home and ha[d] no difficulty on the stairs" (*id.* at p. 2). During individual assessment, the student was "impulsive and self-directed," and was "unable to follow simple 1-2 motor commands" and therefore, the evaluation was "based on assessment as well as observed gross motor activities performed in gym, on the playground, and over the course of the school day" (*id.* at p. 6). The evaluation included completion of the School Function Assessment (SFA) (*id.* at p. 3). The student's total SFA score was 19/36, with a composite score of 52 percent (*id.* at pp. 3-4; 7). According to the evaluator, the student's score on the SFA "reflect[ed] his need for behavioral support, and [did] not indicate gross motor deficits" (*id.* at p. 7).

The December 2022 PT school function evaluation report further described that the purpose of school-based PT was to provide "support to help students physically participate within the context of [their] educational program," and the student "was observed to have the physical capability to navigate his school environment in a safe and efficient manner" (Dist. Ex. 14 at p. 6). The evaluator reported that the student ambulated independently, "was observed to negotiate his crowded classroom, the hallways, and the stairs without the need for physical assistance," and "demonstrated functional speed and balance in all areas" (*id.* at p. 7). The student had "the physical capability to navigate the classroom, hallways, and staircases of his school building without assistance," and had "sufficient balance and muscle strength to allow him to participate in all physical activities" and therefore, "school-based [PT] services [were] not recommended" (*id.*). The report further noted that "the student [was] physically capable of participating within the range typical of his . . . peers" (*id.*).

The January 2023 IEP includes a thorough description of the student's motor skills that reflects language from the December 2022 PT school function evaluation report and indicated that "[b]ased on clinical observations, interviews, and assessments, school-based [PT] [was] not recommended as [the student] [could] physically navigate his school environment" (compare Dist. Ex. 16 at pp. 5-6, with Dist. Ex. 14). While the results of the May 2022 PT evaluation and December 2022 PT school function evaluation and recommendations of the June 2022 and January 2023 CSEs differed, the hearing record shows that by December 2022 the student demonstrated gross motor skills such as functional balance and stair negotiation skills, and improved ability to jump, skip and gallop that he did not in May 2022 when PT was recommended (compare Dist. Ex. 7 at p. 3, with Dist. Ex. 14 at p. 6). The January 2023 CSE considered current, comprehensive evaluative information and took the student's behavioral and language delays into account when observing the student's functional abilities in his school environment.

Thus, the evidence in the hearing record supports the IHO's determination that the January 2023 CSE appropriately determined that the student no longer required PT.⁶

C. Relief

Based on the foregoing, the district failed to meet its burden to prove that it initiated the student's initial evaluation and review in a timely manner during the 2021-22 school year. In addition to the IHO's finding that the district failed to implement the student's related services during the 2022-23 school year, the hearing record also shows that the June 2022 and January 2023 IEPs failed to address the student's behavioral needs and, therefore, did not offer the student a FAPE for the 2022-23 and 2023-24 school years. The remaining disagreements between the parties relate to the relief ordered by the IHO.

1. Compensatory Education

The IHO compensatory ordered compensatory education to be delivered by district in:

the exact amount of missed related services that were mandated for the student but not provided to the student from the June 2022 IEP's implementation date of July 1, 2022, until the district began providing [counseling . . . OT . . . speech-language therapy] in addition to any periods throughout the 2023 portion of the 2022-23 school year that the student was not provided with the full amount of mandated related services contained within the then active IEP

(IHO Decision at p. 17).⁷ The parent argues that the IHO should have awarded more compensatory education and, further, objects to the portion of the order wherein the IHO found that "nothing in the hearing record leads me to conclude that the [d]istrict itself cannot provide the related services necessary to compensate this student" and requests an order allowing the parent to obtain private compensatory related services from non-district providers (see id.).

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]).

⁶ As a final matter, the IHO also appeared to cite the student's "progress in meeting at least some of his goals" to bolster his findings that the IEPs were appropriate (see IHO Decision at p. 11).; however, the IHO cited an April 2022 evaluation that was conducted before the first IEP was in place (id., citing Dist Ex. 3). Moreover, the student's progress under a particular IEP would be impermissibly retrospective for purposes of assessing the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186–87). Therefore, the IHO's finding that the student's behaviors improved after he began attending the 6:1+1 special class in March 2023 would not be a permissible basis for finding the March 2023 CSE's recommendations to be appropriate (see IHO Decision at p. 11), although, in some instances, it may be relevant to considering appropriate relief.

⁷ It is clear from the decision that the IHO intended to include compensatory PT for the district's failure to implement that related service as mandated by the student's June 2022 IEP (see IHO Decision at p. 10; see also Dist. Ex. 9 at p. 1).

Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 & n.12 [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"]).

In the due process complaint notice, the parent requested compensatory education in specified areas, including speech-language therapy, OT, PT, academic tutoring, counseling, and parent counseling and training (Parent Ex. A at p. 5). As part of the IHO's prehearing conference summary and order, the IHO indicated that the parent should "ensure that any remedy being requested is supported by substantial and detailed evidence or testimony which would allow [the IHO] to craft an appropriate remedy" (IHO Ex. I at pp. 2-3, 7).⁸

On appeal, the parent argues that "[t]he IHO should have ordered an IEE to inform the record to identify meaningful and individualized relief." It is within an IHO's authority to order

⁸ While the district was required under the due process procedures set forth in New York State law to address the parent's request for relief by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524), it is reasonable for the IHO to require the parent, as the party requesting relief, to identify and articulate the relief sought by quantifying a request for compensatory education with reference to specific services deemed necessary to remediate a district's failure to offer the student appropriate services and/or present evidence regarding what may be an appropriate compensatory remedy (see Application of a Student with a Disability, Appeal No. 16-050). The IHO properly utilized the prehearing conference and the prehearing conference summary and order as the vehicle to notify the parent of the IHO's expectations in this regard (see 8 NYCRR 200.5[j][3][xi][a]).

an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

Although in the due process complaint notice the parent did request that the IHO issue an interim order for IEEs (Parent Ex. A at p. 5), during the impartial hearing, the parent's attorney characterized the IEEs as ultimate relief sought in the matter (see Tr. pp. 16-17). In an opening statement, the parent's attorney indicated that, had the IEEs been ordered in the interim, they would have provided "some data on which to base a determination on what the appropriate level of compensatory services would be" (Tr. p. 19). However, during the impartial hearing, the parent's attorney did not request that the IHO rule on the parent's request for an interim order or request an adjournment of the impartial hearing so that IEEs could be completed.⁹ Instead, "with no other data," the parent proposed that the IHO order one hour per week of compensatory counseling, speech-language therapy, OT, and PT "for the next three years, to address the three-year denial of FAPE, which "for a 42-week, 12-month school year that would amount to 126 hours of compensatory services for each of those services, counseling, speech, OT, and PT, at a minimum" (Tr. p. 20). Similarly, on appeal, the parent requests "126 hours" each of compensatory counseling, speech-language therapy, OT, and PT or, in the alternative, requests that the matter be remanded for further proceedings following completion of an IEE (Req. for Rev. at p. 10).

Given the lack of discussion during the impartial hearing, I do not find that the IHO abused his discretion by failing to order IEEs to inform the hearing record. I find the IHO's determination that the number of compensatory hours should be equal to the unimplemented related services during the 2022-23 school year to be correct and sufficient to remedy the district's implementation failures for that school year. In addition, as described above, the district failed to offer evidence regarding the referral of the student for special education or any communications or interactions with the parent or the student until April 2022, and therefore, given the parent's un rebutted testimony regarding the initiation of the process in November or December 2021, I find relief is warranted to address an approximate five-month delay. Accordingly, in addition to the make-up services related to the 2022-23 school year, the district will be required to provide the student with 20 hours each of compensatory counseling, speech-language therapy, OT, and PT related to the 2021-22 school year. Because an award of compensatory education should place the student in the position that he would have been in had the district acted properly, and the primary denial of FAPE in this matter lies in the delays that took place during the 2021-22 school year and the failure

⁹ If some discussion of the request for an interim order took place during the prehearing conference, it was not memorialized in the IHO's prehearing conference summary and order (see IHO Ex. I). Further, there is no indication that the parent advised the IHO of any omission in the prehearing conference summary or objected to the order as the order permitted (id. at p. 4).

to implement related services during the 2022-23 school year, an hour for hour accounting and order is appropriate.¹⁰ As set forth above, the district also failed to conduct an FBA or develop a BIP for the student. However, because the parent has not requested any academic services or specifically articulated other compensatory education sought that would remedy these lapses, I will instead order district funding of an independent FBA and a BIP.

As a final matter related to compensatory education, the parent argues that the IHO erred in ordering that the district should provide the compensatory related services (see IHO Decision at p. 17). The parent disputes the IHO's finding that there was "nothing in the hearing record that le[d] [him] to conclude that the district itself c[ould not] provide the related services necessary to compensate this student" (*id.*). While the parent is correct that the district's failure to implement any related services for the student from the time of the June 2022 IEP until after the development of the January 2023 IEP is cause for concern, there is no dispute that the district has been delivering related services to the student since early 2023 (Dist. Ex. 17). Accordingly, there is no basis in the hearing record to disturb the terms of the IHO's equitable award. The parties are free to agree to other delivery arrangements if the district becomes unable or unwilling to deliver the compensatory award or the parent could pursue enforcement.

2. Independent Educational Evaluations

On appeal, the parent asserts that the IHO erred failing to order "an IEE" and requests an order for the district to fund independent evaluations in the form of a neuropsychological evaluation, a bilingual speech-language therapy evaluation, as assistive technology evaluation, an OT evaluation, a PT evaluation, and an FBA from specific evaluators at expressed rates (see Req. for Rev. ¶¶ 4-6). The district asserts that the IHO's denial of the IEEs should be affirmed, because the IHO correctly determined that raising an IEE request for the first time in a due process complaint notice is not appropriate.

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]).

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

¹⁰ The parent contends that the IHO erred in relying on a quantitative approach by ordering missed services hour for hour and should have, instead, engaged in a more qualitative approach; however, the parent's proposed relief is calculated based on a quantitative approach.

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]). 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]).

In the due process complaint notice, the parent did not request the IEEs based on her disagreement with district evaluations but, instead, requested an interim order for publicly funded IEEs in order to inform the hearing record (see Parent Ex. A at p. 5). As discussed above, the IHO did not abuse his discretion in not issuing an interim order. However, even assuming that the IEE request in the due process complaint notice could be interpreted as a request for IEEs at public expense based on disagreement with district evaluations, as the IHO found, there is nothing in the hearing record suggesting that the parent requested an IEE prior to the request found in the due process complaint notice. In testimony, the parent stated that, when she received the initial set of evaluations conducted by the district, she had disagreements with them but did not communicate any disagreement to the district at that time (Tr. pp. 39-40). In the August 2023 due process complaint notice the parent also does not express any disagreement with any specific district evaluation, but does express disagreement with the district's failure to conduct an FBA or an assistive technology evaluation (Parent Ex. A at pp. 2-6).

In past decisions SROs 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, SROs 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) and observed 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];¹¹ 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 (Trumbull, 975 F.3d 152, 168-69 [2d Cir. 2020]).¹² Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed 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 (see, e.g., Application of a Student with a Disability, Appeal No. 23-081). I see no reason to depart from this trend.

Thus, I concur with the IHO's finding that the bulk of the request for district funding of IEEs must be denied because the parent has not disagreed with any specific district evaluations and raised the request for IEEs for the first time in a due process complaint notice rather than directly requesting an IEE from the district and allowing the statutory process to result (see IHO Decision at pp. 12-15).

With that said, during the impartial hearing, the district agreed to fund IEEs of the student in the form of a speech-language evaluation, an OT evaluation, and a PT evaluation (Tr. pp. 11-13; see IHO Decision at p. 14). Moreover, as set forth above I have ordered the district to fund an independent FBA of the student, potentially followed by a BIP for the student as part of the remedy for the denial of FAPE that occurred. The remainder of the parent's requested IEEs are denied.

VII. Conclusion

Based on the foregoing, the district failed to meet its burden to prove that it timely responded to a referral of the student for special education during the 2021-22 school year. In addition to the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year based on the district's failure to implement the student's related services during the 2022-23 school year, the evidence in the hearing record also shows that the June 2022 and January 2023 IEPs failed to address the student's behavioral needs thereby denying the student a FAPE for the 2022-23 and 2023-24 school year. For relief, in addition to the make-up services awarded by the IHO, additional compensatory related services are warranted related to the 2021-22 school year and, further, the district will be required to fund an independent FBA.

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

¹¹ 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.

¹² 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" (975 F.3d at 169).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 16, 2023 is modified by reversing those portions which found that the district did not deny the student a FAPE for the 2021-22 and 2023-24 school year;

IT IS FURTHER ORDERED that, in addition to compensatory education awarded by the IHO, the district shall provide an additional bank of 20 hours of compensatory education counseling, 20 hours of speech-language, 20 hours of OT, and 20 hours of PT related services;

IT IS FURTHER ORDERED that the district shall provide the parent with an IEE in the form of an FBA and a BIP if required from an evaluator of the parent's choice at the amount of \$4,125 as requested in the request for review; and

IT IS FURTHER ORDERED that the compensatory education services awarded herein shall expire three years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
 January 17, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER