



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-269

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

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Michael Gilberg, Esq., attorney for respondents

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2020-21 school year and for the costs of a private neuropsychological evaluation. The parents cross-appeal from that portion of the IHO's decision that found that the district offered the student an appropriate educational program for the 2021-22 school year and denied their request to be reimbursed for their son's tuition costs at the Marvelwood School (Marvelwood) for the 2021-22 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The student has received diagnoses of autism spectrum disorder (autism), attention deficit hyperactivity disorder (ADHD), specific learning disorder with an impairment in reading (dyslexia), and specific learning disorder with an impairment in written expression (Dist. Exs. 5 at p. 1; 9 at p. 1). For the time

period relevant to this appeal, the student has been found eligible for special education services as a student with a learning disability (Dist. Exs. 4 at p. 1; 9 at p. 1).¹ A CSE convened on June 8, 2020 and reconvened on August 27, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Dist. Exs. 4; 19 ¶¶ 13-14, 19).² For the 2021-22 school year, the CSE convened on May 5, 2021 to develop an IEP (see generally Dist. Ex. 9).

In an amended due process complaint notice, dated November 17, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (see Dist. Ex. 1).³ In particular, the parents argued that the programs recommended for each school year failed to offer the student "multisensory instruction in a small group environment" (id. at p. 2). The parents also expressed concern about the "peer models" in the special classes recommended for the student (id.). Specific to the 2021-22 school year, the parents alleged that the IEP was "essentially the same" as the IEP for the 2020-21 school year despite the participation of the private evaluator (id.). The parents indicated that "these IEPs look good on paper but in their experience with the district they were never properly implemented" (id.).

For the 2020-21 school year, the parents alleged that the program at Eagle Hill was appropriate for the student as he had a language-based learning disability, and the school allowed him to make progress (Dist. Ex. 1 at p. 3). In connection with the 2021-22 school year, the parents alleged that Marvelwood was an appropriate unilateral placement as it provided the student with intensive Orton-Gillingham instruction (id. at p. 4). For both school years, the parents alleged that they cooperated with the district and that equitable considerations weighed in favor of tuition reimbursement (id. at p. 6). Furthermore, the parents sought reimbursement for a private neuropsychological evaluation obtained in June 2020, because the district failed to conduct a reevaluation of the student (id. at pp. 4-5).

Three separate prehearing conferences were held on October 12, 2022, November 17, 2022, and January 26, 2023 (Oct. 12, 2022 Tr. pp. 1-25; Nov. 17, 2022 Tr. pp. 26-39; Jan. 26, 2023 Tr. pp. 40-54).⁴ An impartial hearing convened on March 9, 2023 and concluded on May 3, 2023

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

² The CSE reconvened in August 2020 to discuss, for math, recommending placement for the student in either a special class or a general education class with integrated co-teaching (ICT) services (Dist. Ex. 4 at p. 1). The August 2020 IEP was the operative IEP in place at the time of the parents' placement decision for the 2020-21 school year (see *Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S.*, 990 F.3d 152, 173 [2d Cir. 2021]; *R.E.*, 694 F.3d at 187-88). Therefore, for purposes of this appeal, only the August 2020 IEP is discussed.

³ The parents initially filed a due process complaint notice on August 28, 2022 and, upon agreement of the parties, the parents filed the amended due process complaint notice on November 17, 2022 (Dist. Ex. 1 at p. 1).

⁴ The transcripts of the prehearing conferences were not consecutively paginated with the remainder of the transcripts; therefore, for purposes of this decision, the cites to the prehearing conferences will be preceded by the hearing date.

after five days of proceedings (Tr. pp. 1-720).⁵ In a decision, dated October 27, 2023, the IHO determined that, for the 2020-21 school year, the district failed to offer the student a FAPE because it failed to pursue parental consent for reevaluation of the student; Eagle Hill was an appropriate unilateral placement for the student; and equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement at Eagle Hill (IHO Decision at pp. 56-60, 69-72, 77). The IHO found that, for the 2021-22 school year, the May 2021 IEP accurately reflected the student's needs, adopted recommendations of the private neuropsychological evaluation, and recommended an appropriate program (*id.* at pp. 61-69). Consequently, the IHO denied the parents' request for tuition reimbursement at Marvelwood (*id.* at p. 77). The IHO found that the parents were entitled to reimbursement for the private neuropsychological evaluation (*id.* at pp. 74-77). Lastly, the IHO directed the parents to provide the district consent to reevaluate the student for the 2024-25 school year and directed the district to, thereafter, convene a CSE meeting to develop an IEP for the student for the 2024-25 school year (*id.* at pp. 77-78).

IV. Appeal for State-Level Review

The district appeals and the parents cross-appeal. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer and cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here in detail. Briefly, the district appeals from the IHO's findings that it failed to offer the student a FAPE for the 2020-21 school year, that Eagle Hill was an appropriate unilateral placement, that the district should reimburse the parents for the cost of the private neuropsychological evaluation, and that equitable considerations warranted an award of tuition reimbursement for Eagle Hill. In connection with the 2020-21 school year, the district asserts that the IHO erred in finding that the district was required to initiate due process to compel the parents to consent to the reevaluation. Additionally, the district asserts that the IHO failed to consider the substance of the August 2020 IEP in determining whether the district offered the student a FAPE for the 2020-21 school year.

In their cross-appeal, the parents assert that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year, alleging that the IHO failed to examine if the annual goals included in the May 2021 were appropriate or sufficient or if the class profile of the proposed classroom for the 2021-22 school year was appropriate.

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]).

⁵ The transcripts for the five impartial hearings beginning on March 9, 2023 are consecutively paginated; therefore, the transcript cites for those proceedings will not be preceded by the hearing date in this decision (Tr. pp. 1-720).

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]).⁶

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

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

VI. Discussion

A. 2020-21 School Year

1. Consent for Reevaluation

The IHO found that the district "recognized" that the student needed to be reevaluated, but the parents did not provide consent to the district for the reevaluation (IHO Decision at p. 60). The IHO found that the district had an "affirmative duty" to reevaluate the student and the district breached its "affirmative duty" to reevaluate the student and, as a result, there was insufficient evaluative information available to the August 2020 CSE which resulted in a "deficient" IEP and

⁶ 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).

deprived the student of a FAPE (id.). In his analysis the IHO cited to federal and State regulations for the initial evaluation of a student (id. at pp. 57-58). The IHO found that in this case the "requested evaluation" was not "characterized" as an initial evaluation, however, the IHO opined that the fact it was not an initial evaluation did not void "the remedies that the school district could have pursued to secure an evaluation of the student" (id. at p. 58). For that reason, the IHO found that it was mandatory for the district to pursue due process to override the lack of parental consent for the reevaluation (id. at p. 60).

The district asserts that the IHO erred in determining the district failed to offer the student a FAPE for the 2020-21 school year based on the district not using the consent override procedures to reevaluate the student. The district also argues that the IHO "ignored" the language of the State regulations related to when a parent refuses to consent for a reevaluation and use of due process in obtaining consent.

Federal and State regulations provide that parental consent is not required to conduct a reevaluation if the district can demonstrate that it "made reasonable efforts to obtain such consent," and the student's parent "failed to respond" (34 CFR 300.300[c][2]; see 8 NYCRR 200.5[b][1][i][b]). Federal and State regulations also permit the use of consent override procedures, specifically through due process, if the parent refuses to consent to a reevaluation (34 CFR 300.300[c][1][ii]; 8 NYCRR 200.4[a][8]; 200.5[b][3]). However, a district does not violate its obligations to conduct an evaluation or reevaluation if it declines to pursue the reevaluation (34 CFR 300.300[c][1][iii]; 8 NYCRR 200.5[b][3]).

Where a student is placed in a private school by their parents, a district cannot rely on the consent override procedures because federal regulations further provide that:

- (i) [i]f a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and
- (ii) [t]he public agency is not required to consider the child as eligible for services under §§ 300.132 through 300.144.

(34 CFR 300.300[d][4]; see 8 NYCRR 200.5[b][7]).

Leading up to the August 2020 CSE, the district attempted on several occasions to obtain consent to reevaluate the student, but the parents did not provide consent (see Dist. Ex. 19 ¶ 10). Beginning on December 20, 2019, the district sent the parents a prior written notice requesting consent to evaluate the student in preparation for the 2020-21 annual review (Dist. Exs. 2 at pp. 1-3; 19 ¶ 10). The district sought to obtain the following in connection with the reevaluation: psychological reevaluation, educational reevaluation and observation, speech-language reevaluation, social history update, and medical health records (Dist. Ex. 2 at p. 1). Since the district did not receive a response, the district again sent prior written notice to the parents on January 13, 2020 and January 29, 2020 (Dist. Exs. 2 at pp. 4-6; 19 ¶ 10). The parents did not

respond (Dist. Ex. 19 ¶ 10). In an email to the district's director of pupil personnel services (PPS director), dated February 5, 2020, the student's mother stated that she received a request from the district to "schedule some testing for [the student] as part of the re-evaluation process" (Parent Ex. B at p. 2). The mother further stated in her email that she wanted "to use the same evaluators from past testing for continuity" and stated "[a]s you may recall, [the private neuropsychologist] did his last educational evaluation" (*id.*). Moreover, the parent recognized that the district was seeking to reevaluate the student in the area of speech-language, as his last evaluation was on May 25, 2017 (*id.*). Lastly, the mother stated that she would forward the social history update when it was completed (*id.*). After a series of back-and-forth emails to schedule a time to speak, on February 24, 2020, the district's PPS director apologized that one of the mother's emails "went into SPAM" but that the district would begin the speech-language evaluation (*id.* at p. 1).⁷ She also inquired of the parents when to expect the neuropsychologist's evaluation to determine if the district needed to conduct further evaluations of the student (*id.*). On March 10, 2020, the district sent another prior written notice requesting consent for reevaluation of the student (Dist. Exs. 3 at pp. 1-3; 19 ¶ 12). The March 2020 prior written notice "contemplated that the [parents] would provide a privately obtained neuropsychological evaluation and the [d]istrict would conduct supplemental testing" (Dist. Exs. 3 at p. 1; 19 ¶ 12). In her direct affidavit testimony, the district PPS director stated that the parents still did not sign a consent for a reevaluation of the student (Dist. Ex. 19 ¶ 12). After the June and August 2020 CSE meetings, the district continued to seek parental consent to reevaluate the student and sent the parents a prior written notice on September 17, 2020 requesting consent to reevaluate the student (Dist. Exs. 7 at pp. 1-2, 5; 19 ¶ 27). Having received no response from the parents, again on October 9, 2020 and November 5, 2020, the district resent a prior written notice to the parents (Dist. Exs. 7 at pp. 3-5, 7-9; 19 ¶ 27). There was no response from the parents (Dist. Ex. 19 ¶ 27). An email was sent to the parents on December 16, 2020 to follow-up on consent for the reevaluation and the student's mother responded that she already sent the consent and stated it was attached to the email (Dist. Ex. 22 at p. 1).^{8,9}

Based on the above quoted provision of the regulations, the IHO mistakenly found that the district was required to utilize due process to override the parents lack of consent to a reevaluation; to the contrary, the regulations explicitly permit the district to decline to pursue that option (34 CFR 300.300[c][1][iii]; *see* 8 NYCRR 200.5[b][3]). Moreover, while perhaps the district could have pursued reevaluation of the student after documenting its reasonable efforts to obtain the parents' consent, the fact that the student was not physically present in a district public school would make such an effort untenable. Based on the lack of consent from the parents and the district's ability to decline proceeding with the consent override process the district was not

⁷ There is no indication in the hearing record whether the district thereafter conducted a speech-language evaluation.

⁸ The email chain provided by the district in evidence shows that there was an attachment to the email labeled in part "2020 report" but the exhibit does not contain the attachment to that email (Dist. Ex. 22 at pp. 1-2). The labeling of the attachment as a "report" does not seem to indicate that it was a signed consent; however, it is unclear what was attached to the email and neither of the parties offered a signed consent for reevaluation form into evidence (*see* Dist. Ex. 7 at p. 5).

⁹ On October 22, 2020, the parent did provide the district PPS director consent to observe the student at Eagle Hill virtually (Parent Ex. G). The district PPS director stated that during the May 2021 CSE meeting, she observed the student while he was in math class at Eagle Hill (*see* Parent Ex. C).

obligated to conduct an evaluation (34 CFR 300.300[c][1][iii]; see 8 NYCRR 200.5[b][3]). Additionally, to the extent the student was parentally placed, the district may not have had the consent override procedures available to it and may have been within its right to treat the student as not eligible for special education (34 CFR 300.300[d][4][ii]; see 8 NYCRR 200.5[b][7]).¹⁰ Nevertheless, the district went forward to develop an IEP for the student based on available information.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also *D.B. v. New York City Dep't of Educ.*, 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

The hearing record shows that, in developing the student's IEP for the 2020-21 school year, the CSE relied on the results of standardized testing conducted in 2016 and 2017, as well as progress reports from Eagle Hill to determine the student's educational needs (Tr. pp. 205-07; Dist. Ex. 4 at pp. 3-6; see Dist. Exs. 3A; 19 ¶ 13). As noted below, the parents do not allege that the description of the student's needs in the August 2020 IEP, based upon these sources of information, was inaccurate or incomplete. For that matter, the parents do not materially allege that the August 2020 IEP was inappropriate, indicating in their due process complaint notice, instead, that "these IEPs look good on paper but in their experience with the district they were never properly implemented" (Dist. Ex. 1 at p. 2). The evidence in the hearing record demonstrates that the CSE had sufficient information before it to determine the student's present levels of performance; accordingly, even if the lack of updated evaluations had been attributable to the district's failure to pursue the evaluation rather than the parents' lack of consent, it would not support a finding that the resultant IEP was lacking or that the district denied the student a FAPE.

In finding that the district denied the student a FAPE for the 2020-21 school year, the IHO wholly relied upon his erroneous determination that the district was required to pursue due process to override the parents' lack of consent for the reevaluation of the student. Therefore, the IHO failed to analyze the substantive portions of the August 2020 IEP, which the district argues was in error.¹¹ Taking this into account, I must determine what issues are properly before me.

¹⁰ Regulations acknowledge this difficulty in making it impermissible for a district to pursue the consent override process when a student is home schooled or placed in a private school by the parents at their own expense (34 CFR 300.300[d][4]; see 8 NYCRR 200.5[b][7]).

¹¹ It is entirely unclear why the IHO spends almost four pages of his decision discussing the composition of the CSE when the parents did not allege that any required members of the CSE were not present (IHO Decision at pp. 51-54, 61; see Dist. Ex. 1). In addition, the IHO quoted an outdated version of State regulations and, therefore,

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Reviewing the parents' due process complaint notice reveals that the parents did not make specific allegations about the present levels of performance, annual goals, or supports for management needs set forth in the IEP (Dist. Ex. 1 at p. 2). Aside from broad assertions of the parents' disagreement with the IEPs, the parents' specific allegations directed at the August 2020 IEP included that the student "require[d] [a] school specialized in language-based learning disabilities with multisensory instruction in a small group environment," which the district's recommended program did not provide, and that the parents had concerns with the class profile of the classroom in which the district proposed to implement the August 2020 IEP (*id.*). Accordingly, I will conduct an independent review of the evidence in the hearing record to determine if the district offered the student a FAPE for the 2020-21 school year focusing on the special class and school recommendations and the degree to which the CSE was required to or did recommend multisensory instruction. However, any allegations which were not included in the due process complaint notice and which the parents do not allege, through their cross-appeal, that the IHO erred in failing to address, will not be discussed, including issues pertaining to annual

misstated the requirements regarding an additional parent member (*id.* at pp. 52-53). The IHO stated that an additional parent member is required unless a parent waives the attendance; however, State regulation requires the attendance of a parent member only "if specifically requested in writing by the parent of the student, the student or by a member of the committee at least 72 hours prior to the meeting" (8 NYCRR 200.3[a][1][viii]). Ultimately, the IHO does not find that the composition of the CSE denied the student a FAPE so the erroneous analysis is harmless in this instance; however, the IHO is reminded that he should not reach issues *sua sponte* that are not in dispute, and he should ensure that the regulatory provisions to which he cites are current.

goals and the district's provision to the parents of a copy of the August 2020 IEP, which the parents reference in their answer but not as part of their cross-appeal.^{12, 13}

¹² While the parents cross-appeal the IHO's determination that the district offered the student a FAPE for the 2021-22 school year, they do not interpose a cross-appeal alleging that the IHO erred in failing to reach any claims pertaining to the 2020-21 school year. The parents were not aggrieved by the IHO's determination that the district denied the student a FAPE for the 2020-21 school year; however, when State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may effectively have to defend themselves in an appeal and that this might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, through the district's service of the notice of intention to appeal and case information statement, the parents were on notice that the district intended to appeal from aspects of the IHO's decision (see Dist. Notice of Intention to Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parents to assert in a cross-appeal any alternative bases in support of their allegation that the district failed to offer the student a FAPE for the 2020-21 school year (8 NYCRR 279.8[c][4] [providing that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]). As the parents did not avail themselves of the opportunity to cross-appeal from the IHO's failure to address specific claims, those claims are not a proper subject of this appeal. However, as set forth above, I will address the narrow issues raised in the due process complaint notice out of an abundance of caution but will not expand the scope of review to other issues mentioned in the parent's answer but not specifically cross-appealed.

¹³ Even if the issue regarding the district's provision to the parents of a copy of the August 2020 IEP had been properly raised in the due process complaint notice, in their answer, the parents do not state what, if any, harm resulted from the alleged untimely provision of the IEP. A district must ensure that the parents of a student with a disability are provided with a copy of their child's IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]) and with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). However, a failure to provide a copy of the IEP, the prior written notice, or other educational records is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). For example, evidence that the parents attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 226 [S.D.N.Y. 2014] [finding that the failure to provide the parents with a copy of the IEP prior to start of school year denied a FAPE where the school to which the district assigned the student to attend relied on parents to provide it with students' IEPs so that the failure resulted in an impediment to the student receiving a FAPE at the assigned school]). Here, the parents participated in the August 2020 CSE meeting and were provided prior written notice summarizing the August 2022 CSE's recommendations (Dist. Exs. 4 at p. 1; 6 at pp. 3-4). Thus, assuming arguendo that the district did not timely provide the parents with the August 2020 IEP, such violation is not a "per se" denial of FAPE as asserted by the parents.

2. August 2020 IEP

a. Student's Needs

The student's needs are not in dispute on appeal; however, a brief review is necessary to discuss the appropriateness of the August 2020 CSE's recommendations.

The August 2020 IEP indicated the student's reading "comprehension [was] enhanced when he engage[d] in specific active reading strategies such as background building before reading, chunking and stop-think and responding while reading, and post-reading reflection and summarization"(Dist. Ex. 4 at p. 5). In addition, due to his strong verbal skills, the student benefitted from opportunities for in-class discussion with "teacher guidance to keep his comments on topic" (id.). The IEP noted that the student's decoding skills had improved, which "helped him move on to target comprehension skills" and although the student sometimes "ma[de] substitution and pronunciation errors" during word reading, "[t]hese errors d[id] not seem to negatively impact his comprehension" (id.). The IEP indicated that the student's needs included the ability to restate the main idea and make inferences in response to a text he had read, and word reading accuracy (id. at p. 6).

In math, the August 2020 IEP indicated the student "benefit[ed] from using a structured approach to problem solving that include[d] identifying the question, determining relevant information, making a plan, and solving" (Dist. Ex. 4 at p. 5). The student "use[d] a calculator to facilitate computational accuracy" and was aided by "guided practice, allowing him to ask clarifying questions, followed by independent practice using a study guide" (id.). As reported in the August 2020 IEP, the student's teachers indicated their goal was to have the student "consistently perform checks of his answers to ensure accuracy" (id.).

Turning to writing, the August 2020 IEP indicated that direct questioning, whole class discussions, and visuals assisted the student with eliciting ideas (Dist. Ex. 4 at p. 6). In addition, the use of graphic organizers helped the student to sequence and develop paragraphs (id.). The IEP noted that the student's writing in response to a text reflected his tendency to refer to his background knowledge rather than the details of the text (id.).

Next, in terms of study skills, the IEP stated that notetaking was a challenge for the student, and he required direct teacher assistance with notetaking including reminders to effectively use "the hidden curriculum" and time management strategies he had learned (Dist. Ex. 4 at p. 6).

With regard to the student's social skills, the August 2020 IEP indicated that in most classes he was able to have spontaneous and meaningful interactions, implement social problem-solving strategies, respond to others in discussion, and manage group interactions (Dist. Ex. 4 at p. 6). But the student also required "support with managing impulsivity in social conversation as he tend[ed] to interrupt and make off-topic comments" (id.). The IEP stated that the student needed to demonstrate the ability to examine social environments using verbal, nonverbal, and situational clues to inform the appropriateness of his behaviors (id. at pp. 6-7). In addition, the student needed to improve his active listening skills (id. at p. 6). The IEP noted that the student had "high activity levels and sensory seeking behaviors" and that, in order to help with his attention to tasks, he needed movement breaks and flexible seating (id.). In terms of the student's physical development,

the IEP stated that he needed to develop self-regulation skills and improve his attention to tasks because of his "high activity levels and sensory sensitivities" (*id.* at p. 7).

The student's management needs as detailed within the August 2020 IEP included "support with breaking down tasks into manageable chunks, and previewing of materials to increase his understanding" (Dist. Ex. 4 at p. 7). In addition, the management needs included a recommendation that the student receive a copy of class notes, visual cues, checks for understanding, breaks for movement, "access to sensory tools," flexible seating, graphic organizers, access to technology supports, as well as counseling and speech-language therapy (*id.*).

Annual goals developed by the CSE addressed the student's deficits in reading comprehension and writing. According to the school psychologist, the CSE used anecdotal reports provided by the student's parents and teachers at the August CSE meeting, as well as the student progress report from Eagle Hill, to develop the student's IEP goals and discuss recommendations for programming (Tr. p. 210). She testified that based on her recollection the parents and Eagle Hill staff members assisted in developing the annual goals for the student (Tr. p. 212). She did not recall the parents or Eagle Hill staff objecting to the annual goals at the CSE meeting or recommending additional goals that the CSE refused to add (Tr. p. 217-18). As noted above, the August 2020 IEP indicated that the student's needs included "word reading accuracy" but also noted that word reading errors did not appear to negatively impact his reading comprehension (Dist. Ex. 4 at pp. 5, 6).

b. 12:1+1 Special Class

Turning to the parents' claim that the August 2020 IEP did not offer a program that specialized in language-based learning disabilities with multisensory instruction in a small group environment, initially, as the August 2020 CSE did not have a copy of the June 2020 neuropsychological evaluation before it (*see* Tr. pp. 262-64, 297; Dist. Ex. 5), it is unclear that there were specific recommendations for this type of setting or supports before the CSE, and, as it was not available to the CSE, the neuropsychological evaluation may not be relied upon to invalidate the IEP (*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"]; *see also J.M. v New York City Dep't of Educ.*, 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; *F.O. v New York City Dep't of Educ.*, 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). Moreover, a review of the IEP reflects that it did offer small group opportunities and supports that addressed the student's need for multi-sensory instruction and that the recommendations of the CSE were specially designed to enable the student to make progress.

At the time of the June and August 2020 CSE meetings, the student was attending Eagle Hill (*see generally* Dist. Ex. 3A). In the December 2019 Eagle Hill progress note, the student's Eagle Hill biology teacher reported that she employed a multimodal approach to learning that incorporated text, study guides, lectures, activities, and visual aids that matched the needs and

abilities of the student (Dist. Ex. 3A at p. 10). No other teachers reported using a multimodal or multisensory approach (see id. at pp. 1-9, 11-17).

To address the student's needs as described by his parents and teachers, the August 2020 CSE recommended that the student attend a 12:1+1 special class for English language arts (ELA), social studies, science, and math, as well as resource room once daily (Dist. Ex. 4 at p. 10).¹⁴ In addition, the CSE recommended that the student receive two 30-minute sessions per week of group (5:1) speech-language therapy, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of group (5:1) counseling (id.). The CSE also recommended the following modifications and accommodations: break down tasks, refocusing and redirection, visual cues, check for understanding, directions clarified, frequent breaks, modified curriculum, books on tape or other recording device, modify written materials, preview materials, graphic organizers, copy of class notes, preferential seating, and sensory strategies (id. at pp. 11-12). Access to a word processor and specialized software to assist the student with writing were also recommended by the August 2020 CSE, as was an occupational therapy consultation twice per month as a support for school personnel on behalf of the student (id. at p. 12).

In her affidavit, the district PPS director testified that the August 2020 IEP "offered the [s]tudent the opportunity to make meaningful progress" and was developed based on parent and teacher input (Dist. Ex. 19 ¶¶ 17, 18, 20). According to the district PPS director, since the recommended class was limited to 12 students, the special class setting would have provided the student with the opportunity for both small group and individualized instruction (Tr. pp. 134-35; Dist. Ex. 19 ¶ 20). In addition, she described that the curriculum of the classroom was "modified and instruction [was] differentiated to meet the needs of each student" (Dist. Ex. 19 ¶ 20). The PPS director indicated that the "modified curriculum, class notes, graphic organizers[,] and word processor were designed to assist [the student] in writing assignments" (id. ¶ 18). She further testified, in her affidavit, that the "goals on the IEP were tailored to the [s]tudent's specific needs" and that "program modifications and accommodations would have addressed the [s]tudent's deficits in reading and attention" (id. ¶ 20).

The school psychologist testified that within a special class program the student was able to access "specialized instruction in a smaller student[-]to[-]teacher ratio, where he [was] able to access a variety of modifications" and the special education teacher was able to "directly progress monitor the goals" from the student's IEP (Tr. p. 223). In addition, the school psychologist indicated that the student was recommended for an "additional layer of intervention" through the

¹⁴ State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>). By way of comparison, State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive or highly intensive and requiring a significant or high degree of individualized attention and intervention shall not exceed eight or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]-[b]).

resource room (id.). She testified that "[a] resource room is for a student to receive additional support with a special education teacher or a reading interventionist, a reading specialist" and that the CSE specifically recommended resource room for the student "to access additional reading intervention" to "target the foundational reading skills" (Tr. pp. 220, 223; see Dist. Ex. 4 at p. 2).

In terms of management needs related to multisensory instruction, the student's IEP indicated that the student required visual cues for multisensory representation of material (Dist. Ex. 4 at pp. 7, 11). In addition, the supplementary aids and services section of the IEP included a recommendation for Books on Tape or other recording devices to provide the student with access to auditory learning materials (id. at p. 11).

While the parents no doubt preferred that the student attend a setting such as Eagle Hill, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Similarly, although the private evaluator testified that, if the student had to move from Eagle Hill to a district public school, it would be "detrimental to the student's educational, speech and language, and social/emotional goals" (see Parent Ex. J ¶ 22), once the CSE found that a 12:1+1 special class along with resource room and related services in a district school was appropriate for the student, it was not required to consider a nonpublic school for the student, let alone a school that was not State-approved (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015] [finding that once the CSE decided on an appropriate placement in the least restrictive environment in which the student could have been educated, it was not required to thereafter consider other more restrictive placements along the continuum]; see also B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016] [finding a CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]).

Based on the foregoing, the evidence in the hearing record does not support the parents' claim that the IEP was deficient for failing to offer a program that specialized in language-based learning disabilities with multisensory instruction in a small group environment.

3. Functional Grouping

In their due process complaint notice and again in their answer, the parents argue that the class profile for the recommended 12:1+1 special class was inappropriate (Dist. Ex. 1 at p. 2; Answer at p. 2). The parents further assert that the class profile only contained five students with IQs that were lower than the student's and therefore, were not "positive peer models" for the student (Parent Mem. of Law at p. 6; see Dist. Ex. 18).

While the parents raise concerns about the class profile as a claim directed at the IEP, generally, allegations pertaining to the grouping of a particular class relate to a school district's implementation of or capacity to implement an IEP since, as described below, State regulations require students in special classes to be grouped with others of similar needs (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir 2014]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

With respect to functional grouping of the proposed class at the assigned public school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students

having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]).¹⁵ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

The student's father testified that, at the August 2020 CSE meeting, the parents raised concerns about the classroom that the district was proposing and stated that they requested "to know the profile" of the other students (Tr. pp. 400-01). He indicated that he was concerned that a lot of students that had been in the student's fourth-grade class in the district would be in the proposed classroom and that he "believed that . . . it was inappropriate to put [the student] with kids that had severe intellectual disabilities" (Tr. p. 401).

According to the district PPS director, in response to the parents' concern, she prepared a class profile (Dist. Ex. 19 ¶ 25; see Dist. Ex. 18). The class profile for the proposed classroom for the 2020-21 school year described five students by listing their "classification" and describing their academic, communication, social, physical, and management needs (Dist. Ex. 18). The student was eligible for special education as a student with a learning disability and information before the August 2020 CSE revealed that the student had a full scale IQ of 88 based on administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) in January 2017 (Dist. Ex. 4 at pp. 1, 4). The class profile listed the other students' eligibility classifications as multiple disabilities (two), learning disability (one), and speech-language impairment (two), and identified the full-scale IQs of the other students as 69, 64, 93, and 70 (see Dist. Ex. 18).¹⁶ In the area of speech and language, three of the students were described as having below average to average scores, one was described as having low to below average scores; three of those students received speech-language therapy with a fourth receiving English as a new language services (*id.*). One student did not receive speech-language therapy (*id.* at p. 2). The class profile described the students in terms of their social engagement as friendly, shy, and/or engaged with peers (*id.* at pp. 1-3). Similar to the student, the class profile described the students in the proposed classroom as having management needs such as questions clarified and multi-step tasks broken down; preview/review of academic content; as well as refocusing, redirection, cues, and checks for understanding (compare Dist. Ex. 18, with Dist. Ex. 4 at pp. 7, 11-12).

In determining the composition of the 12:1+1 special class the district PPS director testified that the full-scale IQ measures a student's cognitive skills but there were other factors to consider in a class make-up, including reading and math levels, management needs, and language needs (Tr. pp. 136-38). The PPS director indicated that, in her view, the "profiles of the other students

¹⁵ To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

¹⁶ A full scale IQ for the fifth student was not listed (Dist. Ex. 18 at p. 2).

in the class [we]re very similar to the Student, particularly in the area of his reading and writing deficits" (Dist. Ex. 19 ¶ 25).

Here, the student did not attend the recommended 12:1+1 special class for the 2020-21 school year because he was unilaterally placed at Eagle Hill. Accordingly, the parents' allegations about the functional grouping are speculative insofar as the composition could have changed leading up to the school year. On this point, the student's mother testified that the PPS director told the parents that the class profiles were incomplete because the district did not know who might move into the district (Tr. p. 651-52). Indeed, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C., 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at *15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245).

Further, the class profile that the district prepared does not demonstrate that the class composition would have included students whose needs were so different from the student that the grouping would have violated State regulations (see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).

B. 2021-22 School Year

In contrast to his findings related to the 2020-21 school year, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 60-69). The IHO accurately recounted the facts of the case (id. at pp. 61-68), identified the issues to be resolved (id. at p. 4), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2021-22 school year (id. at pp. 68-69), and applied that standard to the facts at hand (id. at pp. 60-69). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO with respect to the 2021-22 school year (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss the parents' allegations in their cross-appeal that the May 2021 IEP failed to have meaningful and appropriate goals in reading and writing and two procedural issues regarding information contained within the IEP, the conclusions of the IHO related to the 2021-22 school year are hereby adopted.

1. May 2021 IEP

a. Student's Needs

Again, although the student's needs are not in dispute, a brief review is necessary to determine if the recommended annual goals met the student's needs. The district PPS director testified in her direct affidavit testimony that the CSE met in May 2021 to review the June 2020 neuropsychological evaluation provided by the parents, as well as the December 2020 progress report from Eagle Hill (Dist. Ex. 19 ¶¶ 28, 33; see Parent Ex. D; Dist. Ex. 5).¹⁷ The June 2020 private neuropsychological evaluation stated that the student was evaluated "to determine his academic and emotional needs for high school" (Dist. Ex. 5 at p. 1). The evaluator indicated the student continued to meet criteria for previous diagnoses of autism, ADHD, and specific learning disability in reading, and she also diagnosed the student with a specific learning disorder with impairment in written expression (id.).

According to the May 2021 IEP, results from testing completed by the neuropsychologist, in June 2020, were discussed, as were progress reports and updates provided by the staff from Eagle Hill (Dist. Ex. 9 at pp. 1, 2).¹⁸ In her June 2020 report, the neuropsychologist indicated the student's visual spatial skills, fund of information, and quantitative reasoning ability were areas of strength (Dist. Ex. 5 at p. 2). The student was able to understand and answer questions when a passage was read to him (id.). The neuropsychologist indicated the student "demonstrate[d] his memory and knowledge best in structured situations with prompts and cues" for "both verbal and visual information" (id.).

The neuropsychologist reported the student had difficulty "form[ing] reciprocal relationships with same-age peers and he often prefer[red] his own company" (Dist. Ex. 5 at p. 2). She noted that the student "struggle[d] to employ social niceties and nuance" (id.). In addition, the neuropsychologist reported that the student had restricted interests and although he was generally good natured it was hard for him to "go with the flow" (id.). The neuropsychologist indicated that the student's executive functioning skills interfered with his learning and he had difficulty "pay[ing] attention to details and [] self-monitor[ing] his work" (id.). The student's "impulse control and activity level" had improved from previous evaluations according to the neuropsychologist, but he "ha[d] great difficulty with planning and organization" (id. at p. 3). The neuropsychologist indicated that "[w]hen writing and speaking, [the student] tend[ed] to be tangential and to have trouble maintaining task demands or the natural arc of a conversation" (id.).

The neuropsychologist reported the student was able to read with fluency and understand what he read, but that he "read at an extremely slow pace" (Dist. Ex. 5 at p. 2). The student "struggle[d] with multi-syllable, rule-breaking words" (id.). His reading was "several grade levels below age expectations" and he "require[d] direct instruction and support to achieve the next steps in his reading progression" (id.). According to the neuropsychologist the student had difficulty

¹⁷ The neuropsychologist testified that she did not know when the report itself was completed (Tr. p. 458; see generally Dist. Ex. 5).

¹⁸ The neuropsychologist was not present at the May 2021 CSE meeting but her evaluation report was reviewed and discussed (see Parent Ex. C; Dist. Ex. 9 at p. 1).

with spelling and struggled to organize his writing (id.). More specifically, he had difficulty crafting paragraphs that adhered to the demands of the task and that contained sufficient information and details (id.). The student's use of punctuation was inconsistent (id.).

The neuropsychologist reported that the student's "learning disabilities ma[de] it impossible for him to access or complete grade level work" and he "require[d] a great deal of direct instruction, structure, and prompting throughout his school day" (Dist. Ex. 5 at p. 3). She wrote that because the student was "easily" distracted he worked best in "structured, calm, and quiet settings" (id. at p. 4). The neuropsychologist recommended small group learning, direct instruction for decoding skills, higher level language skills, and writing (id. at p. 5).

The May 2021 IEP provided additional information about the student's educational needs. With regard to reading, the IEP indicated that providing the student with guided questions assisted him with independently comprehending text (Dist. Ex. 9 at p. 7). In the area of math, the May 2021 IEP indicated the student needed a "structured approach to problem-solving and seeing multiple strategies" and teacher check-ins to address comprehension and ensure accuracy (id.). In writing, the May 2021 IEP indicated the student needed graphic organizers to assist with brainstorming and ordering his ideas prior to writing an essay (id.). The IEP stated that the student had difficulty spelling words accurately and noted that his spelling was often phonetic and decipherable but incorrect (id. at p. 8).

The May 2021 IEP noted the student's "executive functioning skills" continued to interfere with his learning (Dist. Ex. 9 at p. 8). The student benefitted from using a study guide for instructed vocabulary, notetaking from text or a presentation, and to ensure comprehension of presented material (id.). The IEP reflected language from the neuropsychological evaluation that indicated the student demonstrated "weaknesses in pragmatic language, social communication, and higher-level language" (id.; see Dist. Ex. 5 at p. 2). The IEP noted that the student's intellectual functioning fell within the average range (Dist. Ex. 9 at p. 8). It indicated that while the student had shown improvement with his socialization skills with peers, he still needed further improvement with his "social communication skills" and "self-regulation skills" (id. at p. 9). In connection with his physical development, the May 2021 IEP noted that the student continued to have "high activity levels and difficulties sustaining attention" (id. at pp. 9-10).

The May 2021 IEP identified strategies and resources needed to address the student's management needs including assistance to break tasks into chunks, an opportunity to preview materials, provision of classroom notes, and visual cues (Dist. Ex. 9 at p. 10). In addition, the student "require[d] checks for understanding," "breaks for movement," and "sensory tools" (id.). The management needs also included flexible seating, access to technology, graphic organizers, and related services "to support [the student] in the development of self-regulation and socialization skills and pragmatic and expressive language" (id.).

Based on the student's stated needs, the May 2021 IEP recommended that he attend a 12:1+1 special class for ELA, social studies, science, and math, as well as resource room once daily (Dist. Ex. 9 at p. 13). In addition, the CSE recommended that the student receive two 30-minute sessions per week of group (5:1) speech-language therapy, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group (5:1) counseling, and one 30-minute session per week of individual counseling (id.). Occupational therapy

consultation was recommended twice per month as a support for school personnel on behalf of the student to provide sensory strategies (id. at p. 15).

b. Annual Goals

In their answer, the parents argue that the May 2021 IEP's reading and writing goals were inadequate because there were only one reading and two writing goals and no annual goal for spelling (Answer at p. 6).

It is well settled that 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 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]).

The annual goals within the May 2021 IEP addressed the student's needs in the areas of reading, writing, math, speech-language development, study skills, and social/emotional skills (Dist. Ex. 9 at pp. 11-13). The district's PPS director testified via affidavit that the annual goals included in the May 2021 IEP were developed to address the student's needs as identified by the neuropsychological evaluation report provided by the parents and by information from the Eagle Hill staff (Dist. Ex. 19 ¶ 31). The May 2021 IEP included one reading goal that required the student to "correctly decode 40 new multisyllabic, grade[-]level words" (Dist. Ex. 9 at p. 11). There were two writing goals included in the May 2021 IEP, including one for the student to "use a graphic organizer to help make logical development of his ideas when writing," and the other to use a graphic organizer to "write . . . properly constructed introductory and concluding paragraphs" (id. at p. 12). The May 2021 IEP did not include a specific goal to address the student's spelling needs (see Dist. Ex. 9 at pp. 11-13).

The hearing record shows that the decoding goal was developed as a result of the description of the student's needs contained in the June 2020 private neuropsychological report and December 2020 Eagle Hill progress report as reflected in the present levels of performance of the May 2021 IEP (compare Dist. Ex. 5 at pp. 3, 5, and Dist. Ex. 8 at p. 3, with Dist. Ex. 9 at p. 7; Dist. Exs. 19 ¶¶ 31, 33; 20 ¶ 13). The writing goals were also developed based on information from the June 2020 neuropsychological report and the December 2020 Eagle Hill progress report (compare Dist. Ex. 5 at pp. 3, 4, 5-6, and Dist. Ex. 8 at pp. 9, 10, with Dist. Ex. 9 at p. 12). Regarding the student's spelling needs, although the IEP did not include a spelling goal, the CSE recommended the use of assistive technology, including access to a word processor and specialized software (Dist. Ex. 9 at p. 15). According to the district PPS director's testimony, the specialized software was included to assist the student with writing tasks (Dist. Ex. 19 ¶ 30). Additionally, the May 2021 IEP indicated that specialized software was recommended to assist the student with organization and spelling when writing (Dist. Ex. 9 at p. 15; 19 ¶ 30). This was consistent with the private neuropsychological evaluation report, as it included a recommendation that the student "be allowed to complete writing assignments on a laptop or word processor" (Dist. Ex. 5 at p. 6).

Although there were no annual goals directed at addressing the student's needs in the area of spelling, the above listed services would have addressed the student's spelling needs. Additionally, even where deficiencies are identified in the annual goals contained in an IEP, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. 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]). 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]).

Review of the May 2021 IEP shows that the annual goals developed by the CSE were aligned with the student's areas of identified need and even if the CSE could have included different or additional goals, this would not support a finding that the IEP, as a whole, was inappropriate.

Other than their arguments related to annual goals, in their cross-appeal, the parents do not materially allege that the IHO erred in finding the May 2021 IEP appropriate with the exception of two procedural issues: that the IEP listed Marvelwood as the student's current placement, even though the parents did not notify the district until June 2021 of the student's placement there, and that the projected date of reevaluation for the student was January 16, 2020 which was over one year prior to the May 2021 CSE meeting (Answer at p. 6). The parents contend that these procedural violations demonstrate that the IEP was not an "accurate record" and should be disregarded (*id.*). However, the parents do not articulate how that procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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).

Based on a review of the hearing record, the May 2021 IEP summarized the needs of the student based on input from the parents, his teachers at Eagle Hill, as well as a June 2020 private neuropsychological evaluation, and the CSE developed appropriate annual goals to address those needs. There is no basis to modify the IHO's determination that the May 2021 IEP offered the student a FAPE for the 2021-22 school year.

2. Functional Grouping

As a final matter, the parents allege in their cross-appeal that the IHO failed to consider their concerns in the functional grouping of the proposed classroom. The class profile for the proposed classroom for the 2021-22 school year described six students by listing their "classification" and describing their academic, communication, social, physical, and management needs (Dist. Ex. 19). In June 2020, the private neuropsychologist found the student's full-scale IQ

to be 94 which was in the average range for cognitive functioning (Dist. Ex. 5 at pp. 15-16, 26). The class profile listed the other students' eligibility classifications as learning disability (five) and speech-language impairment (one) and identifies the full-scale IQs for four of the students as 98, 105, 92, and 79 (see Dist. Ex. 17).¹⁹ Five of the students are described as receiving corrective reading support (*id.*). Based on this profile, the hearing record does not support the private evaluator's statement that the class would be composed of "multiple children with IQs in the 70-75 range" (Parent Ex. J ¶ 10). Further, the evaluator's concern, that there were "probable differences" in the other students "reading comprehension skills and conceptual understanding" (*id.*), is too speculative to support a finding that the grouping was inappropriate.

For the same reasons as set forth above with respect to the 2020-21 school year, the parents' concerns about the functional grouping of the proposed classroom for the 2021-22 school year were largely speculative (see *J.C.*, 643 Fed. App'x at 33). Moreover, although the parents had concerns about the IQs of students who would be attending the class, the class profile supports that the students had other areas of need that were sufficiently similar such that the proposed grouping would not have violated State regulations requiring that special classes consist of students with similar needs (see 8 NYCRR 200.1[ww][3][i]-[ii]; 200.6[a][3]; [h][2]-[3]; *Walczak*, 142 F.3d at 133).

C. Independent Educational Evaluation

The district asserts that the IHO improperly directed the district to reimburse the parents for the private neuropsychological evaluation. In addition, the district argues that the basis on which the IHO relied in awarding reimbursement for the IEE (the district's failure to use due process to override lack of parental consent for reevaluation) was improper under the law.

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 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

¹⁹ For the two students for which a full scale IQ was not listed, the class profile indicated other standardized test results (Dist. Ex. 17).

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 previously referenced email dated February 5, 2020, the student's mother stated that she wanted to use the neuropsychologist who previously evaluated the student to conduct an updated evaluation (Parent Ex. B at p. 2). The district PPS director acknowledged the email, inquiring when the private neuropsychological evaluation would be completed in order to determine if the district needed to conduct further evaluations (id. at p. 1).

Later, in an email exchange between the attorneys for the parties in October 2021, the parents' counsel requested reimbursement for the private neuropsychological evaluation because the district did not conduct a triennial reevaluation of the student (Dist. Ex. 21 at p. 2). The district's counsel responded to the request, stating that the district would not agree to reimburse the parents for the private neuropsychological evaluation since the parents withheld consent to reevaluate the student (id. at p. 1). The issue of reimbursement for the private neuropsychological evaluation was not again addressed in writing until the November 17, 2022 due process complaint notice, wherein the parents alleged that the district failed to reevaluate the student and requested reimbursement for the private neuropsychological evaluation (Dist. Ex. 1 at pp. 4-5).

The parents cannot insist that the district pay for an IEE in the first instance, while refusing to consent to the district's request to conduct its own reevaluation (D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 177-78 [D. Conn. 2019], rev'd on other grounds & remanded, 975 F.3d 152). Further, given the determination above that the IHO erred in finding that the district denied the student a FAPE for the 2020-21 school year, the IHO's order requiring that the district fund the IEE as equitable relief must also be reversed (see IHO Decision at pp. 76-77).

D. Other Relief

Both parties agree that the IHO went outside the scope of the impartial hearing in awarding relief that was not requested by the parents. More particularly, in his decision, the IHO directed the district to reevaluate the student for the 2024-25 school year and convene a CSE meeting to develop an IEP for the student for the 2024-25 school year (IHO Decision at pp. 77-78). As the order does not require the district to do anything that it is not already required to do pursuant to the IDEA and its implementing regulations, subject to the parents' consent and cooperation, and as the parties agree, I will vacate that portion of the IHO's order pertaining to the 2024-25 school year.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district offered the student a FAPE for both the 2020-21 and 2021-22 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether Eagle Hill or Marvelwood was an appropriate unilateral placement, or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 27, 2023, is modified by reversing those portions which found the district failed to offer the student a FAPE for the 2020-21 school year and ordered it to reimburse the parents the cost of tuition, expenses, and transportation at Eagle Hill for the 2020-21 school year;

IT IS FURTHER ORDERED that the IHO's decision, dated October 27, 2023, is modified by reversing that portion which ordered the district to fund the private neuropsychological evaluation; and

IT IS FURTHER ORDERED that the IHO's decision, dated October 27, 2023, is modified by reversing that portion which ordered the district to evaluate the student and convene a CSE to engage in educational planning for the student for the 2024-25 school year.

**Dated: Albany, New York
February 8, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**