



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-002

**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:**

Barger & Gaines, attorneys for petitioner, by Giulia Frasca, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 granted respondent's (the district's) motion to dismiss the parent's claims pertaining to her son's educational programs for the 2019-20 and 2020-21 school years and determined that the educational programs the district's Committee on Special Education (CSE) had recommended for her son for the 2021-22 and 2022-23 school years were appropriate. The district cross-appeals from that part of the IHO's decision which ordered it to provide the parent with educational records between the 2018-19 and the 2022-23 school years. The appeal must be dismissed. The cross-appeal must be sustained.

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

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

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. Briefly, the student attended a district public school for each of the school years challenged by the parent in this proceeding (Parent Exs. E; H; Dist. Exs. 5; 8; 10). The CSE convened on March 11, 2019 to develop an IEP for the 2019-20 school year (see generally Parent Ex. E). On April 3, 2019, the district provided prior written notice to the parent summarizing the recommendations of the March

2019 CSE and on May 6, 2019, the district provided a school location letter for the 2019-20 school year (Parent Exs. F; G). On March 5, 2020, the CSE convened to develop an IEP with an implementation date of March 19, 2020 (see generally Parent Ex. H). On March 10, 2020, the district provided prior written notice to the parent summarizing the recommendations of the March 2020 CSE (Dist. Ex. 4). On March 4, 2021, the CSE convened to develop an IEP with an implementation date of March 16, 2021 (see generally Dist. Ex. 5). By prior written notice dated March 26, 2021, the district notified the parent of the recommendations of the March 2021 CSE (Dist. Ex. 6). On June 14, 2021, the district provided the parent with prior written notice summarizing the recommendations of the March 2021 CSE and also provided a school location letter for the 2021-22 school year (Parent Ex. M; Dist. Ex. 7). On March 2, 2022, the CSE convened to develop an IEP with an implementation date of March 16, 2022 (Dist. Ex. 8). By prior written notice dated March 25, 2022, the district summarized the recommendations of the March 2022 CSE (Dist. Ex. 9). On October 20, 2022, the CSE convened to develop an IEP with an implementation date of November 14, 2022 (Dist. Ex. 10). By prior written notice dated December 9, 2022, the district summarized the recommendations of the October 2022 CSE (Dist. Ex. 11).

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

In a due process complaint notice, dated September 29, 2022 and subsequently filed on May 23, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. A).<sup>1</sup> The parent further argued that the student had not been comprehensively evaluated and "languished" in an inappropriate program and placement for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (id. at pp. 7-8, 14, 15). The parent also alleged that the district failed to individualize the student's IEPs to address his unique needs by recommending inappropriate class sizes, placements, accommodations, and related services (id. at pp. 7, 14). The parent further asserted that the student did not make any educational progress from 2020 through 2022 (id.). Next, the parent contended that the district failed to provide the student with the special transportation recommended in his IEPs, which caused him to miss school and deprived him of a FAPE (id. at p. 8). The parent also alleged that she was denied meaningful participation in the development of the student's IEPs, denied educational records, denied procedural safeguards and denied prior written notices (id. at pp. 8, 15). The parent asserted that the statute of limitations should be "tolled" because the parent was "denied necessary information that would have allowed her to avail herself of her rights" (id. at pp. 8, 15).

As relief, the parent requested an independent neuropsychological evaluation, an independent functional behavioral assessment (FBA) and behavioral intervention plan (BIP) to be conducted by a Board Certified Behavior Analyst (BCBA) utilizing the principles of applied behavior analysis (ABA), including a classroom observation, an independent occupational therapy (OT) evaluation, an independent physical therapy (PT) evaluation, an independent speech-

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<sup>1</sup> In her opening statement at the impartial hearing, the parent's attorney stated that the due process complaint notice was filed on September 29, 2022 and "refiled on May 23rd, 2023" (Tr. pp. 244-45). However, the attorney's opening statement is not evidence and there is otherwise no evidence in the hearing record to substantiate that the due process complaint notice was filed at or around the date on the document. As such, the due process complaint notice will be described in this decision by the filing date of May 23, 2023.

language therapy evaluation, and an independent assistive technology evaluation (Parent Ex. A at p. 15). The parent further requested all records pertaining to the student in the district's possession from the 2018-19 through 2022-23 school years including, but not limited to, "encounter attendance records" for all related services (including home services), report cards, progress reports, IEPs, prior written notices, school location letters, SESIS records, evaluations, and medical records (*id.*).<sup>2</sup> The parent sought findings that the district denied the student a FAPE for the 2019-20 through 2022-23 school years (*id.* at pp. 15-16). The parent also sought an order that the student "shall receive appropriate transportation to and from school as well as related services, with the appropriate accommodations, including a mini-bus, travel time limited to under one (1) hour, and a temperature-controlled bus" and directing the district "to create an appropriate IEP and fund related services, as mandated by the IEP, on an ongoing basis for [the student] by [parent's]-selected private providers, at those providers' customary rates" for 40 hours of 1:1 tutoring/instruction, five hours per week of OT, five hours per week of PT, five hours per week of speech-language therapy, 35 hours per week of ABA services with two hours per week of BCBA supervision; one hour per week of parent counseling and training with BCBA supervision (*id.* at p. 16). If the district was unable to provide the above-specified services, the parent requested that the student be "immediately deferred to the [Central Based Support Team (CBST)]" (*id.* at pp. 7, 16).

Next, the parent requested reimbursement "for all out-of-pocket expenses incurred as a result of the [d]istrict's denial of a FAPE" during the four school years challenged (Parent Ex. A at p. 16). The parent also sought funding "as compensatory education, at least three (3) school years worth of [the student]'s educational program at [the parent's]-selected private providers, at those providers' customary rates, so as to put [the student] in the position she would have been in if she had been provided with appropriate educational services all along" (*id.*). The parent asserted that the student required 40 hours per week of instruction for a 52-week school year due to the student's significant needs (*id.* at p. 17). In sum, the parent requested compensatory education consisting of 6,240 hours of tutoring, and a bank of an unspecified number of hours in OT, PT, speech-language therapy, ABA services, and counseling (*id.*). The parent further requested funding for private transportation, and an order "tolling the statute of limitations due to the continuous and egregious denial of FAPE and the [d]istrict's failure to provide [p]rocedural [s]afeguard [n]otices and [p]rior [w]ritten [n]otices" (*id.*).

## **B. Impartial Hearing and Impartial Hearing Officer Decisions**

A prehearing conference was held on June 23, 2023 and the IHO issued a prehearing conference summary and order on June 23, 2023 (prehearing order), which summarized the parent's claims from the May 23, 2023 due process complaint notice, identified the IHO's procedural rules for conducting the impartial hearing and provided dates for the impartial hearing, page limitations and timelines for motion practice, and timeframes for disclosure (IHO Ex. I at pp. 1-3). As relevant herein, the IHO's prehearing order provided that any motions must be in writing and filed at least ten business days before the scheduled hearing (*id.* at p. 2). The prehearing order also indicated that any opposition to the motion must be served and filed within three business

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<sup>2</sup> According to the parent's May 23, 2023 due process complaint notice, the district "provided a copy of the student's records on or about October 20, 2021 . . . yet, upon information and belief, the [d]istrict still failed to provide the complete file of records for" the student (Parent Ex. A at p. 2).

days of receipt and further cautioned that "[m]otions made after this deadline may be deemed waived, and this IHO may not consider them" (id. at pp. 2-3).

The impartial hearing convened on July 20, 2023 for a hearing date scheduled during the prehearing conference (Tr. pp. 2-3). Initially the attorney for the parent did not appear and the IHO stated on the record that she had sent a courtesy email to the parent's attorney advising her that no one had appeared on behalf of the parent and that the failure to appear risked dismissal of the due process complaint notice or other sanctions (id.). The district's attorney advised the IHO that a resolution agreement had been offered to the parent, wherein the district had agreed to fund five of the six independent educational evaluations (IEEs) requested in the due process complaint notice at the parent's requested rates (Tr. p. 4). The parent's attorney then appeared late at the impartial hearing and the district's attorney explained more fully that the district had actually agreed to conduct an assistive technology evaluation, to fund four of the parent's requested IEEs at the requested rates and had declined to fund an FBA/BIP (Tr. p. 5). The district's attorney also stated that the district's offer had been rejected by the parent (id.). The parent's attorney indicated that she had expected someone else from her office to appear at the hearing date, had appeared by telephone and was not prepared to proceed with the scheduled status conference (Tr. pp. 6-7). The IHO indicated that she was giving the parent "the courtesy of rescheduling" but warned the parent's attorney that she "sent an email as a courtesy to the [p]arent to let them know that nobody was on the conference, but it's your responsibility to make sure someone is here. I don't want to dismiss a case, but if the [p]arent doesn't appear, then that is a possible outcome" (Tr. pp. 7, 9). On July 21, 2023, the parties reconvened for a status conference and indicated that a hearing was necessary for the parent's request for an independent FBA/BIP but that the parties had reached an agreement with regard to the other five requested IEEs (Tr. pp. 12-14).

The IHO and parties planned to reconvene and conduct the impartial hearing on the parent's request for an independent FBA/BIP on July 27, 2023 (Tr. pp. 18-37). Upon appearing for the hearing, the parent's attorney stated that she had sent the IHO and the district's attorney her disclosure on July 20, 2023; however, the IHO and the district indicated that they had not received it (Tr. pp. 19-21). The hearing record reflects that the IHO provided the parent's attorney with additional time to send the disclosure again (Tr. p. 20). The IHO then stated to the parent's attorney "this isn't the first time that we've had -- you've had issues with sending and receiving documents. So I'm just noting -- and right now, the [d]istrict has no objection, but I just want to put you on notice because the disclosures are due by a certain date" (Tr. p. 21). The IHO further stated, "[h]ere, the [d]istrict doesn't have an objection, but you need to figure out what is the issue and resolve it on your end because this -- it delays the proceedings and then it causes issues" and that "it may impact you negatively if the [d]istrict objects to the service of late disclosures" (id.). The IHO then stated that the parent's attorney had indicated that the email that she had sent was rejected and the IHO allowed the parent's attorney "an opportunity to resend those documents and for the [d]istrict to review the documents once they're received" (id.). The district asked for an adjournment to review the parent's disclosure, which was discussed and subsequently granted by the IHO (Tr. pp. 22-28). During the discussion, the IHO stated that the parent's disclosures were not timely received by the district or the IHO as required by the prehearing order, and also noted that the district had eventually received the disclosures during the hearing, but she still had not (Tr. p. 26). Near the conclusion of the July 27, 2023 hearing date, the parent's attorney attempted to argue that her disclosure was timely and that she did not receive any notification that they were rejected, and that she wanted to advocate for her client (Tr. p. 31). The IHO asked the parent's

attorney to stop speaking because the attorney had been given an opportunity to be heard and the IHO had made her ruling on the issue and would not continue to revisit it (Tr. pp. 31-32).

The parties reconvened on August 2, 2023 to conduct the impartial hearing on the issue of the parent's request for an independent FBA/BIP (Tr. pp. 38-137). Additionally, the district offered all of its documentary evidence for the impartial hearing on August 2, 2023, which was admitted into evidence without objection from the parent (Tr. pp. 50-52). In an interim decision dated August 4, 2023, the IHO denied the parent's request for an independent FBA/BIP (IHO Ex. II at pp. 2-3). The IHO found that the district had established that the student did not exhibit persistent behaviors that impeded the student's learning despite consistent interventions (*id.* at p. 3).

The IHO attempted to conduct a status conference on August 16, 2023, but the parent failed to appear (Tr. pp. 138-87).<sup>3</sup> The IHO conducted status conferences on August 29, 2023, September 7, 2023, and September 19, 2023 while the parties awaited completion of the IEEs (Tr. pp. 150-87). By motion to dismiss dated October 2, 2023, the district alleged that the parent's claims related to the 2019-20 and 2020-21 school years were barred by the IDEA's two-year statute of limitations and that no exception applied to the parent's claims in this case (Dist. Mot. To Dismiss at pp. 2, 5-10). In an interim decision dated October 13, 2023, the IHO granted the district's motion to dismiss in part, finding that the parent had not submitted any opposition to the motion, failed to raise an issue of fact, and that the district had established that the parent's 2019-20 and 2020-21 claims were barred by the statute of limitations and she dismissed them with prejudice (IHO Ex. III at p. 2).<sup>4</sup> The IHO also noted that any opposition to the district's motion was due by October 6, 2023 and that the parent had not opposed the district's motion (*id.* at p. 1).

The parties reconvened on October 16, 2023 for the phase of the impartial hearing on the merits of the parent's claims related to the 2021-22 and 2022-23 school years, which concluded on October 17, 2023 (Tr. pp. 188-510). At the beginning of the proceedings on October 16, 2023, the parent's attorney stated that she had submitted a response to the district's motion to dismiss "on Friday, when it was due" and that she submitted it "along with our disclosure on that day" and that she had "confirmation of delivery" (Tr. p. 198). The parent's attorney further stated that she wanted the IHO to reconsider the motion to dismiss "including [her] response brief" (*id.*). The district's attorney stated that he received the parent's disclosures on October 6th, but he "didn't receive any response brief . . . even to this day" and objected to any reconsideration of the motion to dismiss (*id.*). The parent's attorney reiterated that she had sent a brief in opposition to the motion to dismiss and when she received the IHO's interim decision, she forwarded the emails she previously sent and reattached the brief (Tr. p. 199). The IHO went off the record to "double check" her email

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<sup>3</sup> Once again, the IHO sent the parent's attorney another courtesy email advising her that no one had appeared on behalf of the parent and the IHO and district's attorney waited for her to join the scheduled hearing date (Tr. p. 139).

<sup>4</sup> The IHO's interim order granting the district's motion to dismiss included an exhibit list that reflected that IHO Exhibit I was an October 3, 2023 "Email with motion schedule" (IHO Ex. III at p. 3). The certified hearing record submitted by the district did not include a copy of this exhibit. Further, IHO Exhibit I was the June 23, 2023 prehearing conference summary and order. Nevertheless, the date the IHO stated in her interim decision by which the parent's opposition was due to be filed was consistent with the timeframes for motion practice included in the prehearing conference summary and order (compare IHO Ex. III at p. 1, with IHO Ex. I at pp. 2-3).

(Tr. p. 199). After going back on the record, the IHO stated that the district had filed a motion to dismiss on October 2nd, which was sent by email, "[a]nd on the following day, on the 3rd, I had given the [p]arent until Friday, October 6th, to submit any opposition to that motion. I understand that the [p]arent is representing that they sent something in. However, I have not received, to date, any opposition" (Tr. p. 200). The IHO continued, "[a]nd the [d]istrict has indicated that they did not receive any opposition to that motion. I will note that this is not the first time during this proceeding that the [p]arent has indicated that documents were sent that were not received by [e]ither the District [o]r me" (*id.*). The IHO further reminded the parent's attorney that the hearing scheduled for the FBA/BIP had to be adjourned because her disclosures for that hearing were never received (Tr. pp. 200-01). The IHO stated that at that time, the parent "was on notice to ensure that any documents w[ere] timely sent" (Tr. p. 201). The IHO denied the parent's request to reconsider and reiterated that she still had not received any opposition to the motion to dismiss from the parent (*id.*). The IHO also stated that she had received what the parent had "indicated as a receipt" and that "it appear[ed] to be a forward of an email" and the date it was sent was "Friday, October 13th at 3:29 p.m. [w]hich even if I were to consider that, it's after the deadline. And I'm also going to note that there's nothing attached to that email either" (*id.*). Following the IHO's ruling on her request for reconsideration, the parent's attorney began to state on the record that her client was being denied due process (Tr. p. 202). The IHO then muted the parent's attorney's microphone and advised her she was speaking out of turn, and that if she disagreed with her decision, "there's a process for that" (Tr. pp. 202-03). The impartial hearing then proceeded on the merits on the remainder of the parent's claims (Tr. pp. 204-510).<sup>5</sup>

In a final decision dated November 25, 2023, the IHO found that the district met its burden of demonstrating that it offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at p. 2). With regard to the 2021-22 school year, the IHO found the testimony of the student's special education teacher to be credible and persuasive (*id.* at p. 3). The IHO further found that the March 2021 CSE was properly composed, relied on sufficient evaluative data, and developed an appropriate IEP that was implemented (*id.*). The IHO further found that the March 2022 IEP was implemented at the beginning of the 2022-23 school year and that the testimony of the special education teacher for that school year was also credible and persuasive (*id.*). The IHO noted that the parent declined a PT evaluation and was aware that she would need to obtain a prescription to begin a PT evaluation and had not done so (*id.* at p. 4). The IHO found that the student had made meaningful academic progress during the 2021-22 school year (*id.*). Next, the IHO found the October 2022 IEP was developed by a properly composed CSE who relied on comprehensive evaluative data (*id.*). The IHO determined that during the 2021-22 school year, the student was offered the most appropriate academic and social setting in the least restrictive environment (LRE) (*id.*). For the 2022-23 school year, the IHO determined that the recommended program addressed the student's needs with appropriate behavioral supports and the student continued to make meaningful academic progress (*id.*). With regard to the parent's witnesses, the IHO found that all evidence was offered to support the request for compensatory education and did not present an accurate depiction of the student's needs (*id.* at pp. 4-5).

The IHO also found that some of the parent's testimony was contradicted by the record and found "questionable the parent's testimony that she did not know what due process rights were"

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<sup>5</sup> The parent withdrew her request for reimbursement of out-of-pocket expenses (Tr. p. 237).

and that the parent did not know what services the student was previously receiving (IHO Decision at p. 5). The IHO found that the parent's claims about the student's lack of progress and that she did not meaningfully participate in the development of the IEPs were unsupported by the hearing record (id.). Turning to the parent's special transportation claims, the IHO found that due to the COVID-19 pandemic, the student missed a significant number of days of school because the district failed to provide consistent and appropriate transportation for the student during the 2021-22 school year (id. at p. 6). The IHO noted that "[w]hile the parent may have contributed to the student's absences from school, the special education teacher acknowledge[d] that the student did not make the academic progress he would have made had he been able to attend school on a more consistent basis" (id.). Nevertheless, the district offered the parent "recovery services" to make up for the missed days of school (id.). The IHO found that the hearing record was "unclear as to whether [the] parent availed herself [of] the services" (id.). Therefore, the IHO found that the district's failure to provide consistent transportation for the student did not result in a denial of a FAPE for the 2021-22 school year (id.). The IHO denied the parent's requests for specific programming and compensatory education; however, the IHO ordered the district to convene a CSE to consider the IEEs, develop an IEP for the 2023-24 school year and if appropriate, make a referral to the CBST (id. at p. 8). The IHO further ordered the district to consider the parent's transportation request and to provide the parent with the student's records including any report cards and progress reports from the 2018 through 2023 school years (id.).

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

The parent appeals and argues that the IHO erred in granting the district's motion to dismiss on statute of limitations grounds and that the IHO's decisions in this matter were biased, arbitrary and capricious. The parent further asserts that the IHO erred in finding that the student was offered a FAPE for the 2021-22 and 2022-23 school years. As relief, the parent requests that the IHO's interim decision granting the motion to dismiss be reversed and that her brief in opposition—which asserts a withholding of information exception to the statute of limitations—be considered. The parent further requests findings that the student was denied a FAPE for the 2019-20, 2020-21, 2021-22, and 2022-23 school years and requests a bank of hours of compensatory education.<sup>6</sup>

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<sup>6</sup> The parent's attorney is also having difficulty meeting the filing requirements of Part 279 of State regulations governing appeals from IHO decisions. A request for review filed with the Office of State Review must be accompanied with a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). In this case, the parent's attorney submitted a blank form that was neither dated or signed. The parent also exceeded the page limitations of a request for review by submitting an unnecessary table of contents and table of authorities, of which only a table of contents is required to accompany a memorandum of law not to exceed 30 pages whereas the request for review may not exceed 10 pages. The regulations provide that "the request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length; the memorandum of law in support of a request for review, answer, or answer with cross-appeal shall not exceed 30 pages in length," and furthermore that "[t]he memorandum of law shall include a table of contents" (8 NYCRR 279.8[b], [d]). There is publicly available guidance published by the Office of State Review that assists parties in complying with Part 279 that reiterates the requirements of the regulations (<https://www.sro.nysed.gov/book/overview-part-279-revised-effective-january-1-2017>). The parent's attorney may not attempt to blend multiple documents together to circumvent the page limitations. Furthermore, the practice regulations require that "each issue [be] numbered and set forth separately . . . identifying the precise rulings, failures to rule, or refusals to rule presented for review" (NYCRR 279.8 [c][2] [emphasis added]). In the instant case, the parent's request for review haphazardly enumerates four rambling segments of narrative. Some of the segments have



Lastly, the parent has submitted four documents with her request for review for consideration as additional evidence.

In an answer and cross-appeal, the district denies the parent's allegations and argues that the IHO correctly dismissed the parent's claims related to the 2019-20 and 2020-21 school years and correctly determined that the district offered the student a FAPE for the 2021-22 and 2022-23 school years. The district also objects to the parent's additional evidence and argues that the documents were properly precluded by the IHO during the impartial hearing. The district cross-appeals the IHO's order directing it to provide the parent with the student's records from the school years 2018 through 2023 and argues that the parent acknowledged the district responded to the record request on October 20, 2021, and failed to specify during the impartial hearing and in this appeal what records are missing from the district's disclosure.

In a reply and answer to the district's cross-appeal, the parent reiterates her allegations set forth in the request for review and has submitted eight additional documents for consideration as additional evidence.<sup>7</sup> With regard to the district's cross-appeal, the parent asserts that the IHO correctly awarded the parent's record request and alleges that the district denied access to the student's records.

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

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multiple paragraphs, and each has a substantial number of allegations on different factual topics or alleged errors, and the pleading duplicates the statute of limitations arguments in segments 1 and 3 and sprinkles allegations of IHO bias throughout the same two sections. In addition, the parent bewilderingly alleges that the IHO failed to consider evidence of "the appropriateness of the unilateral placements" and references "prong II" in several places in the request for review (Req. for Rev. at pp. 5, 6, 8, 9). However, in this matter, the student attended a district public school in accordance with a district IEP for all four school years challenged by the parent, and thus no "prong II" unilateral placement is relevant to this proceeding, and it demonstrates the overall slipshod approach of the parent's attorney in the parent's filings. I am expending precious time and resources at this juncture to explain these deficiencies so that the parent's attorney may correct them going forward. The parent's attorney is warned that such deficiencies may result in dismissal in future if she cannot correct these problems and make filings in compliance with State regulations as the resources of this office are finite.

<sup>7</sup> In her reply, the parent has again exceeded the page limitations with an unnecessary table of contents and table of authorities. The parent also reiterates that the IHO failed to consider the parent's "unilateral placement" (Reply ¶9).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

The parent has collectively submitted 12 documents with her request for review and with her reply (Req. for Rev. Exs. MM-PP; Reply SRO Exs. 1-8). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

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<sup>8</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

At the outset, I note that all of the documents offered by the parent were available at the time of the impartial hearing. Turning first to the documents submitted with the request for review, proposed exhibit MM is the parent's brief in opposition to the district's motion to dismiss, proposed exhibit NN appears to be an email dated October 6, 2023, which purports to demonstrate that the parent timely submitted her opposition to the district's motion to dismiss to the IHO and the district's attorney, proposed exhibit OO is a document outlining the parent's requested relief during the impartial hearing, and proposed exhibit PP appears to be a print out of the IHO's LinkedIn profile and resume information. Notably, the parent offers no argument as to why the proposed exhibits OO and PP were not offered at the time of the hearing and why they are necessary to render a decision. According to the parent, proposed exhibit MM was timely submitted on October 6, 2023 and proposed exhibit NN is dated October 6, 2023. However, both the IHO and the district's attorney stated on the record that they did not receive it (Tr. pp. 198, 200). Review of the transcripts demonstrates that the parent's attorney had been advised and warned to remedy whatever issue she was experiencing with her email as there could be adverse rulings going forward (Tr. pp. 20-21, 200-01). In addition, had the parent timely filed her opposition brief with the IHO, it would not be necessary to seek consideration as additional evidence.

Turning to the documents submitted with the parent's reply, they consist of eight emails alternately dated October 5, 2023, October 6, 2023 and October 13, 2023 and purport to establish that the parent timely served her brief in opposition to the district's motion to dismiss on the district and the IHO. While these emails tend to support the parent's assertion that she believed she sent a response to the district's motion to dismiss, they also indicate that the parent's attorney did not have sufficient time for drafting and sought an extension of time in the mid-afternoon of the day the response was due, had technical difficulty sending documents that were oversize, and has documentation showing delivery yet the same documentation indicates that the receiving server did not send delivery notifications. The evidence does not overcome the IHO's and district's attorney's statements on the record that they did not receive them, especially in light the IHO's prior warnings to be mindful of problems given past email delivery difficulties encountered by the parent's attorney (Tr. pp. 20-21). The problem faced by the parent appeared to be repetitive and self-inflicted. It was the responsibility of the parent's attorney to take affirmative steps to remediate known technical problems sending email, not the responsibility of the recipients to waive the deadlines governing the proceeding when the parent later cried foul due to known circumstances within the parent's sphere of influence. I do not find that the IHO erred in refusing to accept the brief as will be further discussed below. Based on the foregoing, none of the parent's proposed exhibits constitute additional evidence, they are not necessary to render a decision, and they will not be considered as additional evidence.

## **2. IHO Bias and Conduct of Impartial Hearing**

Related in part to the parent's request for consideration of the brief in opposition and emails as additional evidence are the parent's claims that the IHO was biased against her and that the IHO's interim and final decisions were arbitrary and capricious.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties

without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). Further, no individual employed by a district, school, or program serving students with disabilities placed there by a CSE may serve as an impartial hearing officer for two years following the termination of such employment (see 8 NYCRR 200.1[x]).

State and federal regulations and the legal interpretations of the IDEA and its implementing regulations and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Notably, the request for review broadly alleges that the IHO was biased but does not provide any specific instances of the IHO engaging in bias. The closest the request for review comes to alleging any specificity is in the assertion that the IHO's review of the evidence unfairly favored the school district. While framed as bias, the parent is merely asserting disagreement with the IHO's findings that the district's evidence was credible and persuasive. As detailed above, the IHO was clear in her directives and simply required the parent's attorney to abide by the rules she established in her prehearing conference summary and order (see Tr. p. 26, IHO Ex. I). The hearing record also establishes that the IHO gave the parent's attorney several warnings about her noncompliance and cautioned that she risked dismissal of the due process complaint notice or another form of sanction if she continued to fail to comply (Tr. pp. 2-3, 7, 9, 21, 200-01). Far from prejudicially favoring the school district, the IHO went further to contact the parent's attorney each time she failed to attend to scheduled appearances.

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving

disputes between the parents and district (*id.*). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Review of the hearing record does not support the parent's claims that the IHO was biased or that her decisions were arbitrary and capricious, and instead the record shows that the parent's attorney had difficulty complying with the reasonable directives of the IHO that were necessary to maintain an orderly proceeding.

### 3. Statute of Limitations

The parent alleges that the IHO erred in finding that the parent's claims related to the 2019-20, and 2020-21 school years were barred by the IDEA's two-year statute of limitations. The parent also asserts that the IHO's error was based on her failure "to review [the parent]'s responsive documents" and that the IHO "made a biased, arbitrary, and capricious decision" (Req. for Rev. ¶1; Reply at p. 1). The parent later alleges that the IHO "erred in dismissing the 2018-2019 [sic] and 2019-2020 SYs from the due process hearing as outside the scope of limitations" (Req. for Rev. ¶3). The parent further argues that the IHO failed to consider the parent's brief in response to the district's motion to dismiss, that the IHO "claimed" the brief had not been received, "but refused to accept evidence from [the parent] showing proof of delivery" and that the IHO "failed to provide any other contact information that would have allowed [the parent] to confirm receipt, such as a phone number or alternative email address" (*id.*). The parent then alleges that the "IHO failed to consider applicable statutory and case law as to why the SOL must be tolled in this matter" (*id.*). In an interim decision dated October 13, 2023, the IHO granted the district's motion to dismiss finding that the parent had not submitted any opposition to the motion, and failed to raise an issue of fact (IHO Ex. III at p. 2). The IHO also found that the district had established that the parent had attended each of the CSE meetings during the school years at issue and that the district had provided prior written notices summarizing the CSEs' recommendations for each CSE meeting (*id.*). The IHO further found that even with the COVID-19 tolling period, the parent's claims for the 2019-20 and 2020-21 school years were nevertheless barred by the statute of limitations.<sup>9</sup>

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).<sup>10</sup> Because an IDEA claim accrues when the parent knew

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<sup>9</sup> I do not adopt the IHO's calculation of the number of days in the tolling period or her accrual dates; however, the IHO reached the correct result in granting the district's motion to dismiss.

<sup>10</sup> New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (*K.H. v. New York City Dep't of Educ.*, 2014 WL 3866430, at \*16 [E.D.N.Y. Aug. 6, 2014]; see *K.C. v. Chappaqua Cent. Sch. Dist.*, 2018 WL 4757965, at \*14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

In this matter, the alleged action that formed the basis of the parent's claims for the 2019-20 and 2020-21 school years related to the development of the March 11, 2019 IEP and the March 5, 2020 IEP, and the program recommendations set forth therein accrued at the time of the CSE meetings (see Parent Ex. A at pp. 3-6). The district provided evidence that the parent attended the March 11, 2019 CSE meeting and that a prior written notice summarizing the recommendations of the March 2019 CSE was sent to the parent on April 3, 2019 (Dist. Exs. 1 at p. 26; 2 at pp. 1-4). The district also provided evidence that the parent attended the March 5, 2020 CSE meeting and that a prior written notice summarizing the recommendations of the March 2020 CSE was sent to the parent on March 10, 2020 (Dist. Exs. 3 at p. 28; 4 at pp. 1-4). Both the April 3, 2019 and March 10, 2020 prior written notices include the language "you have protection under the procedural safeguards of the regulations of the Commissioner of Education" and inform the parent that a copy of the procedural safeguards notice can be downloaded from the district's website (Dist. Exs. 2 at p. 2; 4 at p. 2). In a social history update dated January 18, 2019, which was conducted for the student's "Turning 5" CSE meeting, the evaluator wrote "[d]ue process rights were emphasized in this social history update. Parent was provided with a copy of Procedural Safeguards which delineates in its entirety their rights as a parent/guardian within the NYC Department of Education and the special education programs" (Parent Ex. R at p. 1). In light of the above, the parent's claims related to the 2019-20 school year accrued no later than April 3, 2019 and the parent's claims related to the 2020-21 school year accrued no later than March 10, 2020. Accordingly, the parent's May 23, 2023 due process complaint notice was filed more than two years after her claims accrued for the 2019-20 and 2020-21 school years. The parent will not be able to pursue her claims further unless an exception to the statute of limitations applies.

The parent's effort to evade this result returns once again to her points regarding IHO's refusal to accept the untimely opposition papers to the district's motion to dismiss. The hearing record does not support the parent's claims that the IHO erred in refusing to accept her brief in opposition to the district's motion to dismiss. The parent's attorney's problems with sending email, tardiness and noncompliance with the timeframes established by the IHO were well-documented in the hearing record. The parent's attorney's attempts to shift the blame to the IHO for her own failings are unavailing and misplaced (Tr. pp. 21, 31-32, 200-01; see Req. for Rev. ¶3; Reply ¶5).<sup>11</sup>

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<sup>11</sup> Review of the transcripts do not support the parent's attorney's claim that she requested an alternate form of

The parent also assumes that had the IHO accepted the opposition papers, she would have prevailed in her claim that the statute of limitations should be tolled because the parent was never advised of her procedural rights under the IDEA (Parent Ex. A at pp. 8, 15). However, even if I were to accept the parent's opposition brief, her assertion of the withholding of information exception is without merit.

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 11; R.B., 2011 WL 4375694, at \*4, \*6; see D.K., 696 F.3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at \*7). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at \*7; Richard R., 567 F. Supp. 2d at 944-45).

As indicated above, the district provided documentary evidence of having provided the parent with prior written notices and the procedural safeguards notice. Thus, the hearing record does not support the parent's claim that the district withheld information it was required to provide her. Further, while the IHO considered the district's motion to dismiss unopposed, in her final decision she considered the parent's testimony that she did not know what "due process right" meant (IHO Decision at p. 5). When asked by her attorney, "did anyone discuss with you that if you didn't agree with the IEP that you could file a hearing" the parent responded, "No, I never know about that. I didn't even know that. That's really good" (Tr. p. 463). When asked if anyone ever discussed "due process right" with her, the parent responded "[y]eah, what is that, due process right? I'm writing it down so I can check what it is" (Tr. pp. 462-63). The IHO specifically found that aspect of the parent's testimony to be "questionable" (IHO Decision at p. 5).<sup>12</sup> Therefore, the

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communication with the IHO. If this exchange did in fact occur, it was not recorded on the record. Further, the IHO was under no obligation to provide additional contact information with the parties.

<sup>12</sup> Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330



parent's claim that the IHO granted the district's motion to dismiss because she did not review the parent's opposition to the motion is particularly unconvincing.

With regard to the application of a tolling period, the IHO correctly concluded that even when applying the additional time allotted by the Governor's executive orders on tolling due to the COVID-19 pandemic, the parent's claims related to the 2019-20 and 2020-21 school years, as set forth in the May 23, 2023 due process complaint notice were time barred (IHO Ex. III at p. 2).<sup>13</sup> Review of the evidence in the hearing record demonstrates that the parent's claims, which accrued no later than April 3, 2019 for the 2019-20 school year, and no later than March 10, 2020 for the 2020-21 school year are time barred due to the statute of limitations, the withholding of information exception does not apply to parent's claims, and no tolling periods, other than the tolling created by the executive orders related to the COVID-19 pandemic, apply to the parent's claims. Therefore, the IHO properly granted the district's motion to dismiss the parent's claims related to the 2019-20 and 2020-21 school years on statute of limitations grounds.

## **B. FAPE**

In her May 23, 2023 due process complaint notice, the parent alleged that the March 4, 2021 CSE failed to understand the student's needs and developed a "woefully inadequate" IEP for the 2021-22 school year. Specifically, the parent argued that the March 2021 CSE failed to recommend PT, failed to offer any social/emotional supports, failed to assess the student's instructional and functional needs, failed to consider the student's actual needs and created an IEP that did not afford meaningful educational benefit and led to a lack of progress and regression (Parent Ex. A at p. 6). With regard to the 2022-23 school year, the parent alleged in her May 23, 2023 due process complaint notice that the CSE did not convene to develop an IEP for the 2022-23 school year and provided a school location letter without an IEP (*id.* at p. 7).

During the impartial hearing, the district provided evidence that the CSE convened on March 2, 2022, to develop an IEP to be implemented on March 16, 2022, a meeting which the parent attended (Dist. Ex. 8 at pp. 1, 39-40, 48). The hearing record reflects that the parent was sent a prior written notice dated March 25, 2022, which summarized the recommendation of the March 2022 CSE (Dist. Ex. 9 at pp. 1-4). The district also provided evidence that the CSE convened on October 20, 2022 and developed an IEP to be implemented on November 14, 2022, a meeting which the parent attended (Dist. Ex. 10 at pp. 1, 19-20, 26, 28). On December 9, 2022, the district provided a prior written notice to the parent which referenced the October 2022 CSE meeting, however the evaluative information listed on the notice was progress updates dated November 23, 2022, and indicated that the recommended services would be implemented on December 12, 2022 (Dist. Ex. 11 at pp. 1-3). Nevertheless, the May 23, 2023 due process complaint notice does not include any claims related to the March 2022 CSE and resultant IEP or the October 2022 CSE and resultant IEP. The parent's post-hearing brief submitted to the IHO at

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[E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; *Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer*, 84 A.D.3d 795, 796 [2d Dep't 2011]; *Application of a Student with a Disability*, Appeal No. 12-076).

<sup>13</sup> Although the IHO incorrectly concluded that the tolling period from March 20, 2020 through November 4, 2020 was equal to 228 days rather than the correct number of 229 days, it does not change the result of her correct analysis.

the conclusion of the impartial hearing also makes no mention of these CSE meetings or IEPs (IHO Ex. VI at pp. 2-6). The parent's post-hearing brief does not allege any specific claims related to any IEPs included in the hearing record and broadly alleges that the district "repeatedly created inappropriate IEPs," that there was no discussion of an appropriate placement "at any time during his IEP meetings," that the district used inappropriate assessment measures to develop the students "IEPs," and "[w]hen the [d]istrict finally created IEPs . . . it failed to implement them" (*id.* at pp. 3, 4, 5). The parent's request for review and her reply suffer from this same lack of specificity and again generally allege that all the IEPs were inappropriate.

As noted above, the parent's allegations related to the 2022-23 school year as set forth in the May 23, 2023 due process complaint notice were that the CSE never convened and never developed an IEP for the 2022-23 school year. Not only are those claims not supported by the hearing record, they are demonstrably false in light of the evidence in the hearing record. Notably, the parent never sought to amend the due process complaint notice and failed to grapple with the district's evidence in her post-hearing brief to the IHO, much less in her request for review or her reply in this appeal.<sup>14</sup> While I am tasked with conducting an independent review of the hearing record on appeal, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (*see, e.g., Gross v. Town of Cicero*, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; *Fera v. Baldwin Borough*, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; *see generally Taylor v. American Chemistry Council*, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; *L.I. v. Hawaii*, 2011 WL 6002623, at \*9 [D. Haw. Nov. 30, 2011]; *Lance v. Adams*, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; *Bill Salter Advertising, Inc. v. City of Brewton*, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]).

Additionally in pressing her vague claims, the parent relies on the IEEs conducted during the impartial hearing as proof that the IEPs developed by the CSEs in the prior school years were inappropriate. This strategy has been rejected in the law of this jurisdiction and is without merit. None of these evaluations were available to the March 2021 CSE, the March 2022 CSE or the October 2022 CSE and therefore, may not be relied upon to invalidate the resultant IEPs (*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]).

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<sup>14</sup> The parent appears to reassert the claim an IEP was not created for the 2022-23 school year in her request for review, arguing that the IHO failed to hold the school district to its obligation to create an appropriate IEP and provide an appropriate placement before the start of the school year (Req. for Rev. ¶3).

The parent has alleged that the March 2021 CSE failed to recommend PT, failed to offer any social/emotional supports, failed to assess the student's instructional and functional needs, failed to consider the student's actual needs, and created an IEP that did not afford meaningful educational benefit and led to a lack of progress and regression. The parent also alleged that the district failed to provide transportation.

### **1. March 2021 IEP**

The March 2021 CSE continued to find the student eligible for special education and related services as a student with autism (Dist. Exs. 5 at p. 1; 6 at p. 1). The March 2021 CSE recommended an 8:1+1 special class placement in a district specialized school, together with three periods per week of adapted physical education, two 30-minute sessions per week of OT in a group of two, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, and three 30 to 60-minute sessions per year of parent counseling and training (Dist. Ex. 5 at pp. 1, 39-40, 45). The student was provided the same program and services for the extended school year and the IEP indicated that the student would participate in the New York State Alternate Assessment (NYSAA) (*id.* at pp. 41, 43). The March 2021 IEP included annual goals in the areas of reading, math, writing, ADL, social-emotional, adapted physical education, OT, and speech-language therapy (*id.* at pp. 29-38). As noted above, the parent asserts that the March 2021 IEP did not meet the student's needs, specifically his behavioral needs, and failed to recommend PT.

#### **a. Sufficiency of Evaluative Information**

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; *see* 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; *see Letter to Clarke*, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In her written testimony, the student's special education teacher during the 2020-21 (first grade) and 2021-22 (second grade) school years (second grade teacher), stated that in developing the student's March 2021 IEP the CSE reviewed the student's November 2020 Assessment of Basic Language and Learning Skills – Revised (ABLLS-R) scores, his Fountas and Pinnell reading and writing scores, an October 2020 parent questionnaire, a March 2021 Adapted Physical Education assessment, January 2021 speech-language therapy reports, OT reports, and the March 2020 IEP (Dist. Ex. 26 ¶¶ 4, 14, 17; see Tr. pp. 264-65; Dist. Ex. 5 at pp. 1-3).<sup>15</sup> The second grade teacher stated that the CSE also considered her own classroom observations and the input from the parent and speech-language pathologist, who were present at the meeting, to develop a special education program individually tailored to the student's educational needs (Dist. Ex. 26 ¶ 14). Additionally, according to the March 2021 IEP, a number of other assessments were administered to the student to inform the present levels of performance including: the curriculum-based assessments SMILE (November 2020), and Math Attainment (January 2021); a motivation assessment scale (January 2021), a behavior repertoire chart (November 2020), a parent questionnaire (October 2020), Evaluation of Acquired Skills in Communication (January 2021), University of Washington Social Skills Checklist (January 2021), and a reinforcement inventory completed by the parent (Dist. Ex. 5 at pp. 2-3, 13).

Regarding the student's academic performance and needs, the evaluative information indicated the student continued to need work on answering "wh" questions about a text, writing his name with proper capitalization and spelling, spelling vocabulary words, sequencing and retelling picture events, using appropriate word order including temporal concepts, solving addition problems with sums up to 20, and increasing time on task for non-preferred activities (Dist. Exs. 3 at pp. 11-14; 5 at pp. 1-5, 7). According to the March 2021 IEP, the student communicated verbally using one to three word utterances and receptively gained information from routines, words, sounds, instructions, and written/visually presented information (Dist. Ex. 5 at pp. 4, 5).<sup>16</sup> The March 2021 IEP indicated that based on teacher observation and "data" the student needed supports including repetition, breaks, nonverbal prompting, visuals, simplified language, additional time, reinforcers, and a "picture with words" schedule (id. at pp. 5-6).

Socially, the March 2021 IEP present levels of performance included teacher reporting that the student self-regulated by removing himself from a stressful situation or verbalizing his needs/wants and responded to a challenging situation by withdrawing and sometimes crying or screaming (Dist. Ex. 5 at pp. 11-12). The March 2021 IEP also included parent reporting that the student tended to isolate himself, was usually able to verbalize and express his feelings, and self-soothed by screaming, "hutting," flapping and throwing a tantrum (id. at p. 12). According to the March 2021 IEP, a new behavior plan was being developed by the teacher to target the student's behavior of poor concentration and attention for non-preferred activity as it was reported that this behavior interfered with the student's learning throughout the day (id. at p. 13). The IEP indicated

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<sup>15</sup> While the March 2021 IEP included test scores and reporting from the aforementioned assessments and reports, these assessments and reports were not included in the hearing record (Dist. Ex. 5 at pp. 1-7, 11-13, 17-19).

<sup>16</sup> The March 2021 CSE determined that there was no evidence that an assistive technology evaluation was required at that time, as the student was participating appropriately in the special education setting without assistive technology or services (Dist. Ex. 5 at pp. 6, 13).

that the student would be taught to utilize his token board to request for a timed break and choose from a choice board of highly preferred reinforcements (id.).

Regarding the student's physical development in the areas of adapted physical education, OT and activities of daily living (ADL), student needs were identified as using self-regulation strategies to independently sit with class for a 15-minute activity, buttoning and unbuttoning six buttons on his shirt/coat, improving visual perceptual skills/hand eye coordination/motor planning, performing gross motor movements, and toileting (Dist. Exs. 3 at pp. 17-19; 5 at pp. 1-2, 5, 17-19).

Concerning the parent's allegation related to PT, according to the March 2021 IEP, during the CSE meeting the adapted physical education teacher and the occupational therapist recommended that the student be evaluated for PT and that the parent understood that the PT evaluation process would begin once a prescription from the student's doctor was acquired (Dist. Ex. 5 at p. 23). Regarding parent input, the second grade teacher explained that if the parent had a concern "we always want to consider that and include it in the IEP" and she noted that PT was recommended because as she remembered it, the student was not alternating his steps going down the staircase (Tr. pp. 311-12). The second grade teacher added that district staff explained to the parent that in order to initiate PT, district staff needed a prescription from a physical therapist or the student's physician recommending it and once that was obtained the CSE could "add it on," but believed at that time the parent said she did not want it (Tr. p. 312). At the time of the March 2021 CSE meeting the student navigated the classroom environment safely albeit slower than his peers, he independently accessed his belongings and playground equipment, and he pulled his pants up and down for toileting when prompted (Dist. Ex. 5 at pp. 17-18). The March 2021 IEP indicated that the student "excel[led] physically" and parent reported that the student was able to navigate the house independently (id. at p. 19). Further, the adapted physical education teacher reported that the student was "doing well at moving about the perimeter" (id.).

As summarized above, review of the evaluative information available to the March 2021 CSE shows that the CSE had sufficient evaluative information to identify all of the student's special education and related services' needs and the information within the IEP adequately described the student's performance within the classroom. Additionally, the CSE had information reflecting that the student's gross motor skills were adequate to function at school and home. Accordingly, based on the above, the evidence in the hearing record supports the IHO's determination that the March 2021 CSE relied on sufficient evaluative information, which included input from the parent, about the student and his individual needs to develop an IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

### **b. Special Factors – Interfering Behaviors**

The hearing record demonstrates that the primary concern expressed by the parent during the impartial hearing was whether the student's behavioral needs required the district to conduct an FBA and develop a BIP (see Tr. pp. 268-77, 329-32, 334, 337, 341, 343-46, 356, 358-59). Although the prior school years were dismissed as outside the statute of limitations, discussion of the student's behavioral needs, the district's efforts to address the student's needs, and the student's progress leading up to the March 2021 CSE meeting provide background for the issues and will be described below.

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 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).

The student's second grade teacher testified that she conducted evaluations, "especially for the behavior," including the behavior repertoire checklist and the motivation assessment scale, and added that was how she developed the behavior support plan (BSP) for the student (Tr. p. 268; see Dist. Exs. 13 at pp. 1-5; 14; 15).

The second grade teacher stated that a behavior repertoire checklist was "like a litmus test" of which behaviors the student tended to have more frequently (Tr. p. 269). The November 2020 behavior repertoire checklist indicated that the student occasionally exhibited behaviors of hitting others, scratching others, flapping his hands, twirling objects, rocking, perseverating, and displaying oppositional or defiant behaviors, and usually exhibited behaviors such as running away, picky eating, and demonstrating poor concentration and attention (Dist. Ex. 13 at pp. 1-5). In her written testimony the second grade teacher explained that the student would often run away from a non-preferred task but never eloped from the classroom and that the hitting and scratching was directed at herself and the paraprofessional in the classroom and that otherwise the student did not exhibit any aggressive or violent behavior or any self-injurious behavior (Dist. Ex. 26 ¶ 6).

The January 2021 motivation assessment scale described the targeted behavior as running away, hitting, pinching, and pushing during work time and indicated that the primary function of the student's behavior was escape/avoidance (Dist. Ex. 14). The second grade teacher explained at hearing that she found that most of the time when the student exhibited "these behaviors" it was when there was a demand to do work (Tr. p. 272).

The February 2021 BSP identified the target behavior as running away, hitting, pinching, and/or pushing away items or people during structured classroom activities (Dist. Ex. 15).<sup>17</sup> The BSP noted that then-currently, the behavior occurred at an approximate rate of 11-13 times per day and hypothesized the function of the behavior was escape/avoidance (*id.*). The replacement or "[a]lternate behavior to teach" was having the student learn to use a five-star token board to request a timed break (*id.*). The BSP employed proactive strategies including the use of a first/then board with a five-star token board with motivating reinforcers to earn a sensory break, workstation task boxes that varied from easier to more difficult tasks incorporating activities of interest, frequent sensory breaks, access to a "deep breath visual tool," and verbal praise (*id.*). Interventions included providing nonverbal redirection with use of his first/then board and token system board to remind the student of a preferred reinforcer, using nonverbal redirection to task, ensuring the student was safe by holding his hands and directing him to take deep breaths using the visual tool, and when calm and ready, nonverbally providing direction again and reinforcement when the task was completed (*id.*). The stated goal and "[c]riteria for termination" was when the occurrence of the target behavior decreased to three times per day (*id.*).

When asked to compare the behavior checklist with an FBA, the second grade teacher stated that to her knowledge her school only required an FBA and BIP once a "one-to-one behavior paraprofessional" was recommended and implemented and further noted that while it was not "always the case" it was "usually the case" (Tr. pp. 269-71, 275). She explained that her school's BSP was how they supported the student's behaviors so that they did not progress and escalate to requiring a crisis paraprofessional or a one-to-one behavior paraprofessional (Tr. p. 270). The second grade teacher testified that while every student in her classroom had a BSP, they were individualized and included different interventions (Tr. pp. 276-77).

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<sup>17</sup> In her written testimony the teacher explained that the BSP was mistakenly dated June 2020 but was "actually implemented" February 2021 as, she noted, the student was not enrolled at the school in June 2020 (Dist. Ex. 26 ¶ 6).

In the student's case, the second grade teacher stated that a BIP was not recommended because while the student did exhibit behaviors, he was able to understand the consequences of his behaviors and was "able to be deescalated" using the proactive strategies, interventions, and reinforcers (Tr. pp. 270-71). She further testified that in her judgment, in comparing the student to the other students in the classroom, who were more aggressive with their behaviors or were "just not able" to comprehend the consequences of their actions or behaviors, at that time a BIP was not necessary for the student (Tr. pp. 271-72).

The second grade teacher stated that the student started second grade in July 2021, and she continued to implement the student's BSP during the 2021-22 school year (Dist. Ex. 26 ¶ 17). The evidence in the hearing record shows that the June 2021 and February 2022 BSPs continued with the same information as the February 2021 BSP (compare Dist. Ex. 16 and Dist. Ex. 17, with Dist. Ex. 15). The second grade teacher acknowledged that the parent expressed concerns about the student's program and his behaviors and that they told the parent they would work on it with a BSP (Tr. p. 307). Further, the second grade teacher testified that they also provided resources for the parent to carry out at home, and that they were in very close contact with the parent (id.). Additionally, in her direct testimony by affidavit the second grade teacher stated that throughout the 2021-22 school year she sent resources home to the parent to help her implement the behavior strategies that they were applying in the classroom including first/then boards, social stories, and other visuals "which proved effective" for the student, and that the school offered parent workshops throughout the school years to support the parent (Dist. Ex. 26 ¶ 8).

Based on the foregoing, the IHO correctly determined that it was not necessary for the district to conduct an FBA or develop a BIP as the supports included in the IEP and program otherwise addressed the student's identified behavioral needs.

Turning to the parent's general claims of inappropriateness and lack of progress, the second grade teacher also testified that she sent a copy of the IEP to the parent to review and determine whether the parent "disagree[d] with anything" and to her knowledge, the parent was never "opposed to anything" (Tr. p. 323). The second grade teacher stated that to her knowledge the parent agreed with the IEP (Tr. p. 306; see Dist. Ex. 5 at pp. 11, 23). Additionally, the second grade teacher testified that she continued to implement the student's IEP and annual goals along with the BSP during the 2021-22 school year (Dist. Ex. 26 ¶ 17). The second grade teacher stated that results of the October 2021 administration of the ABLLS-R to the student showed that he had made "great progress" in almost every skill category since the November 2020 assessment (Dist. Ex. 26 at ¶ 17; compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 5 at pp. 1-2). The second grade teacher added that almost every section of the testing showed progress, that the student's IEP annual goals were "building off of the skills that he[had] made progress in," and that she was creating annual goals that were "growing" and a little bit more difficult to show that the student had made progress (Tr. pp. 317-18). In her written testimony the second grade teacher reported the student's progress toward the March 2021 IEP annual goals involving answering "wh" questions and solving addition problems with sums up to 20 and that he had mastered his annual goal of spelling 25 vocabulary words (Dist. Ex. 26 ¶ 21).

The student's 2021-22 school year progress reports indicated improvement in all areas including speech, academics, fine and gross motor skill, self-help and ADL, play and social skills and behavior (Dist. Ex. 19 at pp. 3-4). The final progress report stated that the student was making



great progress toward his new academic goals, loved to read aloud, could identify two story elements (title and author), made great progress toward solving addition problems, and had shown "huge" improvement on remaining seated during individual and/or group instruction (*id.* at p. 4). In sum the second grade teacher testified that she believed the student had made progress to the best of his ability in terms of reaching certain benchmarks (Tr. p. 318). The evidence does not support the parent's allegations that the student was not making progress.

### **c. Special Transportation**

The IHO found that, according to the evidence in the hearing record, the issues related to transportation occurred during the 2021-22 school year (IHO Decision at p. 6). However, the IHO found that the district's inconsistent provision of the student's transportation services did not rise to the level of a denial of a FAPE because the district had offered "recovery services" for any missed school days and that the parent had contributed to the number of the student's absences (*id.*).

In framing the issues at the impartial hearing, the IHO asked the parent's attorney on October 16, 2023 to confirm that the parent was asking for appropriate transportation to and from school noting that the 2022-23 school year was "over" (Tr. pp. 235-36). The parent's attorney replied that the complaint was originally filed during the 2022-23 school year and so it would have been relief for that year but since the year had elapsed she asserted the parent's position was that it should be added to the student's IEP going forward, noting there had been consistent and significant issues with transportation where the bus either did not show up or would not transport the student for various reasons which had prevented the student from getting to school (Tr. p. 256).

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; *see* 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; *see* Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (*Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 894 [1984]; *Dist. of Columbia v. Ramirez*, 377 F. Supp. 2d 63 [D.D.C. 2005]; *see* Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; *Letter to Hamilton*, 25 IDELR 520 [OSEP 1996]; *Letter to Anonymous*, 23 IDELR 832 [OSEP 1995]; *Letter to Smith*, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (*Donald B. v. Bd. of Sch. Commrs.*, 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (*Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at <http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf>). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

The March 2021 IEP included information in the student's management needs that the student received door-to-door transportation in a miniwagon with two seats and air conditioning (Dist. Ex. 5 at p. 23). The March 2021 IEP also included a recommendation for special transportation consisting of transportation from the closest safe curb location to school, air conditioning, two seats and a "door to door mini wagon" (id. at p. 44). The reasons indicated were that the student met "the criteria for the disability classification of Autism, which affect[ed] his learning, behavior, and/or participation in grade level school activities, and therefore the Individualized Educational Plan team recommend[ed] specialized transportation of door to door bussing for [the student] whose documented needs affect[ed] his ability to travel to or from school" (id.).

The student's second grade teacher acknowledged that the bus did have a certain effect on the student's ability to attend school, but noted it was out of her control (Tr. p. 278). The second grade teacher noted that at times "during COVID," transportation staff tested positive and the district was unable to find a substitute (Tr. pp. 278-79). The second grade teacher also testified that the student's sleep schedule and his difficulty sleeping early or through the night made it so the student was unable to wake up for school and affected his attendance (Tr. pp. 312, 320). She added that the parent "was able to fix the sleep schedule" and was able to be more consistent in terms of the student going to sleep earlier and so he was able to wake up on time for school (Tr. pp. 312-13). In sum, the second grade teacher stated that sickness, sleep schedule and bussing issues were all among the reasons for the student's absences (Tr. pp. 321-22). The second grade teacher acknowledged that she believed that if the student's attendance was more consistent it would have been more beneficial (Tr. pp. 279-80). However, as detailed above, the student was making progress toward his annual goals and with the execution of his behavior support plan.

With regard to the 2022-23 school year, the student's third grade teacher testified that during the 2022-23 school year there was a bus issue and that it was resolved within two weeks and that they had not had the issue since (Tr. pp. 329, 331-32, 359-60).

The IHO determined that the testimony of the second grade teacher and the parent established "that due to the COVID- 19 pandemic the student missed a significant number of days from school because the [district] failed to provide consistent and appropriate transportation for the student during the 2021-2022 school year" (IHO Decision at p. 6). The IHO also found that "[w]hile the parent may have contributed to the student's absences from school, the special education teacher acknowledge[d] that the student did not make the academic progress he would

have made had he been able to attend school on a more consistent basis" (id.). The IHO further found that "[t]o make up for the missed days of school, the [district] offered the parent 'recovery services' for the student" (id.). For those reasons, the IHO found that the district's "failure to provide consistent transportation for the student did not result in a denial of FAPE for the 2021-2022 school year" (id.).

The March 2021 CSE recommended that the student receive special transportation and the parent has not alleged that the district failed to implement the special transportation services recommended in the March 2021 IEP with any specificity. In her request for review, the parent argues that "a decision in favor of [the parent] should be issued awarding all relief requested including transportation" (Req. for Rev. ¶3). Within the paragraphs enumerating the parent's specific requests for relief, there is no mention of transportation. In the due process complaint notice, the parent's requested relief was identical to the special transportation recommended in the March 2021 IEP with the exception of a request for a 1:1 travel paraprofessional (Parent Ex. A at p. 17). Notably, the parent's attorney indicated at the impartial hearing that the request for appropriate transportation should be added to the student's IEP going forward (Tr. p. 256). However, the parent's testimony regarding her problems with the district's provision of special transportation was unrelated to the need for a 1:1 paraprofessional. Therefore, there is insufficient reason in the hearing record to disturb the IHO's determination that the inconsistencies in the provision of the student's special transportation services did not rise to the level of a denial of a FAPE.

Review of the hearing record supports the IHO's determination that the student was offered a FAPE for the 2021-22 school year. To the extent the parent alleges the recommendations set forth in the IEEs conducted in 2023 demonstrate that the March 2021 IEP was not appropriate and failed to address the student's needs, that argument must fail. It is an impermissible retrospective comparison of the parent's desired programming with the actual programming implemented in the student's public school placement, but the requirement is that "with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible" (R.E., 694 F.3d at 195). Such a comparison proffered by the parent is not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at \*8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at \*5 [S.D. Cal. Mar. 14, 2011]).

## 2. March 2022 IEP

The parent's arguments are difficult to follow on appeal because with regard to the 2022-23 school year, there are no specific challenges to the IHO's decision related to the March 2022 CSE and resultant IEP or the October 2022 CSE and resultant IEP and therefore such claims are increasingly tenuous. The evidence shows that in March 2022 the CSE convened to conduct the student's annual review and develop his IEP (Dist. Exs. 8; 9 at pp. 1-2). Continuing to find the student eligible for special education and related services as a student with autism, the March 2022 CSE recommended the same program and services found in the prior IEP (compare Dist. Ex. 8 at pp. 1, 39-40, 45, with Dist. Ex. 5 at pp. 1, 39-40, 45). The student was provided the same programs and services for the extended school year and the IEP indicated that the student would continue to participate in the NYSAA (Dist. Ex. 8 at pp. 40, 42-43). The March 2022 IEP included annual goals to improve the student's reading, math, writing, social/emotional skills, self-management/behavior, and skills in the areas measured by adapted physical education, OT, and speech-language therapy (Dist. Ex. 8 at pp. 30-38).

In her direct testimony by affidavit, the student's second grade teacher testified that in developing the student's March 2022 IEP the CSE reviewed the student's October 2021 ABLLS-R scores, his Fountas and Pinnell reading and writing scores, a September 2021 parent questionnaire, an October 2021 adapted physical education assessment, February 2022 speech-language therapy reports, March 2022 OT reports, and the March 2021 IEP, including progress toward his annual goals (Dist. Ex. 26 ¶ 20; see Dist. Ex. 8 at pp. 1-2).<sup>18</sup> Review of the March 2022 IEP shows that the present levels of performance were also based on results of assessments including Math Attainment, Motivation Assessment Scale, and Behavior Repertoire Chart from October 2021, and a November 2021 BSP (Dist. Ex. 8 at pp. 2-3). The second grade teacher testified that the CSE also considered her own classroom observations and the input from the parent and speech provider, who were present at the meeting, to develop a special education program individually tailored to the student's educational needs (Dist. Ex. 26 at ¶ 20).

Regarding the student's academic performance and needs, including those in the area of speech-language development, the evaluative information indicated the student continued to need work on answering "where" and "why" questions, identifying five story elements, solving addition and subtraction problems with sums up to 20, cutting out the correct words to form a sentence and copying the sentence, asking questions such as "do you have \_?" and "Who goes/Who's next?" and increasing time on task for non-preferred activities (Dist. Ex. 8 at pp. 1, 4, 6, 13, 19). The March 2022 IEP indicated that based on teacher observation and "data" the student needed supports including repetition, breaks, gestural, physical, and nonverbal prompting, reminders/redirection, visuals, simplified language, additional time, reinforcers, praise, and a picture schedule (id. at pp. 5-6).

Socially, the March 2022 IEP's present levels of performance indicated the student mostly engaged in isolated play and included teacher reporting that the student usually needed an item/reinforcer to help him transition back into the classroom after a related service session, he

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<sup>18</sup> As with the prior year's IEP, the March 2022 IEP and the subsequent October 2022 IEP included test scores and reporting from the aforementioned assessments and reports, however again these assessments and reports were not included in the hearing record (Dist. Exs. 8 at pp. 1-6, 11-13, 17-20; 10 at pp. 1-6).

went to familiar adults when he needed help, and he needed frequent prompting and redirection to attend to the task or demand at hand (Dist. Ex. 8 at pp. 11-12). The IEP also noted that when overwhelmed or frustrated the student would sometimes withdraw from or attempt to escape the situation, he self-regulated from stressful situations by crying or going to a familiar/preferred adult, and if frustrated he would occasionally curse (id. at p. 12). The IEP also included parent reporting that the student expressed the same emotions at home, would run to his room and close the door and sometimes punch, curse, and/or hit his parent to self-regulate/self-soothe (id.). According to the March 2022 IEP, the March 2021 IEP's progress reporting indicated the student would continue to work on the social/emotional annual goal of answering personal questions (id. at pp. 1).

Regarding the student's physical development in the areas of adapted physical education, OT and ADL skills, according to the March 2022 IEP student needs were identified as fine motor skills development, visual motor/cognitive perceptual skills, graphomotor skills development, locomotor movements, self-care skills, toileting, and manipulating buttons, zippers, and snaps (Dist. Ex. 8 at pp. 18-20).

Turning to the student's behavioral needs, the hearing record shows that a few months before the student's March 2022 annual review, the school counselor contacted the parent to see if she would be interested in having the student evaluated/considered for counseling (Dist. Exs. 8 at p. 17; 26 ¶ 18). The March 2022 IEP stated that the parent declined counseling services after further discussion between the school counselor, the classroom teacher and the parent, as all agreed that counseling was not needed at that time as it would be more restrictive for the student (Dist. Exs. 8 at p. 17; 26 at ¶ 18). Further, according to the IEP the student understood the consequences of his actions and responded to the coping strategies and interventions used in the classroom when he needed to self-soothe and self-regulate (Dist. Ex. 8 at p. 17; see Dist. Ex. 26 at ¶ 18). Additionally, the third grade teacher noted that they wanted to get counseling for the student "a few years ago," but the parent "declined" (Tr. p. 334).

The third grade teacher stated that she began implementing the student's BSP in July 2022 (Dist. Ex. 27 at ¶ 6). She testified that the student did not require an "official" BSP but that the student did have a BSP for the 2022-23 school year because it was "required by our school" (Tr. p. 329). The third grade teacher indicated a similar process for developing the BSP as was described by the student's prior teacher, and she explained that the pick the behavior that was "most interfering with either the learning or the class" (compare Tr. pp. 329-30, 337, with Tr. p. 268).

### **3. October 2022 IEP**

In October 2022 the CSE reconvened to conduct a "reevaluation meeting" (Dist. Exs. 10; 11 at pp. 1-2). According to the student's third grade teacher, the October 2022 CSE reviewed the Fall 2022 SANDI scores, September 2022 parent questionnaire, October 2022 Behavior Repertoire Chart, October 2022 Motivation Assessment Scale, October 2022 BSP, an adapted physical education assessment, Fall 2022 speech-language therapy reports, Fall 2022 OT reports, and the previous March 2022 IEP (Dist. Ex. 27 at ¶¶ 6, 12). The third grade teacher testified that the CSE also relied on her classroom observations and the input from the parent and providers present at the IEP meeting (id.). The October 2022 IEP present levels of performance included much of the same information regarding the student's abilities and needs that was found in the March 2022 IEP

present levels of performance (compare Dist. Ex. 10 at pp. 2-8, with Dist. Ex. 8 at pp. 4-20, 24-25).

Regarding questioning that some of the student's March 2022 annual goals were included in the October 2022 IEP, the third grade teacher explained that at the time of the October 2022 CSE meeting there had not been a full year since the March 2022 IEP, and therefore the student did not have the benefit of working on the annual goals for a full year (Tr. pp. 338-40). Therefore, some of the student's annual goals were the same from the previous year and some annual goals she "tweaked" (id.). The October 2022 IEP included new annual goals in the areas of reading (answering "wh" questions when given two choices), writing (copying a sentence from a model with attention to upper/lower case letters and punctuation), adapted physical education (completing five sit-ups), OT (shoelace tying, improved finger manipulation skills), and speech-language therapy (ask and respond to questions such as "what is it?", "where is it?", "Is it a \_?") (compare Dist. Ex. 10 at pp. 10-19, with Dist. Ex. 8 at pp. 30-38).

The third grade teacher indicated that she completed a behavior repertoire checklist and motivation assessment scale for the student in October 2022 (Dist. Ex. 27 ¶ 8). The October 2022 behavior repertoire checklist indicated the student occasionally exhibited behaviors of hitting himself, pushing others, echolalia, screaming, crying, cursing, perseveration, impulsivity, picky eating, agitation, and peculiar mannerisms or habits, and usually exhibited the behavior of poor concentration and attention (Dist. Ex. 21 at pp. 1-5). The October 2022 motivation assessment scale described the target behaviors as crying, screaming and inappropriate language and identified escape/avoidance as the primary function of the behavior (Dist. Ex. 22).

The October 2022 CSE recommended the same program and services found in the March 2022 IEP with the exception of one additional session of individual speech-language therapy per week (compare Dist. Ex. 10 at pp. 19-20, with Dist. Ex. 8 at p. 39-40).

The updated February 2023 BSP identified the target behavior as crying, screaming, and using inappropriate language and noted that the behavior occurred in the classroom when the student transitioned to an unpreferred activity or if he missed a preferred activity (Dist. Ex. 12). The BSP noted that then-currently, the behavior occurred at an approximate rate of five times per week and hypothesized the function of the behavior was escape (id.). Proactive strategies included use of a daily schedule, daily review of classroom rules, and use of engaging activities, praise, and a first-then board with visuals (id.). Interventions included nonverbal and gestural prompting, redirection to tasks using visual supports with use of his first/then board, opportunities to choose different reinforcers, and modified (or simply time on) task so the student could be successful with systematic increase over time (id.). The stated goal and "[c]riteria for termination" was when the occurrence of the target behavior decreased to one time per week (id.). In discussing the behavior interventions she employed in addition to the BSP, the third grade teacher stated that sometimes just being silly with the student, trying to change the subject and distracting him could change his behavior and she added that it was like a "bag of tricks," what worked today might not work tomorrow or ten minutes from now (Tr. pp. 345-46).

Regarding the student's behaviors exhibited during the 2022-23 school year, the third grade teacher stated that occasionally the student's behavior interfered with his learning or that of others,

but she further testified that at the beginning of the year the target behavior occurred five or six times a week and that by the end of the year it was "maybe once or twice a week" (Tr. p. 333-34).

The third grade teacher explained that on only one occasion had she witnessed any elopement behavior, and in that case specifically, she noted that the parent was present and the student was trying to get to her (Tr. pp. 330-31). She explained that the reference to the function of the behavior as "escape" did not necessarily mean the student was physically trying to leave the classroom but that he was just trying to leave the activity (Tr. p. 345; see Dist. Ex. 22). The third grade teacher also noted that there were no times during the 2022-23 school year where the student would hit either students or adults in the classroom (Tr. p. 341).<sup>19</sup>

The student's 2022-23 fall and spring progress reports stated the student had shown improvement in most all areas including behavior, and speech-language, academic, fine and gross motor, play and social skills, and that he had maintained level in the area of self-help and ADL skills (Dist. Ex. 23 at pp. 1-2). Teacher comments indicated that the student made "excellent progress toward his IEP goals," was "progressing nicely" with his reading and math skills and made "strong progress" adding single digit numbers, had been sitting for group lessons more consistently, and was improving his frustration tolerance and behavior (id.). The final progress report indicated the student had made improvements in all areas and included comments that the student made progress toward all his IEP goals, had improved in math and reading, was able to participate in class lessons more effectively, and that his behavior had improved "dramatically" (id. at p. 3).

The third grade teacher testified that the parent did not express to her concerns regarding the student's learning and behaviors during the 2022-23 school year, and stated that every time they had a parent meeting, the third grade teacher reviewed the goals they were working on and "everything was okay, great, sounds good, no problem, love it, thank you" (Tr. p. 334).

Lastly, without challenging any specific IEP, the parent argues that an appropriate program for the student must be based on the principles and practices of ABA (Parent Ex. A). While not pled as a cognizable claim at any stage of this proceeding, upon my independent review of the hearing record, the evidence shows that the district had considered the student's need for ABA. The student's third grade teacher indicated that prior to becoming a special education teacher at the student's school she worked as an ABA "therapist" (Dist. Ex. 27 ¶ 4). The third grade teacher stated that ABA was more restrictive, and that the student did not need that methodology to learn in the classroom; she further testified that the student had made tremendous progress in all areas and was probably one of the "highest students" in the classroom (Tr. p. 348). The third grade teacher testified that considering the student's needs, progress, and behavior she did not believe that he required ABA services as a part of his special education program in order to access the

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<sup>19</sup> During testimony on October 16, 2023, the third grade teacher acknowledged that the student pinched a student and hit an adult in the classroom during an observation "sometime in August" (Tr. pp. 343-44). It is unclear whether the third grade teacher was referring to August 2022, or August 2023—during the 2023-24 school year which is not at issue in this appeal. Regardless, she explained that was not an accurate representation of the student's behavior since that day was not typical of the student's routine, and he did not like his routine changed (see Tr. pp. 351-52). She reiterated that they did not see the behaviors of pinching and hitting during the school year (Tr. p. 353).

general education curriculum (Dist. Ex. 27 ¶ 16). Additionally, she noted that certain elements of ABA methodology were useful to the student, including a first-then board, which was something she had recommended on his February 2023 BSP (Dist. Ex. 27 ¶ 16; see Dist. Ex. 12).

Of greatest import, however, is that the evidence in the hearing record demonstrated that the parent declined additional academic supports. The student's second grade teacher testified that beginning in December 2021 the district offered the student special education recovery services, which included 20 hours of small group instruction (six or fewer), 10 hours of OT in a group, and 10 hours of speech-language therapy in a group, all offered before the normal school hours (Tr. p. 280; Dist. Ex. 26 ¶12; see Dist. Ex. 20 at pp. 1-2). The second grade teacher stated that in her opinion, the recovery hours would have been beneficial to the student in helping him make up for any potential effect the pandemic had on his learning (Dist. Ex. 26 ¶ 12). The teacher noted that the parent declined to bring the student to any of the sessions (id.). In addition, the third grade teacher stated that there was an afterschool program that was offered but that "they did not participate" (Tr. pp. 340-41). The evidence above describes that the district offered recovery services but the parent turned them down. Thus, even if I were to find that the IHO erred, which I do not, I would be unlikely to award compensatory education services upon equitable considerations.

Based on the foregoing, the hearing record supports the IHO's determination that the student was offered a FAPE for the 2022-23 school year.

### **C. Request for Educational Records**

In its cross-appeal, the district asserts that the IHO erred in ordering it to provide the parent with the student's records from the school years from 2018 through 2023. The district further argues that the parent's May 23, 2023 due process complaint notice stated that the district responded to the parent's record request on October 20, 2021, but upon information and belief had failed to provide the complete file of records. The district asserts that the parent "failed to specifically identify, either at hearing or on appeal, which records are allegedly missing from the records which were produced by the [district] on October 20, 2021" and that the IHO erred in ordering such broad relief (Answer and cross-appeal ¶14). The hearing record supports the district's position on this issue. The parent and the district assert that the district responded to the parent's request and the district avers in its answer and cross-appeal that it has complied with the parent's original records request. In the event the parent continues to believe the district has not complied, her remedy is to challenge the sworn statements set forth in the district's answer and cross-appeal in a proper venue.

## **VII. Conclusion**

In summary, the IHO correctly found that the parent's claims related to the 2019-20 and 2020-21 school years were barred by the IDEA's two-year statute of limitations and that no exceptions or tolling periods applied to allow the claims to go forward. The IHO also correctly determined that the district offered the student a FAPE for the 2021-22 and 2022-23 school years. With regard to the parent's record request, the hearing record supports a finding that the district complied with the parent's request, and it was not necessary for the IHO to order the district to provide the parent with the student's educational records from 2018 through 2023.



I have considered the parent's remaining contentions and find they are without merit.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated November 25, 2023 is modified by reversing that portion which ordered the district to provide the parent with the student's records including any reports cards and progress reports for the school years 2018 through 2023.

**Dated:**            **Albany, New York**  
                         **February 2, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**