



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-033

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 Board of Education of the Marion Central School District

Appearances:

McNelis Law PLLC, attorneys for petitioner, by Patrick M. McNelis, Esq.

Ferrara Fiorenza PC, attorneys for respondent, by Jennifer E. Mathews, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2022-23 school year was appropriate and which determined the parent's claims related to the 2023-24 school year were not ripe for adjudication. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 has received diagnoses of Down Syndrome, post-traumatic stress disorder, and myopia (Dist. Exs. 5 at p. 1; 12 at p. 1). The CSE convened on May 18, 2022 for an annual review and to formulate the student's IEP for the 2022-23 school year (see generally Dist. Ex. 5). The May 2022 CSE determined that the student remained eligible for special education and related services as a student with an intellectual disability and recommended a 12-month program consisting of placement in an 8:1+3 special class together with three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of group (2:1) speech-language therapy, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per

week of group (2:1) OT, one 30-minute session per week of individual music therapy, and one 30-minute session per week of group (2:1) music therapy in a State approved nonpublic school (Dist. Ex. 5 at pp. 1, 10-11, 13).¹

At the parent's request, the CSE reconvened on January 19, 2023 to discuss transportation services and, as a result, a special transportation accommodation was added for the bus driver to honk the horn upon arrival at the student's home (Dist. Exs. 7 at pp. 1, 13; 8). The recommended special education programs and services in the January 2023 IEP remained the same as in the May 2022 IEP (compare Dist. Ex. 5 at pp. 1, 10-11, with Dist. Ex. 7 at pp. 1, 11). On May 5, 2023, the CSE convened for the purposes of an annual review for the 2023-24 school year (see generally Dist. Ex. 9 at p. 1). For the 10-month portion of the school year, the May 2023 CSE recommended that the student attend an 8:1+3 special class with two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of group (3:1) speech-language therapy, one 30-minute session per week of individual music therapy, and one 30-minute session per week of group (2:1) music therapy at the same State approved nonpublic school (see Dist. Ex. 7 at p. 13; Dist. Ex. 9 at pp. 1, 11-12, 14). For July and August 2023 the CSE recommended that the student attend an 8:1+3 special class and receive one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group (3:1) speech-language therapy, one 30-minute session per week of group (2:1) OT, and one 30-minute session per week of group (2:1) music therapy (*id.* at p. 12). The May 2023 CSE recommended the same special transportation for the student as was recommended in the January 2023 IEP (compare Dist. Ex. 9 at p. 14, with Dist. Ex. 7 at p. 13).

In a due process complaint notice, dated May 31, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (see Dist. Ex. 1). The parent noted that neither the recommended 8:1+3 special class placement nor the recommended nonpublic school were in dispute in this proceeding (*id.* at pp. 1-2). Turning to the disputed matter, the parent alleged that the district failed to provide special transportation supports and accommodations to help the student get on the bus in the mornings, which denied the student access to his special education program and related services (*id.* at p. 2). As relief, the parent requested the development of an IEP with appropriate transportation services to eliminate or reduce the number of school days the student missed, reimbursement for the parent's transportation of the student to and from school, and compensatory services for the district's denial of a FAPE (*id.* at p. 3). In response, the district denied the material allegations contained in the due process complaint notice (see Dist. Ex. 2).

After two prehearing conferences on June 30, 2023 and September 20, 2023, an impartial hearing convened and concluded on October 31, 2023 (Tr. pp. 1-111; IHO Decision at p. 2).² In a decision dated December 11, 2023, the IHO determined that the district offered the student a

¹ The recommended summer services differed from the recommended 10-month services in that the frequency of the student's individual related services was reduced (Dist. Ex. 5 at pp. 10-11).

² An email summary of the September 20, 2023 prehearing conference was provided to the Office of State Review. The hearing record does not, however, include either a transcript or a summary of the prehearing conference held on June 30, 2023, as required by State regulation (see 8 NYCRR 200.5[j][3][xi]; see generally Tr. pp. 1-111; Dist. Exs. 1-13).

FAPE for the 2022-23 school year and denied the parent any relief in the form of reimbursement for transportation costs or compensatory services (IHO Decision at pp. 14, 16). With respect to the parent's claims related to the 2023-24 school year, the IHO noted that the parent's due process complaint notice was dated May 31, 2023 and "thus, no one had knowledge at the time of what would happen in the future" and the IHO then determined that the 2023-24 school year was "not a part of this proceeding" (*id.* at pp. 15, 16). Although the IHO did not order relief, the IHO recommended that the district conduct a functional behavioral assessment (FBA) to determine if there was something the district could do to help the student get on the bus, that the district add a transportation goal to the student's IEP, and that all of the agencies working with the student and his parent coordinate with each other (*id.* at p. 16).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be repeated in detail. The central issue presented on appeal is whether the IHO erred in finding that the district offered the student appropriate special transportation services and therefore, a FAPE for the 2022-23 school year. In addition, the parent asserts that the IHO incorrectly determined that the 2023-24 school year was not an issue for this impartial hearing. The parent asserts that the district's failure to ensure that the student attended his special education program by failing to provide appropriate transportation services for the 2022-23 and 2023-24 school years constituted a failure to implement the IEPs for both school years. As relief, the parent seeks compensatory services, and reimbursement for the parent's transportation of the student.

In an answer, the district generally denies the material allegations contained in the request for review. The district argues that the IHO correctly determined that it offered the student a FAPE for the 2022-23 school year, and that the parent is not entitled to reimbursement of transportation costs or compensatory education services. The district also asserts a procedural inadequacy in the service and filing of the request for review.³

The parent submits a verified reply to the district's answer arguing that it is the responsibility of the district and not the parent to address the issue of transportation. The parent

³ The district argues that the parent's appeal papers failed to contain a notice of request for review. Each request for review filed with the Office of State Review must contain 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; 279.4[a]). Here, while the lack of a notice of request for review does violate State regulation, the district does not allege that its ability to timely prepare, serve, or file an answer was compromised or prejudiced in any way. Accordingly, the lack of notice in this instance does not warrant the dismissal of the parent's request for review. Moving forward, counsel for the parent should ensure that he reviews Part 279 and conforms his practice accordingly, as, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after repeated failures to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

also submits additional evidence for consideration.⁴ The district objected to the verified reply arguing that no new claims were raised in the answer, and therefore, most of the reply was outside the scope of the issues raised.⁵

V. Applicable Standards

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

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

⁴ The parent submits as additional evidence two documents: a Notice of Intention to Seek Review and an affidavit of service of the same. However, this is not the document referenced by the district in its answer (see FN 3 above). The additional evidence submitted by the parent is already a part of the hearing record and does not require further action.

⁵ State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, although the district's answer does not raise new issues, the district's memorandum of law references case law that addresses the issue of transportation and the reply responds to the district's arguments. In an exercise of my discretion and to ensure a complete review of the limited issues on appeal, the parent's reply will be considered.

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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. 2022-23 School Year

Generally, the parent asserts that the district failed to offer the student a FAPE for the 2022-23 school year in following ways: failing to provide appropriate transportation services resulting in the student missing more than twenty school days and failing to ensure that the student attended his special education program which constituted a material failure to implement his IEP. In contrast, the district asserts that the evidence in the hearing record demonstrates the "numerous accommodations and strategies" provided to the student to help him get on the bus in the morning. Further, the district asserts that the student made progress on his annual goals for the 2022-23 school year and, therefore, the IHO correctly determined that the district offered the student a FAPE.

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]). Transportation as a related service can include: travel to and from school and between schools; travel in and around school buildings; and specialized equipment, such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). 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 https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.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 district asserts that it is the responsibility of the parent to get the student on the bus and the "[d]istrict's obligation does not extend to going to the home and bringing the [s]tudent to the bus" (Answer ¶ 32; Dist. Mem. of Law at pp. 14-15). The district cites to decisions of the Commissioner of Education regarding transportation in general where it has been held that "[i]t is the responsibility of the parent or guardian, not the district, to ensure that a child safely reaches the pick-up point" (Appeal of C.F. and J.F., 60 Ed. Dep't Rep., Decision No. 17,980 [2021], available at <https://www.counsel.nysed.gov/Decisions/volume60/d17980>; see also Appeal of T.H. and D. H., 58 Ed. Dep't Rep., Decision No. 17,480 [2018], available at <https://www.counsel.nysed.gov/Decisions/volume58/d17480>). However, there are some weaknesses in the district's arguments as those cases do not involve the issue of special transportation of a student with a disability. As noted above, specialized transportation must be provided to a student with a disability if it is determined to be necessary for the student to benefit from special education (see Donald B., 117 F.3d at 1374-75). The question then becomes at what point does the transportation obligation end, with courts have extending it as far as the door of the student's home (see Anchorage Sch. Dist. v. N.S., 2007 WL 8058163, at *8 [D. Alaska Nov. 8, 2007] [emphasis added] [resolving a dispute over the need for curb-to-curb versus door-to-door special transportation]). According to State guidance, the type of transportation to be provided to the student is one consideration, specifically asking "[d]oes the student require accommodations such as door-to-door pick up and drop off, a small bus with few students, or individual transportation?" ("Special Transportation for Students with Disabilities," at p. 1, VESID Mem.).

Nevertheless, the district also argues that it has provided "accommodations, strategies and supports to [the parent] and [s]tudent to help them get him out of the home and to the bus each morning" (Dist. Mem. of Law at p. 15).

According to the district's director of student support services (director), since in or about the year 2020 the student struggled to leave his house and get on the bus (Tr. p. 19). Due to the student's ongoing struggles, in May 2021, the district sought a functional behavioral assessment (FBA) because of the student's "refusal to transition out of the home and to the bus in a timely fashion" (Dist. Ex. 12 at p. 2). The evaluator conducted observations of the student both in school and at home, and specifically, during observations in the home found the student to be on his "own agenda" (id. at pp. 3-4). The evaluator opined that the student "continue[d] to require an environment that has a high degree of structure, consistency and predictability to function optimally" (id. at p. 4). The evaluator found that the functions of the student's behavior were primarily related to escape and avoidance (id.). According to the evaluator, the student would engage in a tantrum or "shut down" when presented with a demand that he did not like, was not on his own agenda, or was difficult for him to perform (id.). A secondary function of gaining access to tangibles was found when he was inhibited from engaging in a preferred task that was not

appropriate at the time (*id.*). The attention function was also observed when the student engaged in problem behavior or attempted to hug an adult when he wanted to avoid following a direction or request (*id.* at p. 5). Based on conversations with school staff, the evaluator found that, in the school environment, the student's behavior had improved "with many problem target behaviors at zero levels" (*id.*). The evaluator concluded that the behaviors exhibited by the student in the home were not solely related to the bus but were "an overall issue and more pronounced in the family setting" (*id.*). Furthermore, the evaluator opined that previous recommendations regarding transitioning the student to the bus were "on target," but the family struggled to consistently implement the recommendations (*id.*). The evaluator recommended "increased structure, consistent limit setting, and contingent reinforcement for compliance" in the home (*id.*). Lastly, she recommended the development of a behavioral intervention plan (BIP) to address the student's challenging behaviors (*id.* at pp. 5-6).

Subsequent to the FBA, a CSE meeting was held to develop an IEP for the student for the 2021-22 school year and to review the results of the FBA (*see* Dist. Ex. 4). The CSE recommended a 12-month program with placement in an 8:1+3 special class in an approved nonpublic school with related services of speech-language therapy, OT, and music therapy (*id.* at p. 1).⁷ The CSE discussed the need for the development of a BIP to provide "consistent language between home and school to help support [the student's] behaviors at home" (*id.* at pp. 2, 4).⁸ The outside agency supporting the family agreed to help support the implementation of the BIP in the home (*id.* at p. 4).

The CSE next convened in May 2022 and according to the May 2022 IEP, special transportation was recommended in the form of a small bus with an attendant (Tr. pp. 23, 41; Dist. Ex. 5 at p. 13).⁹ For the 2022-23 school year, the student was on a bus with approximately five other students, all of whom attended schools outside of the district (Tr. pp. 18-19).

The district implemented and the student received transportation services during the 2022-23 school year (Tr. pp. 18, 74). Once the student was on the bus, he did not exhibit any behaviors that interfered with his transportation to school (Tr. pp. 21-22). Nevertheless, during the 2022-23 school year the student missed a total of 28 school days of which five of the days were for a family vacation (Tr. p. 43; Dist. Ex. 13).¹⁰ When the student had to get on the bus from school to go

⁷ The recommended summer services differed from the recommended 10-month services in that frequency of the student's speech-language therapy was reduced and OT and music therapy were not recommended as no regression was observed in those areas (Dist. Ex. 4 at p. 1, 3).

⁸ According to the various IEPs, a BIP was developed to address the student's refusal behaviors; however, the BIP was not included as part of the hearing record (Tr. p. 21; *see* Dist. Exs. 4 at pp. 2, 4; 5 at p. 8; 7 at p. 8).

⁹ The student attended a State approved nonpublic school which was approximately a 45-minute drive from the school district (Tr. p. 23; Dist. Exs. 5 at pp. 1, 13; 7 at pp. 1, 17).

¹⁰ It is unclear how many of the missed days were due to the student being unable to get out of the house and into the bus, or how many days the parent transported the student due to issues with busing (*see* Tr. pp. 49, 97-98, 100-01).

home there were generally no issues, but a bus monitor was there in case the student needed assistance (Tr. p. 22).

The director testified that in January 2023 the parent contacted her by email requesting a meeting about the bus (Tr. pp. 19-20). The director scheduled the January 2023 CSE meeting to discuss transitioning the student from inside the home to the bus in the morning in a timely manner (Tr. pp. 19-20, 23; Dist. Exs. 7 at pp. 1; 8 at pp. 1-2). The meeting was attended by school staff, including the director who served as district representative, as well as the district director of transportation, a special education teacher, a school psychologist, an assistant program director, the district secretary to special education, and a behavior specialist, in addition to other public agencies that supported the family, a private educational specialist involved in the care and support of the student and his family, and the student's parents (Tr. pp. 23-24, 26; Dist. Exs. 7 at p. 1; 8 at p. 2). According to the parent, the student could take up to 20 minutes to get out of the house to the road where the bus was waiting (Dist. Exs. 8 at p. 2). The parents indicated the student was "combative" and when they attempted to use hand over hand assistance, he escalated quickly and could become dangerous and throw objects inside the house (*id.*). According to the meeting minutes of the January 2023 CSE meeting if the student did not get on the bus in the morning, the student was unable to attend school (*id.* at p. 1).^{11, 12}

The January 2023 CSE members "brainstormed ideas," including having the behavior specialist develop social stories about the bus, the parents placing a picture of the driver and attendant on the front door to denote the next part of the student's schedule, having an electronic device on the bus with family pictures and music for the student to engage in while on the bus, allowing access to an iPad when the student was outside ready for the bus, and having the driver honk the horn upon arrival at the home (Tr. p. 25; Dist. Ex. 8 at pp. 1, 4-5). One of the suggestions was that the bus attendant get off the bus and go to the front door to get the student, but this was rejected as a safety concern for the other students on the bus who required an aide (Tr. pp. 28, 59-60; Dist. Ex. 8 at pp. 2-3). District staff indicated that "parents are responsible for getting their children through the threshold of the bus door" (Dist. Ex. 8 at p. 2). The parent asked if the bus could wait for the student until the student was ready to get on the bus, but this was rejected by the district citing concerns that any delays would increase the chances of other students having emotional reactions and that those students also needed to get to their respective schools (Dist. Ex. 8 at pp. 2-3). Additionally, the idea of sending a second bus for the student was discussed but it was noted that it would take hours for another bus to arrive back at the student's home resulting in the student missing school (Tr. p. 60; Dist. Ex. 8 at pp. 2-3). The meeting minutes reflected that a proposed change to the IEP for time management was discussed but not placed on the IEP, at that

¹¹ The district's director testified that meeting minutes are memorialized in the prior written notice document after each CSE meeting which is provided to the parents (Tr. pp. 14-15).

¹² The parent testified that "rarely" she would drive the student to school if "it work[ed] into [her] workday" (Tr. p. 101). She confirmed that the district had offered to reimburse her for transporting the student to school but explained that she had not chosen that option because "attachment need[ed] to be considered first" and most recently when she had taken the student to school he would not exit the car (*id.*).

time, because of the other discussions at the meeting (Dist. Ex. 8 at p. 2). The January 2023 CSE continued to recommend a bus with an attendant and also recommended that the bus driver honk the horn when the bus arrived at the student's house (Dist. Ex. 7 at p. 13).

The hearing record further reflects that the district has attempted strategies to help the student get to the bus, including reworking the bus route to pick the student up last, turning around to pick the student up on the same side of the road, pulling into the driveway, backing up the driveway to the house, having the bus aide go to the bottom of the stairs and wave to the student, having a tablet on the bus, having coloring sheets on the bus, having the director of transportation speak to the student on the phone in the morning, having the director of student services ride the bus to observe the issue, using a token system in school that allowed the student to earn time on an iPad if he rode the bus, providing pictures of the bus driver and bus aide for the parent to use at home, writing a song about how to get on the bus in the morning, and waiting five minutes for the student rather than the standard 20-30 seconds (Tr. pp. 21, 27-32, 45-47, 72, 74-75; District Ex. 3). The director testified that the district had suggested additional strategies, including having the student's father put him on the bus, using food as a motivator, use of a convex mirror as a visual cue to see the bus coming, and reimbursing the parent for transporting the student but these suggestions were rejected by the parent (Tr. pp. 27-30; Dist. Ex. 8 at pp. 1-3, 5).

The director further testified that the bus driver kept notes on how long it took the student to get on the bus (Tr. p. 27). The interim transportation director testified that the district had built a five-minute waiting period into the schedule, and occasionally waited longer but could not wait an unlimited amount of time because there were other students on the bus (Tr. pp. 71-72, 79; see also Tr. pp. 32-33, 62, 65-66). Additionally, according to the director, the student did not always get on the bus when the bus driver did wait for a period of time (Tr. p. 73; see also Tr. p. 33).

According to the director, although solo transportation was an option used in the district in some cases, it would not solve the problem which was that the student was not leaving the house to get on the bus (Tr. pp. 47-48, 65, 78). Further, although having the district provide solo transportation for the student would have alleviated concerns regarding the other student's on the bus, testimony indicated that there would still be a designated pick-up time and the driver would not necessarily be able to wait longer for the student, considering the bus was already waiting five or more minutes for the student (Tr. pp. 47, 60, 62-63, 65-66, 79). Furthermore, the district's director testified that even a modified school day would not be a solution because the student would still have to leave the home to get on the bus (Tr. pp. 64-65).

The parent testified as to the steps she takes in getting the student ready to leave the house in the morning, describing a routine beginning the night before leading through to completing the routine when the student is on the bus in the morning (Tr. pp. 87-91). According to the parent, although the routine is the same every day and the bus arrives at the same time every day, she cannot predict on a day-to-day basis whether the student will be successful (Tr. pp. 89, 100-01). Additionally, the parent testified that she has received support from outside services, but would

welcome disability support resources in helping the student get out of the house and onto the bus in the mornings (Tr. pp. 98-99).¹³

The director indicated that the behaviors described by the parent were not observed at school and the student followed directions and had few issues getting off the bus (Tr. pp. 42, 55). According to the director, the student made progress, and in fact achieved a majority of his annual goals (Tr. pp. 43-44; see Dist. Ex. 11). The director testified that the student's absences during the 2022-23 school year did not prevent him from receiving a FAPE because despite missing roughly 20 days of school, the student nevertheless met five out of the six annual goals included in his May 2022 IEP (Tr. p. 48; compare Dist. Ex. 5 at pp. 8-10, with Dist. Ex. 11 at pp. 1-10).

The IHO acknowledged the efforts made by the district and the frustration of the parent in trying to get the student on the bus (IHO Decision at p. 15). However, the IHO found that the mother's "expectations of the school district in terms of flexibility of transportation [were] unreasonable" (id.). The IHO found that the issue was not with the bus nor school setting but "confined" to the home environment, over which the district had no control (id.). The IHO noted that the IEPs lacked a "transportation goal of getting the [student] on the bus independently" (IHO Decision at p. 15).¹⁴

While I disagree with aspects of the IHO's reasoning, I nonetheless find no reason to disturb the IHO's conclusion that the district offered the student a FAPE for the 2022-23 school year. To the extent the parent argues on appeal that the IHO should have found that the district failed to offer the student a FAPE for the 2022-23 school year because it did not implement the student's IEP, the evidence in the hearing does not support such a finding.

"[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP" (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 467 ([S.D.N.Y. 2018]; see Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not

¹³ In addition, the parent testified that she has engaged the services of several agencies to help the student transition to the bus in the morning (Tr. pp. 91-95, 99). The parent testified that one of the agencies engaged by the parent in May 2023 had behavior specialists that go into the home on a weekly basis to assist the parent to get the student out of the home and onto the bus, but, according to the parent, this service did not help the student and he regressed getting on the bus (Tr. pp. 96, 98-99).

¹⁴ Guidance from the New York State Education Department states that special transportation goals do not need to be included on an IEP "except when instruction will be provided to enable the student to increase his or her independence or improve his or her behavior or socialization during travel" ("Special Transportation for Students with Disabilities, at p. 2, Office of Deputy Commissioner for Vocational and Educational Services for Individuals with Disabilities [March 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf; see Letter to Smith, 23 IDELR 344 [OSEP 1995]).

followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions under the circumstances of therapist absence as a result of the therapist's absence was not a significant failure to implement the student's IEP]).

Here, the evidence in the hearing record reflects that the district implemented the student's IEP as written and the student made progress during the 2022-23 school year. While the student missed 28 school days out of a 12-month school year, due at times to his behaviors which interfered with his ability to use the special transportation recommended for him, along with family vacation days and absences for other unspecified reasons, there is no indication that the periodic inadequacy of the implementation of the special transportation provided to him, in light of the consistent implementation of all other aspects of his IEP, and the general appropriateness of his educational programming for the 2022-23 school year, rose to the level of a denial of a FAPE to the student.

However, as further discussed below, I do not accept the IHO's apparent reasoning that the student's interfering behaviors regarding his ability to exit his home and get on the school bus constituted an issue "confined to the home" and therefore categorically was outside of the purview of the district's obligation to provide the student with a FAPE. While the district's implementation of the 2022-23 IEP for the student passed muster for purposes of providing the student with a FAPE, the district's continued recommendation of the same special transportation for the 2023-24 school year failed to offer the student a FAPE, as will be further discussed below.

B. 2023-24 School Year

In connection with the 2023-24 school year, the IHO found that the parent's claim was not a part of the proceeding because the due process complaint notice was filed on May 31, 2023 and it was unknown what transportation issues would arise during the 2023-24 school year (IHO Decision at pp. 15-16). I find that the IHO erred in concluding that the parent's allegations related to the 2023-24 school year were not viable in this proceeding.

Similar to the prior school year, the parent alleged in her due process complaint notice that the district failed to offer the student a FAPE because it did not offer the student appropriate accommodations and services to transition from his home to the bus (Dist. Ex. 1 at pp. 1-2). The May 2023 CSE continued to recommend special transportation accommodations of a bus attendant and for the bus driver to honk the horn upon arrival to the student's home (Dist. Ex. 9 at p. 14). The May 2023 CSE continued to discuss the same transportation issues and the district's director testified that the student's music therapist was going to develop a song for the student to assist with getting on the bus (Tr. p. 40). The May 2023 CSE meeting minutes reflect that the parent asked about other supports to help them get the student on the bus in the morning (Dist. Ex. 10 at p. 2). The parent expressed that since the May 2023 IEP noted that "wait time [was] needed for processing" by the student this should also include the bus waiting for the student to get on the bus (Dist. Exs. 9 at p. 8; 10 at p. 2). According to the May 2023 meeting minutes, the bus was able to

wait for "some amount of time," but it could not wait indefinitely because of the impact on other students getting to their schools on time (Dist. Ex. 10 at p. 2).¹⁵ The meeting minutes further noted that if the bus garage was alerted that another student would not be on the bus in the morning on a given day, the bus on that specific day could wait longer (*id.*). Finally, the meeting minutes noted that there was nothing else the district could do regarding the transportation issue at that time (*id.*). At the time of the May 2023 CSE meeting the parent was "pleased" with the student's progress in school (*id.*).

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

The present matter presents a somewhat unique circumstance in that while the student has been able to make some progress educationally, despite his identified need and interfering behaviors related to his ability to safely exit his home and enter the school bus, he has not demonstrated progress with respect to this very specific and discrete transportation need, and the district has failed to recommend anything on his IEP other than the limited special transportation previously discussed, even after first identifying the need in 2021 with a thorough FBA, having extensive data with respect to strategies and supports which did not work during the 2022-23 school year and acknowledging that the student continues to exhibit the same need for the 2023-24 school year. Accordingly, at this juncture, the same special transportation recommendation no longer can be said to offer the student a FAPE. This is particularly true where, as here, the district

¹⁵ Again, for the 2023-24 school year, the interim transportation supervisor testified that there was a built-in five-minute wait time for the bus to wait for the student to get on the bus in the morning (Tr. p. 79).

did not produce as evidence in support of its burden an updated FBA, any BIP created by the district based on the 2021 FBA which addressed the student's interfering behaviors as they related to his transport to school in the morning, or any other evidence that would reflect what strategies or supports the district, as opposed to outside agencies or the parent, not only recommended for the student but which it would also provide pursuant to its obligation to offer the student a FAPE. While it appears the district actively has attempted to communicate with the parent and seek solutions, the solutions arrived at cannot solely rely on the parent or outside agencies for implementation, particularly given that the district has identified the student's transportation difficulties as an area of need and, as specifically identified by the 2021 FBA, an interfering behavior that should be addressed by an appropriate BIP.

While I have determined that the district failed to offer the student a FAPE for the 2023-24 school year, I also find that the record does not support an award of compensatory education or any reimbursement of travel expenses to the parent at this time. However, I find that it is appropriate to order the CSE to reconvene to consider the student's special transportation recommendation for the remainder of the 2023-24 school year. Although I decline to order any particular recommendation be placed on the student's IEP, I urge the CSE to consider an updated FBA and BIP with respect to the student's interfering behaviors related to his ability to ride the bus to school every morning, the retainer of a behavioral consultant or other expert to assist the district in recommending goals, strategies or other supports related to the student's special transportation, or the use of any other evaluative tools available to the CSE.

VII. Conclusion

Having determined that the hearing record supports a finding that the district offered the student a FAPE for the 2022-23 school year but did not offer the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 11, 2023 is modified to reverse that portion of the decision that found the issues pertaining to the 2023-24 school year were not a part of this proceeding;

IT IS FURTHER ORDERED that the CSE shall reconvene within 60 days of the date of this order to consider the student's special transportation for the remainder of the 2023-24 school year.

Dated: Albany, New York
March 25, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER