



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 24-377

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

#### **Appearances:**

Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

Law Office of Benjamin J. Hinerfeld, attorneys for petitioners, by Benjamin J. Hinerfeld, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2021-22 and 2022-23 school years and ordered it to fund compensatory services and independent educational evaluations (IEEs). Respondents (the parents) cross-appeal certain aspects of the compensatory award and the IHO's dismissal of the claims for the 2019-20 and 2020-21 school years. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

During the 2019-20 school year (kindergarten), the student experienced difficulty with handwriting however, the student's kindergarten report card reflected that he was approaching and/or meeting expectations for kindergarten (see Dist. Ex. 18).<sup>1</sup> By March of 2020 the student

---

<sup>1</sup> The student's kindergarten teacher testified that an occupational therapist pushed into the student's kindergarten classroom "once a week for handwriting" and worked with the student on the formation of letters (Feb. 26, 2024 Tr. pp. 1862-63, 1871, 1917-18).

was "[m]eeting the [s]tandards" in math with regard to counting and cardinality, the ability to measure, collection and interpretation of data; and understanding of geometrical concepts (Dist. Ex. 18 at p. 4). The March 2020 kindergarten report card indicated that the student needed to improve his ability to perform operations and display algebraic thinking, to make sense of problems and persevere in solving them, and to use appropriate tools strategically (id.). The report card reflected the student received marks of "good" and "excellent" during the first and second trimesters for all social/emotional indicators (id. at p. 5). In reading, the report card indicated that the student demonstrated advanced emergent reading skills during the first trimester and early beginner reading skills during the second trimester (id. at p. 6). In the area of writing, the kindergarten report card noted the student received a grade of advanced emergent during the first trimester and a grade of early beginner during the second trimester (id.).<sup>2</sup>

In March 2021 (first grade) the student's mother and first grade teacher corresponded via email regarding the student's handwriting (Parent Ex. LL at pp. 1-14). The parent questioned whether she should look into the student receiving OT in school, and the teacher responded that "special education is designed for students who have educational disabilities" and noted that she "did [not] see a disability, but a weakness [wa]s evident" (id. at pp. 10-11). The student's report card for first grade showed that by the end of the school year the student was approaching standards in all areas of math, meeting standards in science and social studies, that his behaviors and social/emotional development was good to excellent, that in reading he was performing in the advanced beginner range, and his writing was also in the advanced beginner range (Dist. Ex. 19 at pp. 3-5).

On October 8, 2021 (second grade), the district notified the parents that the student was identified as a student at risk of not meeting the New York State learning standards in math and that as part of the district's multi-tiered system of supports (MTSS) framework, the student would receive two 30-minute sessions per week of Tier II math for an expected duration of five months (Dist. Ex. 46 at p. 1).

On March 11, 2022, the parents referred the student to the CSE to determine his eligibility for special education services (see Parent Ex. CC; Parent Ex. LL at pp. 24-25). Between March and May 2022 the district conducted a social history, a psychological evaluation, an educational evaluation, a reading evaluation, a speech-language evaluation, a test of auditory processing, and an occupational therapy (OT) evaluation (see Parent Ex. TT; see District Exs. 8-13).

On May 19, 2022, an initial eligibility determination meeting was held, and the student was found eligible for special education services as a student with a speech or language impairment (see generally Dist. Ex. 1). Based upon the student's needs, the May 2022 CSE recommended the student attend a daily 40-minute group (5:1) resource room program and receive two 30-minute sessions per week of group (5:1) speech-language therapy and two 30-minute sessions per week of group (5:1) OT (Dist. Ex. 1 at pp. 1, 10).<sup>3</sup> Additionally, the May 2022 CSE recommended the

---

<sup>2</sup> The student's kindergarten teacher testified that all students were provided a grade of "meets expectations" for the third trimester due to the COVID-19 pandemic (Feb. 26, 2024 Tr. pp. 1895-96; see Dist. Ex. 18).

<sup>3</sup> The recommended program and related services were scheduled to begin on June 6, 2022 and to continue through the end of the 2021-22 school year (Dist. Ex. 1 at pp. 1, 10-11).

supplementary aids and services of modeling, preferential seating, visual aids, checks for understanding, directions explained and simplified, and copy of class notes (id. at pp. 10-11).

Additionally, on May 19, 2022, the CSE conducted an annual review for the 2022-23 school year (see generally Dist. Ex. 2). For third grade, the May 2022 CSE recommended that the student attend three 40-minute sessions per week of group (5:1) resource room for systematic phonics-based reading instruction and two additional 40-minute sessions per week of group (5:1) resource room (Dist. Ex. 2 at pp. 1, 11). The CSE also recommended that the student receive two 30-minute sessions per week of group (5:1) speech-language therapy and two 30-minute sessions per week of group (5:1) OT (id.).

In September, October, November 2022 and January 2023, the student underwent a private comprehensive psychological evaluation (see generally Dist. Ex. 15). Based upon the testing results, the private psychologist diagnosed the student with attention deficit hyperactivity disorder (ADHD), inattentive type; other specified neurodevelopmental disorder, visual-spatial processing impairment; and separation anxiety disorder (Dist. Ex. 15 at p. 23).

On February 13, 2023, the CSE met for a requested review to consider the results of the parent's private February 9, 2023 psychological evaluation (Dist. Ex. 3 at pp. 2-3, 8; see generally Dist. Ex. 15). The February 2023 CSE found the student eligible for special education services as a student with an other health impairment (OHI) (Dist. Ex. 3 at p. 1). The February 2023 CSE recommended that the student continue to attend the same resource room program as recommended in the second May 2022 IEP and also continue to receive speech-language therapy at the same frequency and duration but recommended that the student receive one 30-minute session per week of group (5:1) OT and one 30-minute session per week of individual OT (compare Dist. Ex. 2 at pp. 1, 22, with Dist. Ex. 3 at pp. 1, 12).

Although the resulting IEP is not in dispute in this proceeding, the evidence in the hearing record also shows that the CSE reconvened on May 22, 2023 and found the student eligible for special education as a student with a speech or language impairment (Parent Ex. M at p. 1). The CSE recommended that for July and August 2023 the student be provided with three hours per week of "[s]pecially [d]esigned [i]nstruction" at school, in a group of five students (id. at pp. 11-12). In addition, for the 10-month 2023-24 school year the CSE recommended that the student receive 4 hours and 20 minutes daily of integrated co-teaching services for ELA and math, that he attend a resource room program daily for a 40-minute session of systematic phonics-based reading instruction, and that he receive related services of two 30-minute sessions per week of group (5:1) speech-language therapy, one 30-minute session per week of group (5:1) OT, and one 30-minute session per week of individual OT (id. at p. 10).

Further information included in the hearing record show that, in July 2023 the student underwent a private educational evaluation to assess his reading skills, which resulted in an evaluation report dated October 10, 2023 (see Parent Ex. Y). Based upon the results of the evaluation, and in addition to the student's previous diagnoses, the evaluator diagnosed the student with a specific learning disorder with impairment in reading (dyslexia) and specific learning disorder with impairment in written expression (dysgraphia) (Parent Ex. Y at pp. 14-15).

Lastly, the hearing record included evidence that in September and October 2023, the student underwent a private developmental vision evaluation by an optometrist and received diagnoses of convergence insufficiency, oculomotor dysfunction, accommodative insufficiency, and visual perceptual disorder (see Parent Ex. X).

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

In a due process complaint notice dated June 16, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (see generally Parent Ex. A).

In connection with the 2019-20 (kindergarten) and 2020-21 (first grade) school years, the parents alleged that the district failed to make a referral to the CSE for a determination of whether the student was eligible for special education services (Parent Ex. A at pp. 3-4). Similarly, in the beginning of the 2021-22 school year (second grade) the parents alleged that the district again failed to make a referral of the student for a determination of whether the student was eligible for special education services (id. at p. 4).

With respect to the May 2022 CSE meeting to determine the student's initial eligibility, the parents alleged that the CSE denied the student compensatory education services and failed to consider the parents' concerns regarding the student's reading skills or extended school year (ESY) services (Parent Ex. A at pp. 11-13). With respect to the February 2023 CSE meeting, the parents contend that the CSE failed to recommend a vision evaluation or vision services (id. at p. 16).

The parents summarized their arguments that the district failed to comply with its child find obligations, failed to authorize IEEs at public expense, failed to proactively provide compensatory education services in response to the COVID-19 pandemic, failed to permit the parents meaningful participation in the CSE meetings, failed to comply with evaluation procedures, failed to consider available evaluative data, failed to appropriately evaluate the student, failed to recommend a functional behavioral assessment (FBA), failed to consider 12-month services, failed to address the student's vision deficits, and predetermined the IEP recommendations (id. at pp. 21-23).

The parents asserted that the district failed to file a due process complaint notice or fund the requested IEEs (reimbursement of psychological evaluation, or vision and reading IEEs) in response to the parents request to the district for certain IEEs (Parent Ex. A at pp. 17-18, 20).

As relief, the parents requested that the IHO find that the student was denied a FAPE for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (Parent Ex. A at p. 24). The parents requested public funding for IEEs in the areas of reading and vision as well as reimbursement for the cost of the private psychoeducational evaluation (id.). Additionally, the parents sought compensatory education services to be determined at the hearing and "any further relief" deemed "just and proper" by the IHO (id.).

In a response to the due process complaint notice, the district denied the material allegations and opposed any relief sought by the parents (see Parent Ex. O). The district asserted that it made a FAPE available to the student for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (Parent Ex. O at p. 1). In addition, the district argued that although the IEPs were

procedurally valid, if any procedural violations existed, they did not deny the student a FAPE, impede the parents' opportunity to participate in the decision-making process, or deprive the student of educational benefits (id. at pp. 2-3). Further, the district claimed that equitable considerations did not favor any remedy sought by the parents (id. at p. 4). The district contended that it complied with its child find obligations and conducted appropriate evaluations of the student (id. at p. 8). Lastly, the district argued that some of the parents' claims were barred by the two-year statute of limitations (id.).

### **B. Impartial Hearing Officer Decision**

After prehearing conferences were held on July 27, 2023 (Tr. pp. 1-33); August 27, 2023 (Tr. pp. 1-49); and October 19, 2023 (Tr. pp. 1-16), an impartial hearing convened on November 9, 2023 and was completed on April 22, 2024 after 17 days of proceedings (Tr. pp. 1-2658).<sup>4</sup> On June 30, 2023, the district made a motion to dismiss the due process complaint notice claiming it was insufficient and failed to contain the required elements to state a valid claim (Interim IHO Decision at p. 1). In an interim decision dated July 5, 2023, the IHO found that the due process complaint notice was sufficient and denied the district's motion to dismiss (id.).

Also, on June 30, 2022, the district made a second motion to dismiss the parents' due process complaint notice with respect to the claims pertaining to the 2019-20 and 2020-21 school years, claims pertaining to the 2023-24 school year, and claims pertaining to the parents' request for IEEs (see Parent Ex. P). At the suggestion of the IHO, the district agreed that the motion to dismiss would be held "in abeyance" pending the issues being raised during the impartial hearing (July 27, 2023 Tr. pp. 22-24).

On July 18, 2023, the parents requested that the IHO direct the district to reimburse the parents for the private psychological evaluation and conduct vision and reading IEEs (July 27, 2023 Tr. pp. 9-22; see IHO Ex. IV). The IHO stated that at that stage of the proceedings there was insufficient evidence to direct the district to reimburse or fund IEEs at that point (July 27, 2023 Tr. p. 22).

In a final decision dated July 29, 2024, the IHO found that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 41, 51, 53).<sup>5</sup> Next, the IHO addressed the district's motion to dismiss based upon the statute of limitations (IHO Decision at pp. 41-42). After reviewing the parties' arguments, the IHO found that the parents filed their due process complaint notice on June 20, 2023 and that all claims prior to June 20, 2021 were barred by the applicable statute of limitations (id.).

Then, the IHO addressed the parents' child-find claims and found that the hearing record demonstrated that "by the end of the first semester of second grade the [d]istrict should have

---

<sup>4</sup> The IHO additionally conducted prehearing conferences on July 5, 2023 and September 26, 2023; however, no transcripts were made of the proceedings and the IHO issued conference summary emails for both conferences (see IHO Ex. II).

<sup>5</sup> The July 29, 2024 IHO decision notes that it was a corrected copy dated July 30, 2024; however, there is no explanation as to why the decision was corrected.

recognized 'clear signs of a disability' in [the] [s]tudent and initiated the process of evaluating him for eligibility for special education and related services" (IHO Decision at pp. 42-44, 53). The IHO set the time in which the denial of FAPE began as January 2022 (id. at pp. 52-53).

Next, the IHO found in connection with the district's initial evaluations, the district failed to use available information to "develop an appropriate classification" and failed to evaluate the student's "visuospatial deficits" or whether the student had a learning disability, and therefore, failed to develop an IEP that would allow the student to make progress (IHO Decision at pp. 45-49). Further, the IHO found that the May 2022 IEP's motor goals failed to address the student's visual perceptual skills (id. at p. 49).

The IHO next discussed the parents' request for IEEs and found that because the district failed to commence due process after granting the parents the one vision IEE and denying reimbursement for the psychological evaluation and denying the reading IEE, that the district violated the IDEA (IHO Decision at pp. 49-51).

The IHO further found that the district's refusal to discuss compensatory educational services during the May 2022 CSE meet impeded the parents' right to participate in the decision-making process and was a violation of the IDEA (IHO Decision at p. 51).

Lastly, the IHO considered the parents requested relief (IHO Decision at pp. 51-53). It was in this section that the IHO stated that the district denied the student a FAPE from January 2022 through June 20, 2023, and the IHO awarded the parents reimbursement for the private evaluations as follows: psychological evaluation in the amount of \$3,191; reading evaluation in the amount of \$1,500; and vision evaluation in the amount of \$295 (id. at pp. 51-53). Next, using a Burlington/Carter analysis, the IHO decided whether the vision services were appropriate and if so, whether the parents were entitled to reimbursement for the vision services (id. at pp. 52-53). The IHO found that the vision services were appropriate to meet the student's needs and the balance of equitable considerations favored the parents (id. at p. 52). Accordingly, the IHO ordered the district to reimburse the parents for the "vision therapy [the] [s]tudent had received as of the date of the hearing in the amount of \$2,510 and for future weekly therapy sessions up to a total of 48, at the rate of \$170 per session" (id.). In discussing compensatory education, the IHO found as a result of a denial of a FAPE from January 2022 through to June 20, 2023, the student should be provided with 240 hours of compensatory education services: 120 hours for OT and 120 hours for reading tutoring with the award expiring two years from the date of the IHO order (id. at pp. 52-53).

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

The district appeals, alleging that the IHO erred in finding that the district denied the student a FAPE and awarding the parents' their requested relief. The district argues that the IHO erred in finding that the district failed to timely identify and classify the student, as prior to the student's referral in March 2022 the student was at grade level and received supports through the district's response to intervention (RTI) program (Req. for Rev. ¶¶ 4-5). Second, the district claims that it properly evaluated the student in all areas of suspected disability and considered all evaluative information, including a private psychological evaluation, when developing and recommending the student's programs and services (id. ¶¶ 7, 9). The district's third claim on appeal

is that the IHO erred in finding that it denied the student a FAPE for the 2021-22 and 2022-23 school years as the recommended programs were based upon the student's "unique special education needs" (id. ¶ 11). The fourth claim alleges that the IHO improperly found that the district should have commenced due process when it denied the parents' requested IEEs (id. ¶¶ 13, 15). The district further argues that it was error for the IHO to award three IEEs to the parents at public expense (id. ¶ 14). The district's fifth claim is that the IHO's award of compensatory educational services and reimbursement for the privately obtained vision services was not supported by the hearing record and in error (id. ¶¶ 16, 18).

As relief, the district seeks reversal of the IHO's findings that: the district failed to offer or provide the student with a FAPE for the 2021-22 and 2022-23 school years; the district violated its child find obligations; the district failed to properly classify the student and evaluate and develop appropriate IEPs for him; the district failed to grant or commence a due process hearing related to two out of three of the parents' IEE requests; and that the district denied the parents' the right to meaningful participation. Accordingly, the district also seeks reversal of the IHO's orders that the district reimburse the parents for private evaluations; reimburse and prospectively fund vision services; and fund compensatory services in the areas of OT and reading.

In an answer and cross-appeal, the parents allege that the district's appeal fails to identify the "specific factual and legal errors" of the IHO (Answer at p. 1). The parents assert that the IHO correctly determined that the district violated its child find obligations, that the district's initial evaluation of the student was inadequate, that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, that the IHO properly ordered the district to fund the parents' private evaluations, and properly awarded compensatory education services. In their cross-appeal, the parents seek an upward modification of the expiration date of the compensatory award to no later than the student's 21st birthday. The parents also allege that the IHO erred in failing to award a remedy for the IHO's finding that the parents were denied meaningful participation by the May 2022 CSE's failure to consider compensatory services. The parents further assert in their cross-appeal that the IHO erred in finding that a denial of FAPE occurred in January 2022 rather than at the beginning of the 2021-22 school year. Lastly, the parents claim that the IHO's dismissal of their claims for the 2019-20 and 2020-21 school years on the basis of statute of limitations was in error.

In a reply to the parent's answer, the district generally denies the material allegations contained in the parents' answer. Additionally, in an answer to the parents' cross-appeal, the district asserts that the parents' answer fails to comply with the practice regulations as the answer failed to "contain a clear and concise statement of the issues presented for review and relief requested." Further, the district argues that the parents raised new allegations in their cross-appeal, and that the relief sought by the parents' is moot.

## **V. Applicable Standards**

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



T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

The parents assert that the request for review failed to identify the IHO's "factual and legal errors" (Answer at p. 1). Additionally, the parents argue that the request for review failed to contain a "clear and concise statement of the issues presented for review and the grounds for

---

<sup>6</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).

reversal" (*id.*). The parents assert that the undersigned should "decline the [d]istrict's invitation to perform in essence a full *de novo* review" (*id.*). In its responsive pleadings, the district similarly argues that the parents failed to comply with the practice regulations in failing to set forth a clear and concise statement of the issues sought to be reviewed and their requested relief.

State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Here, both parties sufficiently complied with the State regulations of pleading their issues in the request for review, and answer with cross-appeal. In addition, neither party alleges that their ability to timely prepare, serve, or file any pleadings in this matter was compromised or prejudiced in any way. Accordingly, there is insufficient basis to dismiss the district's request for review or parents' answer with cross-appeal on the grounds asserted by the parties.

## **2. Statute of Limitations**

Turning next to the parents assertions in their cross-appeal that the IHO erred in his application of the statute of limitations to the 2019-20 and 2020-21 school years, they argue that the district had an obligation to provide the parents with a procedural safeguards notice on three separate occasions and failed to do so which should have precluded application of the statute of limitations. Additionally, the parents argue that the IHO found that the district failed to provide the parents with the student's academic records which should have tolled the statute of limitations. The parents argue that the district should not benefit from a statute of limitations defense because it withheld the student's educational records for more than 18 months.

In discussing the statute of limitations, the IHO found that "all claims prior to June 20, 2021 [we]re barred by the IDEA's statute of limitations" (IHO Decision at p. 42). Notably, the parent's the parents do not take issue with that particular accrual date discussed by the IHO but

rather argue that defense of the statute of limitations should be precluded altogether under the withholding information exception and, therefore, the IHO's date of June 20, 2021 went unchallenged in this proceeding and shall be used as the relevant date, subject to the exception argument raised by the parent.<sup>7, 8</sup> The parent's argument regarding the date a child find violation during the 2021-22 school year is a separate issue that is addressed in conjunction with the district's cross-appeal regarding child find during that school year.

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>1</sup> Because an IDEA claim accrues when the parent knew 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]).

#### **a. Withholding of Information**

The parents contention that the withholding of information exception to the statute of limitations applies because the district withheld information that it was required to provide under the IDEA. Specifically, the parents contend that the district failed to provide a copy of the "Procedural Safeguards Notice" upon the following events: when the student's mother asked the student's first grade teacher whether the student required special education services; when the student's first grade teacher reported behaviors of the student that "objectively, gave rise to suspicion of a disability; and when the student's first grade teacher did not initiate a referral to the CSE for the student's initial eligibility evaluation (Answer at p. 9).

---

<sup>7</sup> Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

<sup>8</sup> The student's father testified that he is an attorney who began practicing law in the area of special education in the summer 2019 (April 4, 2024 Tr. pp. 2459, 2465). Accordingly, as an attorney the parent should be fully knowledgeable regarding the import of compliance with the rules of practice and procedure in New York State administrative and legal actions, especially the applicable statute of limitations.

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).

A procedural safeguards notice "must be given to the parents of a student with a disability, at a minimum one time per year" and under the following circumstances:

- (i) upon initial referral or parental request for evaluation;
- (ii) upon the first filing of a due process complaint notice to request mediation or an impartial hearing as described in subdivisions (h) and (j) of this section;
- (iii) upon request by a parent;
- (iv) upon a decision to impose a suspension or removal that constitutes a disciplinary change in placement pursuant to section 201.2(e) of this Title; and
- (v) upon first receipt of a State complaint pursuant to section 200.5(l) of this Part.

(8 NYCRR 200.5[f][3]). Additionally, a district may place a copy of the procedural safeguards notice on its website (8 NYCRR 200.5[f][4]).

Here, the circumstances in which the parents claim they were not provided with a procedural safeguards notice do not fall within the required circumstances in which the procedural safeguards such should be provided (see 8 NYCRR 200.5[f][3]).<sup>9</sup> Furthermore, the parents do not allege or argue how they were prevented from filing a due process complaint notice because they did not receive a procedural safeguards notice during the times in which the parents alleged they

---

<sup>9</sup> The district indicated in a March 24, 2022 prior written notice that it sent a procedural safeguards notice to the parent as an enclosure with the document (Dist. Ex. 4 at p. 2).

should have received the same (see 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]). Therefore, under the circumstances, I find that the withholding of information exception is not applicable to toll the statute of limitations.

Next, although the withholding of information exception generally does not apply to circumstances other than whether or not the parents received written notice of procedural safeguards, I will also review whether the disclosure of academic records prevented the parents from filing a due process complaint notice. The father of the student, who is an attorney with knowledge in the area of special education law, prepared a detailed 24-page due process complaint notice (see generally Parent Ex. A). Again, the parents fail to argue how their requests for documents and the district's alleged withholding of educational records prevented them from filing a due process complaint notice in this matter.

In accord with the IHO's ultimate determination, the evidence in the hearing record does not lead me to the conclusion that the IHO erred in determining that the statute of limitations should apply in this case. Accordingly, the evidence in the hearing record does not demonstrate that the parents were prevented from filing a due process complaint notice due to the withholding of information which the district was required to provide. Therefore, the IHO's dismissal of the parents' claims for the 2019-20 and 2020-21 school years shall not be disturbed.

## **B. Child Find**

Next, in finding that the parents' claims prior to June 20, 2021 were barred by the applicable statute of limitations, the parents' child-find claims relating to the 2019-20 and 2020-21 school years are precluded and will not be further discussed.

However, the district argues that the IHO's finding against the district with respect to the district's subsequent child find obligations was incorrect and that the IHO failed to consider the student's academic performance and the supports provided to the student prior to the parents' referral to the CSE in March 2022. Thus, the district argues that the student was "performing in the classroom at or around grade level," had made progress with the academic intervention support program and was meeting grade level standards (Req. for Rev. ¶ 5). On the other hand, the parents argue that the date which the IHO fixed as the date when the district failed in its child find obligations was incorrect and the district violated the student's child find obligation in the beginning of the 2021-22 school year (Answer at pp. 8-9). As relief for the district's child-find violations, the parents request additional compensatory services in the amount of 80 hours.

The IHO found the hearing record demonstrates that by the end of the first trimester of the 2021-22 (second grade) school year, the district should have recognized "clear signs of a disability" in the student and initiated the process of evaluating him for eligibility for special education and related services (IHO Decision at p. 42).

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26,

2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

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

Here, for the 2021-22 school year (second grade), the student's second grade teacher sent an email to the school principal on September 21, 2021 including the names of students in the second grade "who may benefit from [m]ath/[r]eading [s]upport" (Parent Ex. KK at p. 4). The building principal determined the student required math intervention two times per week for thirty minutes (Feb. 15, 2024 Tr. pp. 1672-74; see Dist. Ex. 46). On October 8, 2021, the district notified the parents that the student was identified as a student at risk of not meeting the New York State learning standards in math and that the student would receive two 30-minute sessions per week of

Tier II math for an expected duration of five months (Feb. 15, 2024 Tr. pp. 1673-74; Dist. Ex. 46 at p. 1).

On the NWEA math assessment, in fall 2021, the student received a raw score of 18 and in the winter and spring of the 2021-22 school year, the student received a raw score of 22 (Dist. Ex. 22 at p. 7). The math specialist testified that she could not recall exactly what it was that made her consider the student for math services (Feb. 15, 2024 Tr. p. 1631). She explained that it could have been that the student's NWEA assessment score was below the 35th percentile, but it was likely based on the student's NWEA score coupled with his performance on the beginning of the year classroom assessment (Feb. 15, 2024 Tr. pp. 1631-32, 34-35). The math specialist testified that once the student was identified as needing math services, she administered a fluency test to determine how the student was solving basic math facts (Feb. 15, 2024 Tr. pp. 1636-39). The math specialist indicated that in response to the student's performance on the fluency test she worked on fluency with the student and making sure he knew his basic math facts (Feb. 15, 2024 Tr. pp. 1639-40). The math specialist reported that she also observed how the student was performing on skills that the classroom teacher was working on and that in addition to addressing the student's fluency she worked on different exercises with him including skills his classroom teacher worked on "to make sure he was able to access not just [his] class lesson but [his] homework later on" (Feb. 15, 2024 Tr. pp. 1638-40).

With regard to reading, the student started second grade at a Fountas & Pinnell instructional "level K" (Dist. Exs. 34 at pp. 1-6; 22 at pp. 3-4; Dec. 20, 2023 Tr. p. 575). More specifically, on a level K running record, administered on October 13, 2021 the student attained an accuracy score of 93 percent and a comprehension score of five out of six which was considered "proficient" (*id.*). According to the student's teacher, the student's comprehension score was "great for a level K" and "at that point of the year, beyond where [the district] want[ed] [the students] to be" (Dec. 20, 2023 Tr. pp. 575, 592; Jan. 11, 2024 Tr. p. 744). The student's scores on Foundations unit tests in October and November 2021 were 52 percent, 76 percent, 96 percent, and 88 percent respectively (Parent Ex. FF at pp. 1-5).

The student's math specialist testified that the student was a "Tier 2" student when he was first identified and started in her program in October 2021 (Feb. 15, 2024 Tr. p. 1681). The student's math specialist recalled discussing the student's math skills with his second-grade teacher including his difficulty with organization and basic math facts (Feb. 15, 2024 Tr. p. 1676). The math specialist further testified that at the time that she pushed into the student's math class, the student demonstrated organizational struggles including not having a pencil, not opening a book, and not being in a seat (Feb. 15, 2024 Tr. pp. 1676-77).

By email dated December 1, 2021, the student's second grade teacher contacted a school secretary for the district and requested to schedule an initial MTSS meeting for the student (Parent Ex. KK at p. 8; *see* Jan. 11, 2024 Tr. p. 797). On the same date, the school secretary replied that she added the student to the January 5, 2022 but noted that if the teacher felt she could not wait until then, she could try to schedule a separate meeting (*id.*). Specifically, the second-grade teacher testified that she referred the student to the MTSS team because he received scores of 63 percent and 62 percent on his first two math tests of the 2021-22 school year (Dec. 20, 2023 Tr. pp. 580-81; *see* Dist. Ex. 22 at p. 4).



According to a winter 2021-22 NWEA assessment student profile report, the student completed an NWEA assessment in math on January 25, 2022 (Dist. Ex. 27 at p. 2). The report indicated the student's performance reflected growth at the ninth percentile and achievement at the 18th percentile, both below the mean, which reflected "[l]ow [g]rowth/[l]ow [a]chievement" and projected New York State Testing Program results at "NYS Level 1" (*id.*). The report noted that the instructional math areas assessed included geometry, measurement and data, operations and algebraic thinking, and number and operations (*id.*). The winter 2021-22 NWEA student profile report indicated the student completed an NWEA reading assessment on January 24, 2022 (*id.*). According to the report, the student's performance reflected growth at the 27th percentile and achievement at the 23rd percentile, both below the mean which indicated "[l]ow [g]rowth/[l]ow [a]chievement" and projected New York State Testing Program results at "NYS Level 2" (*id.*). The report noted the student was assessed in the following reading areas: vocabulary: acquisition and use; understand key ideas, details, and connections; and understand language, craft, and structure (*id.*).

According to the 2021-22 MTSS first trimester math progress report, the student needed "regular and frequent support" to complete three identified skills/goals related to measurement, e.g., measuring the length of an object (Dist. Ex. 22 at p. 1). The math specialist who provided the student with Tier 2 instruction during the second grade opined that there was a difference between attending to a lesson and absorbing it and the student was "in the lower end insofar as getting it right away" (Feb. 15, 2024, Tr. p. 1679). She testified that when the classroom teacher was providing instruction the student "would be a little off" but that instruction in the smaller group with the math specialist was more helpful to the student "because he would get it (Feb. 15, 2024 Tr. p. 1680).

On February 1, 2022, the school psychologist contacted the student's second grade teacher and based on a conversation with the school principal, requested the names of the students the teacher was concerned about so they could be added to the MTSS agenda (Parent Ex. KK at p. 9). In a response that same day the teacher indicated that she had spoken with the principal about a few students, including the student who is the subject of this appeal, and that she could see these students needing "additional math supports" and "an extra push" (Parent Ex. KK at p. 9; *see* Dist. Ex. 39 at p. 1; Dec. 2-, 2023 Tr. p. 649). The second grade teacher's notes from March 2022 indicated the student's writing was "below grade level in encoding" and "not meeting requirements" (Dist. Ex. 22 at p. 5). The second-grade teacher testified that at the February 1, 2022 MTSS meeting she raised concerns regarding the student's writing and social skills (Dec. 20, 2023 Tr. pp. 585-58).

In a series of emails dated February 2, 2022, the parent and the student's second grade teacher discussed the student's math performance and upcoming testing by the math specialist and the parent stated she wanted the student "to continue the after-school math support" offered during the "next cycle, regardless of how [the student] did on the NWEA;" (Parent Ex. LL at pp. 19-20). In response, the teacher stated, "we will be assessing from many different assessment points, I still believe [the student] would qualify for it again" (*id.*).

A Level L benchmark recording form completed on February 3, 2022, indicated the student was reading at a "Level L" instructional level (Dist. Ex. 34 at p. 7). He received the following

scores: accuracy, 95 percent; comprehension, six out of nine, and fluency, two (Dist. Ex. 34 at p. 7).<sup>10</sup> The form indicated the student read at a rate of 75 words per minute (id. at p. 11).

A 2021-22 MTSS second trimester math progress report, reflected the student's performance in mathematics in or around March 4, 2022 (Parent Ex. C at p. 1). The report indicated that on a five-minute timed computation accuracy test consisting of 64 addition problems the student got 45 of 47 attempted problems correct (id.). However, the progress report stated that the student required regular and frequent support to use math skills and strategies as applicable to meet his identified skills and goals (Parent Ex. C at p. 1).

By email dated March 11, 2022, the parents requested that the district evaluate the student for determination his eligibility for special education (Parent Ex. LL at pp. 25).<sup>11</sup> On the same date, by email, the director of pupil personnel services replied that the building psychologist "c[ould] walk [the parent] through building supports as well as the referral process" (id. at p. 24). At the time of the student's psychological evaluation was conducted in March 2022 and April 2022, the student was receiving math academic intervention services (AIS) four times per week (Dist. Ex. 8 at p. 2).<sup>12</sup> According to an "Initial Parent Referral to the [CSE]" form, dated March 15, 2022, the student was referred to the CSE due to his second-grade teacher's concerns about his language processing and social development (see Parent Ex. CC at p. 1). The form noted the parent was the referral source and that the parent had been contacted regarding the referral on March 17, 2022 (Parent Ex. CC at p. 7). The form also indicated that the student received "RTI/Academic Support" in the form of "AIS Math" four times per week in a pull-out model (id. at p. 3). At the time of the initial referral for special education, the parents indicated the student's reading decoding was at

---

<sup>10</sup> According to the benchmark recording, a fluency score of two reflected the student read primarily in three- or four-word phrase groups; demonstrated some smooth, expressive interpretation and pausing guided by author's meaning and punctuation; and exhibited mostly appropriate stress and rate with some slowdowns (Dist. Ex. 34 at p. 11).

<sup>11</sup> Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

<sup>12</sup> A licensed psychologist opined during her testimony that when asked if the district had enough information about the student's reading and writing during spring 2022, her reply was "not fully" and that further "diagnostic clarification" was needed (see April 2, 2024 Tr. p. 2223).

"Level K" and the student was performing "below expectations" in reading comprehension, math concepts/applications, and written language (id. at p. 4). The form reflected that in terms of the student's work habits, he always completed homework with parent support and displayed "[i]nconsistent [l]earning;" usually he was motivated to learn; sometimes he was attentive to tasks, easily frustrated, and highly distractible; and he rarely completed classwork, transitioned between activities, generalized learning to new situations, worked independently, or presented with a "[v]ery [s]hot [a]ttention [s]pan" (id.). The form reflected the referral form was submitted in consultation with the principal/assistant principal, psychologist, and the general education teacher (id. at p. 5).

By email dated March 14, 2022, the district director of pupil personnel services sent the parents a letter regarding "the Academic Support program" offered at the student's school, further explaining that "[the student] ha[d] been recommended for both ELA and Math support" (Parent Ex. LL at p. 26).

The student's report card for the first two terms, indicated that in reading the student was meeting standards in several areas approaching standards in others (Dist. Ex. 20 at pp. 1-2). More specifically, by the second trimester the student was meeting standards with regard to applying word analysis skills in decoding words, reading with sufficient accuracy and fluency to support comprehension, self-correcting words and checking for understanding and referring to text when asking and answering questions (id. at p. 2). The student was approaching reading standards with regard to his ability to determine the meaning of words and phrases in a text, determine the main idea and recount how details support the main idea, demonstrate critical thinking skills and apply strategies for meaning, and respond to literature making relevant connections (id.). In math, by the second trimester the student was meeting standards related to number and operations in base ten, applying appropriate strategies to solve word problems, and applying mathematical reasoning (id.) The student was approaching standards related to knowledge of basic math facts, computing with accuracy and fluency, and demonstrating an understanding of operations and algebraic thinking(id.). The student's skills related to measurement and data were below standards (id.). In writing, the report card indicated that by the second trimester the student was meeting standards related to his ability to use strategies to plan, draft, revise and edit; use appropriate, varied and descriptive language in a variety of genres; and research and organize information (id.). In addition, the student was approaching standards in his ability to correctly spell high frequency words, apply correct use of capitalization, punctuation, and grammar; organize paragraphs appropriately; and support and enrich writing with quality details (id. at p. 1). In terms of behaviors, by the second trimester the student was meeting or exceeding expectations in all areas (id. at p. 1).

Here I am not convinced that the shows that the district violated its obligations under the child find provisions of the IDEA and State regulation. The district was responsive to the parents' requests and was diligently proceeding through the RTI/MTSS structure in fall 2021 and beginning of the 2022 calendar year and collecting information about the student's performance when the student was noted to have difficulty with math before referring the student for special education eligibility. It does not follow that the district was required to shortchange that process and jump all the way to an initial CSE eligibility determination in the first trimester. On the other hand, the parents were not required to wait until the conclusion of the RTI/MTSS process before initiating their own referral to the CSE for special education eligibility, which the parents elected to do soon

thereafter. Upon referral of the student by his parents, the aforementioned evaluations were timely conducted and the May 2022 CSE meeting was also convened in a timely manner. Accordingly, I find that the IHO erred in finding that the district violated its child find obligations in January 2022. Accordingly, any award for compensatory education services for the period of the child find violations shall be vacated.

### **C. Sufficiency and Consideration of Evaluative Information**

With regard to the parties' dispute over the adequacy of the initial evaluation of the student, I note at the outset that the findings by the IHO with respect to his determination that the district failed to offer the student a FAPE for the 2021-22 and the 2022-23 school years largely relied on the evaluative information which the parents privately obtained later, namely, the psychological evaluation dated February 9, 2023; the October 10, 2023 developmental vision evaluation, and October 10, 2023 educational evaluation (see generally Parent Exs. X-Y; see Dist. Ex. 15). In particular, the IHO found that the district failed to account for the student's ADHD when developing the IEPs, failed to assess the student's visual perceptual skills as identified by the private developmental optometrist, and failed to have sufficient information to classify the student with a learning disability as identified by the private psychologist (reading evaluation), all of which resulted in the district's failure to develop appropriate IEPs that were reasonably calculated for the student to make progress (IHO Decision at pp. 45-47). The IHO's findings that the district failed to provide the student with a FAPE for the 2021-22 and 2022-23 school years were not however, based on any specific deficiencies related to the programming, related services, annual goals, or placement recommended by the May 2022 or February 2023 CSEs or the IEPs developed for the 2021-22 and 2022-23 school years, with the sole exception being that IHO found the motor goals included in the February 2023 IEP to be inappropriate for the student.<sup>13</sup>

Moreover, the parents do not appeal the lack of findings by the IHO based upon those issues identified in their due process complaint notice that the IHO failed to address in his decision (see generally Parent Ex. A). More specifically, the parents do not cross-appeal that the IHO failed to make findings with respect to the district's failure to recommend 12-month programming for the student; failure to recommend a functional behavioral assessment (FBA); failure to offer methodologies or strategies based upon peer-reviewed research; predetermination; inappropriate classification for the May 2022 or February 2023 IEPs; or procedural violations in connection with the May 2022 or February 2023 IEPs (Parent Ex. A at pp. 22-23). Accordingly, those issues are deemed abandoned and have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Therefore, with respect to a determination on whether the district offered the student a FAPE for the 2021-22 and 2022-23 school years, the focus of this appeal will be the sufficiency of the district's evaluations and the CSEs consideration of evaluative information.

The district asserts that it appropriately evaluated the student in each area of suspected disability. The district further asserts that the evaluations conducted "addressed each of the various concerns expressed by the staff or raised by the parents, and were sufficiently comprehensive,

---

<sup>13</sup> The February 2023 comprehensive psychological evaluation was considered by the February 2023 CSE; however, the vision and educational evaluations from October 2023 were not available for the CSE to review for the school years at issue in this case as they were conducted during the 2023-24 school year (see Dist. Exs. 3; 15).

utilizing technically sound assessment tools and strategies to gather relevant functional, developmental, and academic information about the student" (Req. for Rev. ¶ 8). Based upon my review of the hearing record, there is a reasonable basis to overturn the IHO's finding that the CSEs did not have sufficient evaluative information to develop appropriate IEPs for the student.

In New York, State regulation specifies that an initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). 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 S.F., 2011 WL 5419847 at \*12 [S.D.N.Y. Nov. 9, 2011]; 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]; see Application of the Dep't of Educ., Appeal No. 07-018).

On May 19, 2022, the CSE met for an initial eligibility determination which resulted in the development of an IEP for the remainder of the 2022-23 school year dated May 19, 2022 with a projected implementation date of June 6, 2022 and a projected end date of June 23, 2022, and for what it deemed an "annual review" which resulted in a second IEP May 19, 2023 which was developed for the 2023-24 school year with a projected implementation date of September 1, 2022 and projected end date of June 23 2023 (Dist. Exs. 1; 2). A prior written notice dated June 1, 2022 reflected the CSE's finding of initial eligibility of the student for special education services as a student with a speech language impairment, and that the May 2022 CSE had considered the following evaluative information to develop the student's IEP for the 2021-22 school year: a committee discussion dated May 19, 2022; a May 9, 2022 speech addendum; an April 29, 2022 reading evaluation; an April 13, 2022 educational evaluation; an April 8, 2022 occupational therapy evaluation; a March 31, 2022 psychological evaluation; a March 30, 2022 speech-language evaluation; a March 26, 2022 social history; a March 18, 2022 report card; and an August 26, 2021 physical examination (see Parent Ex. TT; see Dist. Exs. 5; 8-14). A subsequent prior written notice dated June 27, 2022 reflected that the CSE had determined that the student should continue to receive special education services for the 2022-23 school year and that the CSE had considered the same evaluative information listed in the June 1, 2022 prior written notice as a basis for its recommended program and placement for the student (Dist. Ex. 6).

For the district's psychological evaluation, the student was evaluated on March 31, 2022 and April 1, 2022 (Dist. Ex. 8 at p. 1). The resultant report indicated the reason for referral was parental concerns regarding the student's overall academic progress and social/emotional development (id.). According to the report, assessment measures included the following:

classroom observations; the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V); the Connors-3 Parent Rating Scale; the Connors-3 Teacher Rating Scale; the Behavior Assessment System for Children—Third Edition (BASC-3) Parent Rating Scale; the BASC-3 Teacher Rating Scale; the Behavior Rating Inventory of Executive Functioning—Second Edition (BRIEF-2) Parent Form; and the BRIEF-2 Teacher Form (id.).

The March 2022 psychological evaluation report indicated that administration of the WISC-V yielded a full-scale IQ of 105 which fell within the average range of general cognitive ability (Dist. Ex. 8 at p. 11). According to the psychological evaluation report, the student's verbal reasoning skills presented as a relative strength when compared to other cognitive domains (id.). The report noted that the student's performance on the visual spatial and processing speed indices was variable, which appeared to be due to visual perceptual difficulties (id.). Overall, the psychoeducational evaluation report indicated the student had many strengths but that he presented with consistent weakness in his executive functioning, visual perceptual abilities, and social skills which were noted to potentially impact his access to the general education curriculum (id. at pp. 11-12).

According to the 2022 psychological evaluation report, the student's performance on the Beery-Buktenica Developmental Test of Visual-Motor Integration, administered by the occupational therapist indicated that "it [wa]s evident that [the student's] visual perceptual skills present[ed] [him] with difficulty [at the eighth percentile] and [we]re impacting his performance" (Dist. Ex. 8 at p. 11). The school psychologist who conducted the March 2022 psychological evaluation of the student testified that findings with respect to the student's visual perceptual skills were supported by the findings in the OT evaluation (Jan. 22, 2024 Tr. pp. 951-52, 958-59; 972-73).

The March 2022 psychological evaluation report reflected the results of observations of the student conducted during an April 12, 2022 Foundations assessment,<sup>14</sup> and a May 2, 2022 math lesson (Dist. Ex. 8 at p. 2). According to the report, the student appeared motivated to perform well during the Foundations assessment, sat appropriately, and was focused on his responses to the assessment, and noted that he required validation of his responses four times throughout the 40-minute observation and student-initiated teacher check-ins to ensure he was answering items correctly (id.). The psychologist reported that although the student sat in an atypical position during the math lesson, he appeared to be attentive and focused (id.). The psychologist observed that during whole class instruction the student did not raise his hand or volunteer information but that most of his peers had their hands up for all questions that were asked (id.). The student required teacher check-ins to ensuring he was initiating and following through with tasks and when the student could not find his scissors to perform a cutting activity, the teacher was required to instruct him to stand up and ask a friend to borrow scissors (id.). Overall, based on her observation the psychologist reported the student appeared to be motivated to do well in class but in order to be successful required teacher support for clarification of concepts and directions, initiation and completion of academic tasks, and tasks broken down and information scaffolded (id.).

---

<sup>14</sup> Foundations was the phonics-based curriculum used by the teachers (Dec. 20, 2023 Tr. p. 541).

Administration of the Woodcock Johnson IV Tests of Achievement (WJ-IV) to the student, as part of the district's April/May 2022 educational evaluation, yielded standard scores in the low range on the math facts fluency subtest, low average range on the editing and number matrices subtests, and average range in all other subtests and a measure of broad achievement (Dist. Ex. 9 at pp. 1-2).

The score report for the WJ-IV indicated the student attained a broad reading standard score of 96 (39th percentile) (Parent Ex. Z at p. 3). In addition, the student attained a broad written language standard score of 97 (43rd percentile) and a broad mathematics standard score of 85 (16th percentile) (*id.*).

During the CSE meeting, the student's teacher indicated that the student's instructional reading level was "level M," which is where we like to see kids leave by the end of second grade" (Parent Ex. YY#1 Tr. pp. 70-71).<sup>15</sup>

The district conducted a second educational evaluation on April 29, 2022 that focused on areas of reading related to phonological skills, fluency, and reading comprehension (Dist. Ex. 10). Administration of the Fieffer Assessment of Reading (FAR), by a district special education teacher who was a Wilson Dyslexia Practitioner, yielded a total index score that fell within the below average range (standard score 89, 23rd percentile) (*id.* at p. 6).<sup>16</sup> The evaluator reported that the student demonstrated weaknesses when reading nonsense words and irregular words on a single word level and when completing orthographical processing tasks (*id.* at p. 6). The evaluator noted the student also demonstrated difficulties when he was expected to delete and manipulate sounds within words (*id.*).

According to the evaluator, student demonstrated average abilities related to the reading of isolated decodable words, rapid automatic naming, verbal fluency, and visual perception (*id.* at pp. 6-7). In addition, the student demonstrated average skills related to the understanding of antonyms and synonyms, word recall, silent reading comprehension, and silent reading rate (*id.* at p. 7).

An OT evaluation report conducted on April 8, 2022 indicated administration of the Beery Buktencia Test of Visual Motor Integration—Sixth Edition (Beery VMI-VI) that yielded a standard score of 83 (13th percentile) on the visual motor integration subtest which fell within the low average range, a standard score of 79 (8th percentile) on the visual perception subtest which fell within the below average range, and a standard score of 96 (39th percentile) on the motor coordination subtest which fell within the average range (March 18, 2024 Tr. pp. 1992-93; Dist. Ex. 13 at pp. 1-2, 5). The April 2022 OT evaluation report indicated the student presented with some fatigue after multiple fine motor tasks, demonstrated difficulty with the formation of letters "a" and "q," demonstrated floating letters and words in his writing, big sizing while writing, no

---

<sup>15</sup> The hearing record includes Parent Ex. YY#1 which is a transcript of the May 19, 2022 CSE meeting and Parent Ex. YY#2 which is an audio recording of the same meeting. Parent Ex. YY#2 is a duplicate of Parent Ex. MMM (see generally Parent Exs. YY#2; Parent Ex. MMM). For the purposes of this decision, Parent Ex. YY#2 will be cited to).

<sup>16</sup> The clinical psychologist who conducted the student's July 2023 educational evaluation testified that there was nothing in the student's evaluative reports completed by the district that would have made her question the validity of the evaluation (Tr. p. 2223).

differentiation between tall and short letters, and inconsistent spacing (Dist. Ex. 13 at pp. 7-8). The evaluation report noted the student had difficulty copying novel, more complex shapes and shapes with multiple parts as well as difficulty picking the correct match even with more familiar shapes (id. at p. 6). The OT evaluation report indicated that the student demonstrated proper postural stability throughout the evaluation and presented with age-appropriate upper extremity range of motion of strength, further noting he used a mature tripod grasp when writing with a pencil and demonstrated right hand dominance (March 18, 2024 Tr. pp. 1996-99, 2000-02, 2003-05; Dist. Ex. 13 at p. 5). Additionally, the evaluation report indicated that while copying from near point, the student had fair letter formation including for letters a and q, line regard, sizing, spacing, and good margin regard and orientation (Dist. Ex. 13 at p. 5). During the evaluation it was noted that the student was able to follow directions and transitioned well between all tasks (id.).

The April 2022 OT evaluation report reflected general strategies recommended to support the student's visual motor needs including extra time to complete visual motor activities, e.g., mazes; writing strategies, e.g., visual checklist to remember handwriting rules; provision of a visual checklist to assist with desk organization; and visual perception activities, e.g., hidden pictures (Dist. Ex. 13 at p. 5). Similar to the student's challenges with writing as noted above, administration of the WOLD sentence copying test to the student indicated the student presented with difficulties in writing consistent with those noted by his second-grade teacher (March 18, 2024 Tr. pp. 1995-96; Dist. Ex. 13 at p. 3).

On March 30, 2022 and April 1, 2022, the student underwent a speech-language evaluation in which he was administered the Clinical Evaluation of Language Fundamentals—Fifth Edition (CELF-5) (Jan. 29, 2024 Tr. pp. 1348-49, 1357-62; Dist. Ex. 11 at pp. 1-2). The April 2022 speech-language evaluation report indicated the student's performance reflected a core language score of 89 at the 23rd percentile which fell within the average range (Dist. Ex. 11 at p. 2). On the receptive language index, a cumulative measure of the student's performance on the sentence comprehension, word classes, and following directions subtest, the student's performance reflected a receptive language index score of 74 at the fourth percentile which fell within the below average range (Jan. 29, 2024 Tr. pp. 1361-62; Dist. Ex. 11 at p. 3). The speech-language evaluation report noted the expressive language index consisted of the word structure, formulated sentences, and recalling sentences subtest (Dist. Ex. 11 at p. 3). On the expressive language index, the student's performance resulted in a score of 94 at the 34th percentile which fell within the average range (id.). According to the report, the language content index included the linguistic concepts, word classes, and following directions subtests (id.). The report reflected the student received a language content index score of 79 at the eighth percentile which fell within the below average range (id.). On the language structure index, which was comprised of the sentence comprehension, word structure, formulated sentences, and recalling sentences subtests, the student's performance reflected a language structure index score of 88 at the 21st percentile which fell within the average range (id. at p. 4).

The April 2022 speech-language evaluation also included the administration of the Social Language Development Test—(SLDT—Elementary) which indicated the student's performance yielded below average scores on both the making inferences and interpersonal negotiation subtests (Jan. 29, 2024 Tr. p. 1430; Dist. Ex. 11 at p. 6). Further, the speech-language pathologist noted the student had some difficulty with pragmatic language in the areas of making inferences and



interpersonal negotiations when he examined real life photos (Jan. 29, 2024 Tr. pp. 1357, 1359-60; Dist. Ex. 11 at p. 5). After a March 30, 2022 classroom observation, the speech-language pathologist noted the student required steps to be broken down to be successful at a writing workshop task, and further noted he often used verbal rehearsals while processing information before responding to questions (Jan. 29, 2024 Tr. pp. 1352-53; Dist. Ex. 11 at pp. 1, 6).

An addendum to the April 2022 speech-language evaluation noted the Test of Auditory Processing, Fourth Edition (TAPS-4) was administered to the student on May 9, 2022 to gather further information regarding the student's phonological processing, listening comprehension, and auditory memory (Jan. 29, 2024 Tr. pp. 1364, 1370-72; Dist. Ex. 12 at p. 1). The resultant report dated May 12, 2022 indicated the student's performance on the TAPS-4 reflected subtest scores which fell within the average range and index scores which all fell within the average range (Dist. Ex. 12 at p. 2). The report noted the overall sum of scaled scores reflected a standard score of 113 at the 81st percentile which fell within the average range (id. at pp. 1-2).

With respect to the student's social/emotional skills, the March 2022 psychological evaluation report indicated observational rating scales administered to the student's classroom teacher and the parents' included the BASC-3, the BRIEF-2, and the Conners-3 (see Dist. Ex. 8 at pp. 5-11). According to the Conners-3 rating scales, the student's second grade teacher reported learning problems, executive functioning, and peer relations skills as areas in need of intervention while the student's parents reported learning problem, executive functioning, and inattention as a difficulty related to the student's ability to function at home (Dist. Ex. 8 at p. 11). The report revealed the BRIEF-2 rating scales demonstrated consistency in difficulty when assessing executive functioning skills including successful initiation of tasks, cognitive shifting, organization of material, and self-monitoring skills (see Dist. Ex. 8 at p. 11). Finally, the BASC-2 rating scales suggested that in school, the student presented with significant levels of internalizing behaviors such as anxiety, e.g., worry, nervousness, fear; learning problems, e.g., comprehending and completing school work; atypicality, e.g., seemed to be disconnected from his surroundings; and withdrawal, e.g., observed to be generally alone, difficulty making friends, and hesitant to join group activities (id.).

Regarding the IHO's argument that the district should have conducted a vision evaluation, I note that the evaluations reflected that the student's visual spatial skills were noted to be a deficit and an area of difficulty for the student (Jan. 22, 2024 Tr. pp. 951, 959-60; Jan. 29, 2024 Tr. pp. 1299). The district recommended annual goals, management needs, and supplemental aids and services to help the student with his visual deficits (see Dist. Exs. 1 at pp. 8, 10-11; 2 at pp. 8, 11-12). More specifically, the IEP indicated that the student required visual aides, such as letter sound charts, sight word references, math checklists, and writing checklists (Dist. Ex. 1 at pp. 8, 10-11). In addition, annual goals targeted the student's handwriting skills including his ability to print sentences with correct sizing, spacing, and line regard and his ability to reproduce designs from visual models (id. at p. 10). Further, in connection with the student's reading, the district conducted two educational evaluations and the second educational evaluation focused solely on assessing the student's reading skills (see Dist. Exs. 9-10). The district was well aware of the student's needs and deficits identified through the evaluation process and in fact, when needed, sought additional testing to gather more detailed information on the student's needs.

A review of the May 2022 IEPs in combination with the testimony of the school psychologist who served as the CSE chairperson/district representative (district representative) at the time of the student's May 19, 2022 CSE meeting shows that the CSE appropriately considered the information contained in the comprehensive evaluations the district used to develop the student's May 2022 IEP pertaining to the last few weeks of the 2021-22 second grade school year, the parents' input and concerns, and the May 2022 IEP pertaining to the student's 2022-23 third grade school year (Nov. 9, 2023 Tr. pp. 3, 6, 50-52, 70; compare Dist. Ex. 1 at pp. 2-6 and Dist. Ex. 2 at pp. 2-6, with Dist. Exs. 8-11; 13; Parent Exs. TT; YY#1 Tr. pp. 1-155; YY#2).<sup>17</sup> The district representative testified that at the May 2022 CSE meeting, the parents provided input to the CSE in that they shared anecdotal information and provided examples of "things" that the student shied away from in his outside extracurricular activities and things that they noticed could be related so some of the academic concerns (Nov. 9, 2023 Tr. pp. 62-63).

Based on the foregoing, the hearing record does not support the IHO's determinations that the May 2022 CSE for that developed the initial IEP for the remainder of the 2021-22 school year as well as the IEP that would continue into the 2022-23 school year lacked sufficient evaluative information to determine appropriate programming for the student during these time periods.

Turning to the following IEP that was developed in February 2023 and the information that was before the CSE at that point, in connection with the IHO's finding on sufficiency of evaluative information, the IHO for the same reasons noted above, found that the district failed to consider available evaluative information in developing the student's February 2023 IEP (IHO Decision at pp. 45-49). However, the district argues that the district conducted the Wilson Assessment of Decoding and Encoding (WADE) prior to the end of the 2021-22 school year and it was later

---

<sup>17</sup> The parents' claim that they were not given the opportunity to meaningfully participate in the decision-making process is without any merit. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at \*18-\*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Comm'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"). The evidence in the hearing record demonstrated that the parents received and reviewed the evaluation reports with the evaluators prior to the May 2022 CSE meeting (Nov. 9, 2023 Tr. pp. 41-42, 54; Dec. 18, 2023 Tr. pp. 242-43; Dec. 20, 2023 Tr. pp. 627, 630, 633; Parent Ex. YY#1 Tr. pp. 2, 44). Here, the evidence in the hearing record supports that the parents were afforded meaningful participation in the creation of the student's IEPs. With respect to the IHO's finding of a denial of FAPE because the May 2022 CSE failed to discuss compensatory services, even if I determined that this was a procedural violation, I do not find that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process, or deprived the student of educational benefits (see 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).

considered during the February 2023 CSE meeting as well as the private psychological evaluation report from February 2023.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

On June 9, 2022 and June 10, 2022,, the student was assessed by a "Wilson Dyslexia Practitioner" using the WADE (see generally Parent Ex. YY#1; see Dist. Ex. 33 at pp. 1-2). The district representative testified that "knowing that we were also going to be taking data using the WADE which is that Wilson assessment because we knew that [the student] required a multi-sensory program for reading" (Nov. 9, 2023 Tr. pp. 50-51). The WADE report indicated the WADE sounds assessment included the consonants, vowels, additional sounds, digraphs/trigraphs, and welded sounds subtests (Dist. Ex. 33 at p. 2). The WADE report reflected the student's results indicated a "[total sounds]" score of 54 out of 120 (45 percent) correct (id. at p. 1). The WADE report noted reading subtests included high frequency words, words, and pseudo words (id.). According to the WADE report, the student's performance reflected a "[total reading]" score of 66 out of 240 (28 percent) correct (id.). The WADE report indicated spelling subtests included high frequency words, words, and sentences (id. at pp. 1-2). The WADE report reflected the student completed 13 out of 184 (seven percent) test items correctly on the "[total spelling]" index (id.). The WADE report noted the student's performance on the WADE reflected his initial placement in the WRS should be at "substep 1.3" (id. at p. 2).

The licensed psychologist who evaluated the student subsequent to the May 2022 CSE meeting opined that the student's motor skills goals identified in the May 2022 IEP did not address the underlying causes of how the student's visual perceptual skills interfered with his ability to complete the tasks established in the goals (Feb. 6, 2024 Tr. pp. 1505-06). Based on her review of district testing, the licensed psychologist reported that the student's performance on the visual - spatial domain of the WISC-V stood out to her because there was a split in the student's performance on the two subtests that constituted that index (Feb. 6, 2024 Tr. p. 1483). She noted

that the student performed well on one task, the block design subtest but on the second subtest, which involved viewing visual puzzles on a page, the student's performance was at the 16th percentile and constituted an area of weakness for him (Feb. 6, 2024 Tr. p. 1483). In addition, the licensed psychologist noted that the student's lowest composite score was on the processing speed index where the student demonstrated weakness on the symbol search subtest (9th percentile), "a task with a lot of visuals present on the page" (Feb. 6, 2024 Tr. p. 1484). According to the licensed psychologist, the student's scores related to the symbol search subtest and the visual puzzles subtest stood out to her among scores which otherwise fell predominantly in the average range (Feb. 6, 2024 Tr. pp. 1483-84).

The licensed psychologist explained that "something like symbol search, a task that has a lot to do with visual scanning and being able to stay visually organized and get through visual information [] would translate over to if a student has a lot of data or information on a page how that student is able to understand and process and work with that information" (Feb. 6, 2024 Tr. pp. 1485-86). The clinical psychologist testified that the April 2022 OT evaluation offered "further support for an issue going on in the visual perceptual or visual processing domain (Feb. 6, 2024 Tr. pp. 1492-95). In addition, she noted that the student had issues with spacing and sizing when writing and when taken together the pieces were consistent with "some sort of nuance going on neurodevelopmentally" (Feb. 6, 2024 Tr. p. 1495). The licensed psychologist characterized the annual goal that addressed the student's ability to print sentences with correct letter formation, sizing, spacing and line regard as "hefty" and stated that she would want to know what it was about the student's visual processing that was getting in the way of him completing these tasks (Feb. 6, 2020, Tr. pp. 1505-06). She further indicated that she would want information regarding how much the student could remediate those areas versus learning accommodations (Feb. 6, 2024 Tr. p. 1506). The licensed psychologist reported that she tended to break goals down and would work on one piece at a time (Feb. 6, 2024 Tr. pp. 1506-07). The licensed psychologist opined that there was information that suggested that the student was struggling with visual spatial processing and examples of how and when but not an overarching full profile or understanding or diagnosis of the nature of the student's deficit (Feb. 6, 2024 Tr. p. 1508). She noted that although the IEP included an annual goal related to replicating block designs it was not an area that the student had difficulty with on testing, rather the student struggled with the ability to complete visual puzzles and the goal did not address that (Feb. 6 2024 Tr. pp. 1508-10). With regard to her recommendation for vision therapy, the licensed psychologist suggested that it would address "the underlying, sort of wiring, from someone's eye to their brain and the way that those process operate which we know is a deficit for [the student]" (Feb. 6, 2024 Tr. pp. 1598-99). She testified that that it was not the same as implementing supports or practicing processes, rather it "tackle[d] the underlying connections that present as problematic in folks who have the deficiency" (Feb. 6, 2024 Tr. p. 1599). The licensed psychologist testified that her understanding of a behavioral developmental optometrist, which she recommended for the student, was that "they work to really on a micro and medical or biological level to understand where the deficits in visual processing are coming from and what specific eye to brain related processes are lacking" (Feb. 6 2024 Tr. pp. 1598-1600; see Dist. Ex. 15 at p. 23).

Next, the March 6, 2023 prior written notice indicated the CSE convened on February 13, 2023 "to review an outside psychoeducational evaluation/recommendations [sic] and [the student's] present levels of performance across all academic areas" (Dist. Ex. 7 at p. 1). The prior written notice indicated that upon review of the private evaluation report and the student's present

levels of performance, the student's classification was changed from speech or language impairment to OHI (*id.*).<sup>18</sup> In addition, the document reflected the CSE changed the student's recommendation for OT services from two 30-minute sessions per week of OT in a group to one 30-minute session per week of individual OT and one 30-minute session per week of OT in a group (Dist. Exs. 7 at p. 1; 3 at p. 1). According to the February 2023 IEP, the CSE considered: committee discussion from February 13, 2023; a December 2, 2022 IEP progress report, the September 23, 2022 psychoeducational evaluation, and the May 19, 2022 IEP along with all of the student's test results from the student's initial evaluation and the private licensed psychologist's psychoeducational evaluation results from the ABAS-3; the CEFI; the NEPSY-II; and the SRS-2, all of which were reports dated September 22, 2022 (Dist. Ex. 3 at pp. 2-7).

The February 2023 CSE considered updated information from the student's classroom teacher as well as related service providers. The February 2023 IEP stated classroom benchmarks reflected the student's instructional reading level as of February 2023 was a Fountas and Pinnell "level O" which the IEP noted was "on grade level and me[t] expectations" (Dist. Ex. 3 at p. 7). The student's running record showed his reading accuracy of connected text and comprehension was strong (*id.*). According to the IEP, during multi-sensory reading instruction, the student was able to decode closed single-syllable words with up to five sounds which included CVC words, words with digraphs, consonant digraph blends, welded sounds, and suffixes "-s and -es" (*id.*). The IEP noted the student was able to read closed exceptions, e.g., gold, mild, with accuracy (*id.*). The IEP indicated the student had shown progress reading with appropriate phrasing and intonation when working on target word patterns within the context of sentences and passages (*id.*). The IEP reflected the student was independently able to phrase his sentences and would self-correct when appropriate; however, he continued to need to work on additional word patterns which included three-letter consonant blends in single-syllable words and multi-syllabic words with closed syllables (*id.*).

---

<sup>18</sup> CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and the resulting IEP must address all the student's 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]). Similarly, on the question of disability classification, courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at \*2 [2d Cir. May 1, 2023] [agreeing that the classification issue was a "red herring" and that the disability categories served only the purpose of ascertaining the student's eligibility for special education]; B.D. v. Eldred Cent. Sch. Dist., 2023 WL 3025308, at \*10 [S.D.N.Y. Apr. 20, 2023] [characterizing the eligibility category as "a distinction without a difference"]; Polanco v. Porter, 2023 WL 2242764, at \*6 [S.D.N.Y. Feb. 27, 2023] [finding that "well-reasoned decisions in other circuits have clarified that a student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student"]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]). "Indeed, [t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

Regarding writing, the February 2023 IEP noted according to the student's third grade classroom teacher and writing samples, the student benefited from the use of an organizer to plan and brainstorm his writing (Dist. Ex. 3 at p. 7). The student was able to compose an organized writing piece, with logical and sequential details and incorporated topic and conclusion sentences within his writing (id.). According to the IEP, the student was able to follow the criteria expected for a writing piece (id.). The IEP noted the student had been developing more complex and detailed sentences, which resulted in reduced punctuation and an increase in run-on sentences (id.). The IEP reflected the student needed time to edit his work sentence by sentence, to check for "run-ons" (id.). The IEP indicated the student was most consistent with ending punctuation, but he did not apply commas to his writing (id.). The IEP reported the student became increasingly consistent with capitalization at the start of his sentences and would edit for additional proper nouns with reminders (id.). According to the February 2023 IEP, the student tended to use uppercase letters within his writing, some included "B" and "D" within his sentences, however, he had shown an increase in self-corrections and had begun to recognize some of those errors during the editing process (id.). The IEP noted that during multisensory encoding instruction, the student was able to encode single-syllable words up to five sounds with and without suffix "-s and 'es" with consistency (id.). The IEP reported the student needed to work on encoding additional word patterns which included three-letter consonant blends and multi-syllabic words with closed syllables (id.).

With respect to math, the IEP reflected that "[m]ath [wa]s an area [the student] [wa]s doing well with in the classroom" noting the student conceptually understood the math being taught and could apply the procedures to accurately compute problems (Dist. Ex. 3 at p. 8). The IEP indicated "[o]ccasional errors that appear[ed] within [the student's] math" included the ability to identify when to regroup for subtraction and the ability to line up numbers, in order to avoid calculation errors (id.). The IEP noted had difficulty with being able to interpret some of the math language within word problems and being able to identify whether to use multiplication or division within a mixed set of word problems (id.). Consistent with the February 2023 IEP, the student's third grade teacher testified regarding the student's difficulty with math word problems noting multi-step word problems were "a little bit more challenging for him" and she described the strategies she implemented with the student for solving word problems in math (Jan. 25, 2024 Tr. pp. 1081-84).

Regarding speech-language development, the IEP noted the student was working hard towards his goals so far during the 2022-23 third grade school year (Dist. Ex. 3 at p. 7). According to the IEP, the student was an active participant in all group sessions and his then-current goals were focused on listening comprehension and responding to inferentially based questions as well as to improve his phonemic awareness and "speech pattern/vocal tone skills" (id.). The IEP noted the student was making steady progress towards those goals (id.). The IEP indicated the student continued to exhibit some difficulty with oral motor planning and was working on errors in his speech such as "/f/ for /th/" (id.). The IEP reported the student then-currently made steady progress with his goal to listen to short stories or contrived situations, and he had increased his ability to identify a problem and offer two possible solutions (id.). The IEP reflected the student had been observed to use those skills during conversations with peers in the therapy sessions (id.). According to the IEP, speech sessions had also included some review of academic vocabulary words prior to any classroom tests further noting strategies such as making associations for the vocabulary words had been helpful for the student (id.). The IEP noted the student benefited from

his teachers checking in for understanding, and he continued to need directions explained (*id.*). The IEP indicated visual supports were extremely helpful to the student during speech sessions as well (*id.*).

With regard to physical development, the IEP reported the student worked hard during his OT sessions and had shown improvements in his handwriting with the use of highlighted paper to help with sizing of his letters and line orientation (Dist. Ex. 3 at p. 8). The IEP indicated the student benefited from a visual model of proper sizing on his page in order to improve accuracy of letter sizing further noting he showed difficulty with "dive letter 'g, p, y, q, j'" (*see* Jan. 25, 2024 Tr. pp. 1084-85, 1087-88; Dist. Ex. 3 at pp. 8-9). The student's third grade teacher testified that the student benefited from using a mechanical pencil (Jan. 25, 2024 Tr. pp. 1084-86, 1088-89). The IEP reflected the student should continue to work on consistency of his handwriting in order to increase legibility (Dist. Ex. 3 at p. 9). According to the IEP, the student used a visual writing checklist with prompting to correct missed errors in punctuation and capitalization (*id.*). The IEP noted the student demonstrated decreased fine motor skills and bilateral coordination (*id.*). The IEP reported the student continued to show progress in tabletop shoe-tying and was able to complete steps one through three with cueing and demonstration (*id.*). According to the IEP, the student demonstrated deficits in his executive functioning skills, visual perceptual skills, and visual spatial skills, further noting he should continue working on initiating tasks independently and consistently (*id.*). The IEP reflected the student engaged well with his peers and enjoyed participating in group activities (*id.*).

Review of the student's February 2023 IEP shows that CSE included many of the student's scores from cognitive and behavioral tests administered during the private psychological evaluation in the IEP (Dist. Ex. 3 at pp. 2-3). The February 2023 IEP reflects that the district adopted some, but not all, of the recommendations made in the February 2023 private psychological evaluation report. For example, the CSE agreed to change the student's eligibility classification to OHI, and OT was recommended both an individual and group basis (*id.* at pp. 1, 12). The private psychologist testified that in authoring her report, she relied upon the initial testing conducted by the district "as a significant component of [her] evaluation" (Feb. 6, 2024 Tr. pp. 1589-90).

Based on the foregoing evidence, the hearing record supports a finding that the May 2022 and February 2023, CSEs appropriately conducted comprehensive evaluations in all areas of the student's areas of disability, considered all of the evaluative information before it at the time of the CSE meetings and carefully constructed supports, strategies and corresponding goals and learning objectives to address all areas related to the student's identified needs along with daily resource room, OT and speech-language services, program modifications and accommodations, management needs, and testing accommodations. Moreover, the CSE also utilized significant input for the student's teachers and, in the case of the February 2023 CSE, considered the private psychologist's evaluation report and incorporated aspects of it into the student's February 2023 IEP.

With respect to the IHO's findings that the district did not meet its burden to prove that it evaluated the student in all areas of suspected disability and considered sufficient evaluative information to develop appropriate educational programming for the student, he largely relied on the assessments, diagnoses, conclusions and recommendations contained in the three private

evaluations obtained by the parent.<sup>19</sup> With respect to the student's classification, the IHO found that the district's failure to take into account his "obvious ADHD" and to classify him as a student with an other health impairment until the February 2023 CSE meeting and resultant IEP prevented the district from developing appropriate educational programming for the student (IHO Decision at pp. 45-46). The IHO effectively construed this as a failure on the part of the district to evaluate the student in all areas of suspected disability and, in his view, that failure was only rectified by the private psychologist's diagnosis of the student with ADHD and recommendation that he be classified as other health impairment rather than speech or language impaired. When cataloguing the needs gleaned from a classroom observation of the student and assessment of the student conducted by the district, however, the IHO failed to distinguish them from the needs identified by the private psychologist; indeed, the district and the private psychologist largely agreed with respect to his attentional needs in the classroom. To the extent the district and the private psychologist reached different conclusions as to the appropriate classification for the student, such disagreement does not compel a conclusion that the district failed to evaluate the student sufficiently or was otherwise unable to recommend appropriate educational programming for the student due to his original classification of speech or language impairment, and the later change in classification similarly does not support a finding that the earlier classification, based on the comprehensive district evaluation of the student, was inappropriate. Indeed, it is well settled that, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have placed considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir. 1997]).

Accordingly, CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and this is why 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

---

<sup>19</sup> The IHO does not distinguish between the three different IEPs created for the student for the 2021-22 and 2022-23 school years in his determination that the district failed to evaluate the student sufficiently.



been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories. As a result, the hearing record does not support the IHO's finding that the district's evaluations and resulting educational programming recommendations did not adequately capture the student's needs related to his ADHD diagnosis or that the student's initial classification by the district as speech or language impaired deprived the student of a FAPE.<sup>20</sup>

Additionally, the IHO faulted the district for failing to assess the student's visuoperceptual needs (IHO Decision at pp. 46-47). The IHO's finding in this regard was based on the evaluation of the optometrist who diagnosed the student with several visual disorders. The CSEs had noted areas of weakness in the student's visuoperceptual abilities gleaned from the district's visual and spatial testing of the student and sought consent from the parent to conduct further vision testing. The parent ultimately obtained the private vision evaluation for the student. The evaluation report was completed on October 10, 2023, during the 2023-24 school year and, therefore, the May 2022 CSE and the February 2023 CSE did not have access to the optometrist's findings (Parent Ex. X). However, neither the developmental optometrist's evaluation report or the IHO's decision explain how the particular diagnoses obtained from the optometrist's testing differed from the district's assessments and observations of the student's visual and spatial abilities in terms of identifying the student's educational needs or what aspect of the CSEs' recommended programming was deficient to address those needs as identified by the district evaluations. Rather, the IHO noted that the developmental optometrist's findings were consistent with the other information about the student in the record. As a result, the IHO erred in finding that the district failed to assess the student's visuoperceptual needs and thereby denied the student a FAPE.

Finally, the IHO found that the district failed to evaluate the student for a learning disability although he noted that the district's "observations and testing [we]re replete with evidence that [t]he student has a disability in reading, writing and math (IHO Decision at p. 47). In making this determination, the IHO relied on the private reading specialist's evaluation of the student's reading and writing skills (*id.* at pp. 47-49). While the reading specialist may have used different testing and reached specific diagnoses of the student as having learning disabilities in both reading and writing, similarly to the issue of classification, the issue is not so much one of diagnosis as it is identification of the student's areas of need. As acknowledged by the IHO, the district observations and testing of the student identified his needs in reading, writing and math and, notably, the reading specialist did not reach a different conclusion than the district with respect to the student's deficits in reading and writing. Moreover, the reading specialist did not complete her report until October 10, 2023, during the 2023-24 school year and so her evaluation was not available to either the May 2022 or February 2023 CSEs (Parent Ex. Y). As a result, the IHO erred by finding that the district did not sufficiently evaluate the student with respect to his core academic needs in reading, writing and math.

---

<sup>20</sup> Moreover, the private psychologist's evaluation was not available to the May 2022 CSE as it was not completed until February 2023, but it was considered, as required, by the February 2023 CSE (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

With respect to the student's IEPs, the sole substantive finding by the IHO was that the motor perceptual goals developed for the student for the 2022-23 school year did not meet his needs (IHO Decision at p. 49). The IHO based his finding on the private psychologist's opinion that the three motor goals developed for the student for the 2022-23 school year were not adequate to address his visual spatial needs. During the impartial hearing, the district special education teacher who administered the FAR to the student on May 11, 2022 and attended the May 2022 CSE meeting testified that the student's IEP goals addressed the student's weaknesses in phonemic awareness, spelling, handwriting, and visual perceptual skills (see Dec. 19, 2023 Tr. pp. 477-84). The speech-language pathologist who evaluated the student, as discussed above, and participated in the meeting described the student's needs related to social language difficulties, e.g., ability to make inferences, listening comprehension, interpret facial expressions and body language, and problem solve hypothetical situations which aligned with the speech-language goals identified in the IEP (compare Tr. pp. 1365-70, 1374, 1380-86, 1389, 1393-94, 1396-97, with Dist. Ex. 2 at pp. 10-11). The occupational therapist who evaluated the student attended the meeting and explained how the student's motor skills goals addressed his needs (see March 18, 2024 Tr. pp. 2007-11, 2015).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). However, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M., 2017 WL 607579, at \*20-\*21). Moreover, where an IEP contains specific, objectively measurable "short-term objectives to supplement otherwise broad annual goals, the vagueness of the annual goals alone will not rise to the level of the denial of a FAPE" (D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 359-60 [S.D.N.Y. Sept. 16, 2013]; A.D., 2013 WL 1155570, at \*10-11).

Here, the IEPs in evidence, and the testimony from the district witnesses concerning the development of the student's goals, demonstrate that the district developed goals that addressed all of the student's areas of identified need. While the private psychologist had a differing opinion as to the sufficiency of three discrete motor goals developed for the student, even if the goals in question were lacking, such a minor deficiency, in the context of the other goals and overall program developed for the student, would not demonstrate that the district denied the student a FAPE.

Since I have found that the district offered the student a FAPE for both the 2021-22 and 2022-23 school years, I find that the parents are not entitled to an award of compensatory education

services.<sup>21</sup> I also find that the student was not owed compensatory education for the period of time between mid-March and mid-June 2020 due to COVID in which the parents allege that the student lost or had reduced instruction during that period of time.<sup>22</sup> Having found that the IEPs identified the student's needs related to visual perceptual deficits and that the IEPs were appropriate to address these needs, the student did not require vision therapy and therefore, an award for reimbursement or prospective vision therapy is also denied. The evidence in the hearing record demonstrates that the student was making progress before and after COVID-19, and there is no evidence of lost skills or lack of progress due to remote learning during COVID-19 (see Dist. Exs. 18-19).

## D Relief

### 1. Independent Educational Evaluations

The district contends that the parents were only entitled to one IEE when the district conducts an evaluation in which the parent disagrees and the IHO's award of three IEEs was "clear error" (Req. for Rev. ¶ 14). Furthermore, the district asserts that since the district granted one of the parents requested IEEs the district was not required to initiate a due process impartial hearing to defend its decision to grant one of the three requested evaluations and deny the other requested IEEs (*id.* ¶¶ 14-15).<sup>23</sup> The parents seek to uphold the IHO's award of the three IEEs because the

---

<sup>21</sup> Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

<sup>22</sup> This time period was before the student was found eligible for special education services and the IHO found that claims from that time period were barred by the statute of limitations.

<sup>23</sup> "A parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." 34 C.F.R. § 300.502(b)(5). D.S. By and Through M.S. v Trumbull Bd. of Educ., 975 F.3d 152, 169-70 [2d Cir 2020].

district disregarded the requirements that it either grant an IEE or initiate due process to defend its evaluation (Answer at p. 6).

The IHO found that when an IEE is requested the district has two options: to grant the IEE or seek an impartial hearing to defend its evaluation (IHO Decision at p. 51). The IHO found that because the district "rejected" two of the parents requested IEEs and did not seek due process it violated the IDEA (id.).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).<sup>24</sup>

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

Here, during the February 2023 CSE meeting, the school psychologist testified that there was a conversation regarding the student's vision (Jan. 29, 2024 Tr. pp. 1315). She testified that she suggested a vision evaluation twice to the parents (once during sub- CSE meeting) but they declined because they did not want the district to conduct the vision evaluation (Jan. 29, 2024 Tr. pp. 1319-23).

---

<sup>24</sup> Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

Thereafter, in an email dated February 28, 2023, the parents requested that the "district fund/reimburse the [psychological] evaluation as an independent educational evaluation as well as prospectively fund an independent vision evaluation of [the student] to inform this area of need" (Parent Ex. G). The parents' email further stated that these were the only two IEEs they were "requesting following his initial testing" (Parent Ex. G; see Parent N at p. 1). In response to the parents' request, the district's director of pupil personnel services stated that it was the district's "process" to hold a multidisciplinary team meeting to review the request(s), past assessments and the student's academic strengths and needs" and then determine the next steps (Parent Ex. H at p. 2).<sup>25</sup> A multitude of emails went back and forth between the parents and district regarding the IEEs (see Parents Exs. H; J-K). The district attempted to schedule a meeting but the parents declined to attend (April 4, 2023 Tr. pp. 2573-74; Parent Ex. K at p. 1). Later, on March 23, 2023, the parents added a request for a district funded reading evaluation (see Parent Ex. L). Then, on March 29, 2023, the district agreed to fund a vision IEE (Parent Ex. L at p. 2). In approving the vision IEE, the district stated that a "parent is entitled to only one IEE at public expense each time the school district conducts an evaluation with which the parent disagrees" and therefore, the district was "under no legal obligation to grant in excess of one independent evaluation" and not required to file due process to defend its evaluations (id.). Lastly, the district requested the parents to provide the name of the evaluator for the vision IEE in order to make payment arrangements (id.).

Ultimately, the parents obtained a developmental vision evaluation of the student in September and October, 2023 (see generally Parent Ex. X). Accordingly, based upon the foregoing, and since the district already agreed to fund the vision IEE, I will direct the district to fund the vision evaluation in the amount of \$295 (see IHO Decision at pp. 51, 53).

Moreover, with respect to the parents request for funding of the psychological evaluation and reading evaluation, I further find that the district is required to fund both of those aspects of an IEE. The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021] [discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at \*2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at \*14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at \*18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether

---

<sup>25</sup> Although the district "may ask for the parent's reason why he or she objects to the public evaluation," an explanation by the parent "may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint notice to request a hearing to defend the public evaluation" (8 NYCRR 200.5[g][1][iii]; see 34 CFR 300.502[b][4]).

and granting IEE at public expense];<sup>26</sup> Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (Trumbull, 975 F.3d 152, 168-69 [2d Cir. 2020]).<sup>27</sup>

In the present matter, the district's argument that it is not required to commence due process for the remaining portion of an IEE that it denied because it granted the vision assessment is misplaced. The district had an affirmative duty to either grant an IEE at public expense or commence due process. The fact that the district granted one aspect of the requested IEE does not relieve the district of its obligations, because it denied the other aspects of the requested IEE. Accordingly, I find a sufficient basis to uphold the IHO's award of both the psychological evaluation in the amount of \$3,191, and the reading evaluation in the amount of \$1,500 (see IHO Decision at pp. 51, 53).

## **VII. Conclusion**

In summary, I find that the IHO erred in finding that the district denied the student a FAPE for the period of January 2022 through June 20, 2023. Having found that the district offered the student a FAPE, I find no basis for an award of compensatory education services, including reimbursement for vision therapy services or prospective vision therapy services. However, the hearing record support the IHO's decision to grant an IEE consisting of a psychological, vision, and reading assessments at district expense.

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

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

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

**IT IS ORDERED** that the IHO's decision, dated July 29, 2024, is modified by reversing those portions that found the district denied the student a FAPE for the period of January 2022 through June 20, 2023; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 29, 2024, is modified by reversing the IHO's award of reimbursement for the student's vision therapy and reversing the IHO's prospective award of vision therapy sessions; and

---

<sup>26</sup> The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

<sup>27</sup> The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (975 F.3d at 169).

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 29, 2024, is modified by reversing the IHO's award of 240 hours of compensatory educational services.

**Dated:**            **Albany, New York**  
                         **October 31, 2024**

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