The University of the State of New York

The State Education Department
State Review Officer
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No. 24-560

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied in part their request that respondent (the district) fund compensatory education related to the 2022-23 and 2023-24 school years and denied their request for reimbursement of the cost of their son's private educational program for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student attended a preschool program during the 2022-23 school year (Dist. Ex. 4 at pp. 1, 2). On February 16, 2023, the parent reached out to a Committee on Preschool Education (CPSE) administrator, notifying her that she was waiting for the district to call "to continue with the process" of the student's initial evaluations to determine if he was eligible for special education services (Parent Ex. K at pp. 3-4; see Parent Ex. D ¶ 35).[1] The CPSE administrator responded on February 17, 2023 and sent the parents a CPSE referral packet (see Parent Ex. E). The parents

[1] The parent's February 16, 2023 email indicated that she had referred the student to the CPSE on February 7, 2023; however, that referral was not entered into the hearing record (Parent Ex. K at pp. 3-4; see Parent Exs. A-G, I-GG, JJ-OO; Dist. Exs. 1-20).

signed a consent to evaluate form on February 24, 2023 and the student was evaluated between February and March 2023 by a private evaluation agency selected by the parent (see Parent Ex. E at pp. 1-3; Dist. Ex. 4 at pp. 1-23, 44).[2] The private evaluation agency conducted a social history, a psychological evaluation, an educational evaluation, a physical therapy (PT) evaluation, and an occupational therapy (OT) evaluation of the student (Dist. Ex. 4 at pp. 1-23).

On May 10, 2023, the CPSE held an initial eligibility determination meeting and found that the student was eligible for special education as a preschool student with a disability (see Parent Ex. N). The May 2023 CPSE recommended seven hours per week of special education itinerate teacher (SEIT) services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT with a projected implementation date of June 10, 2023 (id. at pp. 28-29). The district sent the parent a prior written notice, a final notice of recommendation, and a district form approving the SEIT services recommended on the student's IEP, all dated May 10, 2023 (Parent Ex. BB).

In a prior written notice dated June 7, 2023, the district requested that the parents provide consent for the CSE to conduct an initial evaluation of the student to determine his eligibility for school-age special education services, notifying the parent that the initial evaluation would include a social history, a psychological evaluation, a physical examination, and an observation (see Dist. Ex. 11).

On June 8, 2023, the parent sent an email to the CPSE administrator, notifying her that she had not received a copy of the student's May 2023 IEP and asking for an explanation as to "what the process" was as the IEP "[wa]s supposed to go into effect" on June 10, 2023 (Parent Ex. CC at p. 6). The CPSE administrator from the district responded the same day, indicating that the student would not receive "pre-school services due to the time of year and the end of pre-school," but that the district "wanted to put the IEP in place" so that the parents could have a meeting for the student's kindergarten year (id. at p. 4). On June 8 and June 9, 2023, the parent emailed the CPSE administrator indicating she had located an OT provider and a SEIT provider who would begin delivering services to the student on June 10, 2023 for the remainder of the school year (id. at pp. 1, 4).

On June 27, 2023, the district sent a letter notifying the parent that a social history assessment was scheduled for the student on July 10, 2023 (Parent Ex. J).

On July 5, 2023, the parent signed an enrollment agreement with the Hebrew Academy of Long Beach (HALB) for the student to attend the Lev Chana Early Childhood Center during the 2023-24 school year from September 6, 2023 to June 18, 2024 (Parent Exs. DD-FF).[3]

[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits will be cited in instances where both a parent and district exhibit were identical, with the exception of District Exhibit 4, which encompasses Parent Exhibit M (compare Dist. Ex. 4 at pp. 1-23, with Parent Ex. M). The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The Hebrew Academy of Long Beach has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct school-aged students with disabilities (see 8 NYCRR

On July 10, 2023, the CSE convened, found the student eligible for special education as a student with an other health impairment, and developed an IEP for the student with a projected implementation date of September 1, 2023 (Dist. Ex. 12 at pp. 1, 20).[4] The July 2023 CSE recommended a 10-month program consisting of two periods per week of special education teacher support services (SETSS) for math, three periods per week of SETSS for English language arts (ELA), one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group of three, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (id. at pp. 15-16). The district sent the parent a prior written notice dated July 10, 2023, summarizing the July 2023 CSE's recommendations (Dist. Ex. 13). The district sent the parent another prior written notice dated July 31, 2023, which again summarized the July 2023 CSE's recommendations and also identified the public school location which would implement the student's July 2023 IEP (Dist. Ex. 14).

On August 1, 2023, the parent signed a service and payment agreement with EdZone to provide services to the student during the 2023-24 school year (Parent Ex. Z at pp. 1-2). According to the addendum of the service and payment agreement, EdZone agreed to provide the student with services on a 10-month basis "in accordance with the last agreed upon [education program]" (id. at p. 3).[5]

On September 6, 2023, the parent sent a letter to the district which indicated her disagreement with the district's "most recent evaluations" of the student and requested an independent educational evaluation (IEE) of the student consisting of a neuropsychological evaluation, an autism/applied behavior analysis (ABA) assessment, an OT evaluation, a speech-language evaluation, an assistive technology evaluation, an observation with an expert in behavior in school and at home, and a private functional behavioral assessment (FBA) and behavioral intervention plan (BIP) for home and school (Parent Ex. B).

A. Due Process Complaint Notice, Amended Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated September 27, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (see Parent Ex. A). On October 18, 2023, the district signed a pendency implementation form agreeing that the student's pendency program was based on the May 10, 2023 IEP, which recommended a 10-month program of seven hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (Parent Ex. C).

200.1[d], 200.7). However, it appears the Lev Chana Early Childhood Center is a preschool program contained within HALB (see Tr. p. 10; see generally Parent Exs. EE-FF).

[4] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[5] According to the EdZone progress report for the 2023-24 school year, EdZone only provided the student with SEIT services (Parent Ex. AA).

The parties proceeded to a prehearing conference before the Office of Administrative Trials and Hearings (OATH) on October 30, 2023 (Tr. pp. 1-15). During the prehearing conference, the parents, through their attorney, indicated they intended to file an amended due process complaint notice to address additional allegations that arose after the filing of the due process complaint notice (Tr. pp. 11-12).

The parties then proceeded to a status conference on November 20, 2023 (Tr. pp. 16-25). During the status conference, the parents again, through their attorney, indicated they intended to amend the due process complaint notice but were delayed because there was an issue with the implementation of the student's pendency program (Tr. p. 18). The parties next appeared on December 7, 2023, at which time, counsel for the parent indicated she would be filing an amended due process complaint notice that day (Tr. pp. 26-34).

In an amended due process complaint notice dated December 7, 2023 the parents alleged that the district denied the student a FAPE for the 2022-23 and 2023-24 school years (Parent Ex. D). Following a recitation of the student's educational history, intermixed with allegations regarding the district's actions taken during the 2022-23 and 2023-24 school years, the parents identified a number of alleged procedural and substantive violations regarding the recommended IEPs (id. at pp. 13-18). The parents' allegations included assertions related to the district failing to provide the parents with their due process rights, including a prior written notice, legally sufficient procedural safeguards, and the parent handbook; not holding properly constituted CSE meetings; predetermining the outcome of the CSE meetings; not conducting an FBA or developing a BIP for the student; failing to identify the student's disabilities and failing to adequately describe the student in the IEPs; failing to address the student's toileting and feeding needs; failing to create adequate annual goals; failing to offer ABA/behavior therapy, sufficient 1:1 instruction, or home services; failing to recommend parent counseling and training; failing to recommend sufficient special education, related services, supplementary aides and services, modifications and supports, to adequately address the student's delays in the areas of communication, visual, fine, and gross motor skills, academics, behavior, executive functioning, sensory, activities of daily living (ADLs), functional skills, cognition, and socialization; failing to recommend paraprofessional services; and failing to recommend a specific methodology for the student (id.). In addition to the above, specifically for the 2023-24 school year, the parents asserted that the July 2023 CSE removed the student's SEIT services without regard to the student's needs; failed to include positive behavioral interventions and support services for the 2023-24 school year; failed to conduct a reevaluation before changing the student's placement; could not make a determination as to whether the student was ready for a structured kindergarten program; failed to recommend a small class or a small school setting; recommended that the student's program include general education classes without support; recommended management needs which could not be implemented with the recommendation for SETSS; failed to recommend appropriate academic and social supports or executive functioning interventions; failed to consider whether the student required 12-month services or special transportation services (id. at pp. 15-16).[6]

[6] The parents also claimed the district did not timely implement the student's pendency program after the filing of the initial due process complaint notice, and as agreed on October 18, 2023 (id. at p. 12).

As relief, the parents requested an interim order directing the district to fund or reimburse the parent for an IEE of the student consisting of a neuropsychological evaluation, an autism/ABA assessment, an OT evaluation, a speech-language evaluation, a PT evaluation, an assistive technology evaluation, an observation with an expert in behavior in school and home, and an FBA and BIP for home and school (Parent Ex. D at pp. 19-20). The parents also requested immediate implementation of the student's pendency services, including seven hours per week of SEIT services, two 30-minute sessions per week of individual PT services, and two 30-minute sessions per week of individual OT services (id. at p. 19). As relief for any failure to implement the May 2023 CPSE or pendency services, the parent requested that the district fund a bank of compensatory education, to be delivered by providers of the parents' choosing, including but not limited to PT, OT, counseling, social skills training, parent counseling and training, behavior therapy, and speech-language therapy (id. at pp. 19-20). In addition, the parent requested reimbursement or funding for the costs of the student's tuition at HALB for the 2023-24 school year; for the district to satisfy the parents' debt or reimburse the parents for any out-of-pocket expenses relating to the student's special education needs; and for declaratory relief as to the student's appropriate programming for the 2023-24 school year including 1:1 instruction and related services (id. at p. 20).

B. Impartial Hearing Officer Decision

The parties then appeared for three additional prehearing conferences on January 16, 2024, March 4, 2024, and April 2, 2024, after which the parties proceeded to an impartial hearing, which commenced June 10, 2024 and concluded on July 10, 2024 after five hearing dates (Tr. pp. 35-573).

On January 26, 2024, the IHO issued an interim decision regarding the parents' request for an IEE (see Parent Ex. P). The IHO determined that the parents formally requested an IEE in their September 6, 2023 letter to the district; that the district failed to initiate an impartial hearing to establish that its evaluations were appropriate, nor did it take the necessary steps to ensure that the parents' requested IEE was provided at public expense; and that the parents were entitled to an IEE at a public expense (Parent Ex. P at pp. 3-4). Accordingly, the IHO ordered the district to fund an independent neuropsychological evaluation with an FBA component, if possible, an independent PT evaluation, an independent OT evaluation, and an independent speech-language evaluation; and that such would be conducted by qualified providers of the parents' choosing at a reasonable market rate (id. at pp. 5-6).

An independent OT evaluation was completed on May 13, 2024, an independent neuropsychological evaluation was completed on May 20, 2024, an independent PT evaluation was completed on May 31, 2024, and an independent speech-language evaluation was completed on May 31, 2024 (see Parent Exs. U-W; NN).[7]

In a decision dated October 16, 2024, the IHO found that the May 2023 CPSE IEP was appropriate but that the district failed to implement the services recommended, denying the student a FAPE for a portion of the 2022-23 school year from May 10, 2023 to the end of the 2022-23

[7] The IHO noted in her decision that the FBA ordered as part of the neuropsychological evaluation was not completed (IHO Decision at p. 3).

school year; that the district offered the student a FAPE for the 2023-24 school year; that the student's unilateral placement at HALB with private services delivered by EdZone was not appropriate; and that equitable considerations favored the district (IHO Decision at pp. 13-17, 20).

More specifically, for the 2022-23 school year, the IHO determined that the May 2023 CPSE meeting was held in a timely manner; that the evidence supported that the student did not require speech-language therapy or 12-month services to be offered a FAPE; and that the May 2023 CPSE's recommended program was appropriate (IHO Decision at pp. 12-14, 14 n. 11). For the 2023-24 school year, the IHO determined that the July 2023 CSE was duly constituted; that the district's procedural violation of not including a list of the evaluations considered by the July 2023 CSE in the prior written notice did not amount to a denial of FAPE; that the July 2023 IEP included behavior strategies for the student; that the district provided a cogent explanation as to why the student's recommended program changed and why individual SEIT services were not recommended for kindergarten; that the district timely sent a school location letter; and that the July 2023 CSE recommended an appropriate program that was reasonably calculated to enable the student to make progress appropriate in light of his circumstances (IHO Decision at pp. 14-15).

For the district's denial of FAPE for a portion of the 2022-23 school year, the IHO used a quantitative approach in determining compensatory education and ordered the district to provide a bank of hour-for-hour services consisting of the services recommended in the May 2023 IEP multiplied by the weeks in which the district failed to implement the IEP during the 10-month 2022-23 school year beginning May 10, 2023, and further ordered that the services be delivered by providers of the parents' choosing (IHO Decision at pp. 18, 20). The IHO denied the parents' other requested relief (id. at pp. 19-20).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. Briefly, the following issues presented on appeal must be resolved in order to render a decision in this matter: whether the IHO erred determining that the district did not violate its child find obligations; whether the IHO erred in determining that the evaluations of the student before the May and July 2023 CSEs were sufficient; whether the IHO erred in determining the student did not require speech-language services to be offered a FAPE during the 2022-23 and 2023-24 school years; whether the IHO erred in determining the annual goals recommended in the May 2023 IEP were appropriate to address the student's needs; whether the IHO erred in determining the May 2023 CSE recommended sufficient special education services; whether the IHO erred in determining the student did not require extended school year services; whether the IHO erred in determining that the July 2023 CSE recommended an appropriate program to address the student's needs; whether the IHO erred in determining that the student did not require an FBA and/or a BIP to address the student's behaviors; whether the IHO erred in determining the district did not predetermine the recommendations made at the July 2023 CSE meeting; whether the IHO erred by not finding the district denied the student a FAPE for the 2023-24 school year by failing to implement the July 2023 IEP; whether the IHO erred in determining relief, such as by not awarding compensatory services for the 2023-24 school year and a portion of the 2022-23 school year beginning February 2023, in determining the student was not entitled to compensatory speech-language therapy, in failing to award declaratory relief as

requested by the parents; in denying funding for the cost of the SEIT services provided to the student by EdZone during September 2023; and by failing to award compensatory pendency services.[8, 9]

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

[8] The parents also argue that the IHO erred by denying the parents' section 504 claims. However, the district correctly asserts in its answer that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Accordingly, such issue will not be addressed further.

[9] The district claims that the parents waived their argument that the student required 12-month services because they failed to cite to any regression of the student in the hearing record. However, a review of the parents' request for review is sufficient to identify the precise rulings presented for review and the parents provided appropriate citations to support their argument. Though the district claims the parents failed to cite to any regression and thus waived any argument relating to 12-month services, the parents provided a clear statement that they are disagreeing with the lack of 12-month services for the 2023-24 school year and the district's claim relates more to the weight of the evidence, which will be discussed further below when addressing the issue.

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]).[10]

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. Child Find and Referral

Turning now to the parents' claim that the IHO erred in his determination that the district did not violate its child find obligations, 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

[10] 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).

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]).

Separate from a district's child find obligations, upon written request by a preschool student's parent, a district must initiate an individual evaluation of a student by an approved evaluator (see Educ. Law § 4410[4][a]; 8 NYCRR 200.4[a][1][i], 200.16[b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CPSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (id.).[11] In addition, the CPSE chairperson must immediately notify the parent that the referral has been received and request consent for evaluation of the preschool student (see 8 NYCRR 200.16[b][1]; see also 34 CFR 300.300[a]). Upon the parent's selection of an approved program to conduct the initial evaluation of the student and the parent's consent, the district is required to arrange for the evaluation by the approved evaluator (8 NYCRR 200.16[c][1]).

The CPSE is required to meet to review the results of the evaluation and develop a recommendation within 60 calendar days of the receipt of the consent to evaluate (8 NYCRR 200.16[e][1]). Following the recommendation of the CPSE, the district must arrange for the preschool student with a disability to receive the recommended programs and services commencing with the July, September, or January starting date for the approved program or if services are recommended less than 30 days prior to, or after, the appropriate starting date selected for the preschool student, services shall be provided "as soon as possible following development

[11] For preschool students, State regulations further specify that the district shall provide a prior written notice of an initial evaluation and

> the notice shall, for parents of preschool students referred to the committee for the first time, request parental consent to the proposed evaluation and advise the parent of the right to consent or withhold consent to an initial evaluation of the student or to the initial provision of special education services to a student who has not been previously identified as having a disability. Such notice shall also:
>
> > (i) include a list containing a description of each preschool program which has been approved by the commissioner to provide evaluations, and is located within the county in which the preschool student resides and adjoining counties, or, for students residing in the City of New York, within the City of New York and adjoining counties, and the procedures which the parent should follow to select an available program to conduct a timely evaluation.

(8 NYCRR 200.16[h][1]-[2]).

of the IEP, but no later than 30 school days from the recommendation of the committee and within 60 school days from receipt of consent to evaluate" (8 NYCRR 200.16[f][1]).

Initially, it should be noted that after a review of the parents' due process complaint notice and the hearing record, the parents did not take issue with the district's child find process, but instead raised allegations relating to the district's evaluation process after the parents contacted the CPSE in February 2023. On appeal, the parents contend that they raised the issue of the student's developmental coordination disability in November 2022, and that the district failed to take any action until the parents renewed their concern in February 2023 (Req. for Rev. at p. 1).

However, a review of the hearing record does not support the parents' argument, as raised on appeal, as there is no evidence that the parents expressed their concerns or sent a written request for referral to the CPSE in November 2022 (see Parent Exs. A-G, I-GG, JJ-OO; Dist. Exs. 1-20). Rather, the parents' amended due process complaint notice indicated that the student was attending a private preschool program during the 2022-23 school year and that, according to the parents, in November 2022 they contacted a private evaluation agency who suggested the parents should obtain evaluations of the student through the district's CPSE (Parent Ex. D ¶¶ 25, 31). The parents also alleged in their amended due process complaint that because the private evaluation agency had a long waitlist, they referred the parents to another private evaluation agency, which helped the parents "navigate the CPSE referral process" helping the parents in "reaching out" to the CPSE on or around February 7, 2023 (id. ¶ 34). The evidence in the hearing record shows that, on February 16, 2023, the student's mother sent an email to a district CPSE administrator, which indicated she had "been waiting to receive a call from the [district] in order to continue with the process of [the student's] initial evaluation for CPSE" and that a referral had been made on February 7, 2023; however, there is no evidence in the hearing record that the parents contacted the district regarding the student prior to the February 2023 referral (Parent Ex. K at pp. 3-4; see Parent Exs. A-G, I-GG, JJ-OO; Dist. Exs. 1-20).

On February 17, 2023, the district CPSE administrator responded to the parents, requesting additional information, which the parents supplied the same day stating they were "waiting for a referral for [the student] to receive an OT and PT evaluation due to [a] rise in developmental concerns from his teachers" (Dist. Ex. 1 at p. 1). On the same day, the district sent the parents a CPSE referral packet, which included a letter explaining the enclosed documents, a copy of the parents' rights, the required documents to be completed, and a list of State approved preschool evaluation agencies that the parents may select from to conduct the student's initial evaluation at public expense (see Parent Ex. E). Additionally, the district provided the parents with a prior written notice, dated February 17, 2023, which indicated the district proposed to conduct an initial evaluation of the student to determine if he was eligible for special education services (Parent Ex. E at pp. 8-9). The parents prior written notice requested that the parents bring the consent to evaluate to their first appointment, indicating that the representative would explain the evaluations to be conducted at that initial meeting and then ask for the parent to sign the consent at that meeting (id. at p. 9). The parents signed the consent to evaluate form on February 24, 2023 (Dist. Ex. 4 at p. 44).

The private evaluation agency that assisted the parents in contacting the CPSE (Parent Ex. D ¶ 34) conducted the following evaluations of the student: a social history dated February 24, 2023 (Dist. Ex. 4 at pp. 1-3); a PT evaluation dated March 14, 2023 (id. at pp. 21-23); an OT

evaluation dated March 17, 2023 (id. at pp. 15-20); a psychological evaluation dated March 17, 2023 (id. at pp. 4-10).[12]

The CPSE convened on May 10, 2023, found the student eligible for special education services as a preschool student with a disability, and developed a CPSE IEP recommending seven hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT, with a projected implementation date of June 10, 2023 (Parent Ex. N at pp. 1, 28-29). Although the initial evaluation was completed, the CPSE did not convene to review the evaluation until after 60 calendar days from the receipt of the parents' consent to evaluate the student, dated February 24, 2023, as required by State regulation (8 NYCRR 200.16[e][1]). In addition, the district was required to arrange for the delivery of the recommended special education services no later than 30 school days from the CPSE recommendation and within 60 school days from receipt of consent to evaluate (8 NYCRR 200.16[f][1]).

Although the May 10, 2023 CPSE meeting took place outside of the 60 calendar day time period for holding a meeting after the provision of consent to evaluate, the CPSE meeting occurred within the 60 school day period for provision of special education services. In this instance, the IHO has already determined that the district denied the student a FAPE for the 2022-23 school year by failing to implement the recommendation made by the May 10, 2023 CPSE, using the May 10, 2023 CPSE meeting date for the calculation of compensatory education (IHO Decision at pp. 13-14, 18, 20). Accordingly, the evidence in the hearing record supports determining that the student was "found" by the district in February 2023 after the parents' referral of the student for an initial evaluation, the district took the appropriate steps to evaluate the student, and, although the CPSE did not convene within the timelines contemplated by State regulation, the IHO's compensatory education award covered a sufficient portion of the school year such that the district was held to the timelines contemplated by State regulation. Therefore, there is no basis in the hearing record to overturn the IHO's determination on this point.

B. May 2023 CPSE – Sufficiency of Evaluative Information

On appeal, the parents argue that the district should have evaluated the student "in all areas of functioning," more specifically, that a speech-language evaluation should have been conducted as part of the student's initial evaluation.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools

[12] The private evaluation agency is an approved preschool multi-disciplinary evaluation agency (see Parent Ex. E at p. 16).

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).

The IHO determined that the student's receptive and expressive language skills were measured, and that the student did not demonstrate deficiencies in such areas, and further, that the student's pediatrician highlighted the need for PT and OT evaluations but did not highlight a need for a speech-language evaluation (IHO Decision at p. 13).

According to the parents, the student's expressive language skills were assessed as being below his age as part of the initial evaluation and, because of that, the district should have conducted a speech-language evaluation. A review of the evidence in the hearing record does not support the parents' argument.

The available information in the hearing record indicated that the parent referred the student to the CPSE in February 2023 to address concerns about the student's sensory processing, motor functioning, and social/emotional skills (Parent Exs. A ¶¶ 31-32, 34-35; K; Dist. Ex. 4 at pp. 1-2, 4, 11, 15, 21). At the time, the parent specifically requested an OT and PT evaluation of the student; further, as indicated in the consent for initial evaluations signed by the parent on February 24, 2023, the parent consented to a social history interview, a psychological evaluation, a physical examination, and an observation (Dist. Exs. 1 at p. 1; 4 at p. 44). Additionally, according to the February 17, 2023 prior written notice, parents "may ask the [approved preschool evaluation agency] to assess any area of [the student's] development" the parents were concerned about (Dist. Ex. 2 at p. 2). There is no evidence that the parents requested a speech-language evaluation to be performed by the evaluation agency they selected (see Parent Exs. A-G, I-GG, JJ-OO; Dist. Exs. 1-20).

Additionally, the initial evaluation did not indicate that the parent, teacher, or the evaluators reported any difficulties with expressive language, nor did the evaluators report parental concerns about the student's language skills as a reason for the evaluations (Dist. Ex. 4). A review of the reports completed with the initial evaluation indicated that the teacher described the student as "expressive" and as someone "who [] converse[d] with clarity" (id. at p. 4). Both the February 2023 educational evaluation and March 2023 psychological evaluation found the student's receptive and expressive language skills to be within the average range (id. at pp. 6-9, 13, 14). The February 2023 educational evaluation indicated that the student was able to "speak in sentences," answer what-if questions, "define simple words," and "complete[] simple analogies" (id. at p. 13).

In an affidavit, the CPSE administrator testified that based on her review of the student's CPSE evaluation reports, "the evaluations were comprehensive and assessed the student in all areas related to the student's suspected disability" (Dist. Ex. 17 ¶ 5). The CPSE administrator testified during cross-examination that the CPSE evaluators did not indicate the need for a speech-language evaluation, even though they were able to recommend additional evaluations if they deemed it necessary (Tr. p. 177). According to the initial evaluations, the primary concerns, as determined through teacher and parent interview along with formalized testing, were related to the student's social skills, motor functioning, and sensory processing (see Dist. Ex. 4).

Based on the information from the student's parents and teacher along with the district's initial evaluations, the student's receptive and expressive language skills were average. As such, there is insufficient evidence to overturn the IHO's determination that the student did not require a speech-language evaluation as part of the initial evaluation.

C. May 2023 CPSE IEP

The parents assert on appeal that the IHO erred in finding the May 2023 CPSE IEP was appropriate. According to the parents, the May 2023 CPSE failed to recommend speech-language therapy services for the student, the district failed to establish that the May 2023 CPSE recommended sufficient 1:1 SEIT services and had appropriate annual goals, and that the district erred in not recommended special education programs and services for the student for the summer 2023.

1**. Annual Goals**

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]).

Review of the May 2023 CPSE IEP present levels of performance, which are not in dispute on appeal, indicated that the student's cognitive abilities were in the average range (Parent Ex. N at p. 4). Academically, the student named at least 20 letters, printed his first name legibly, identified the larger number in a set, matched the number of items to the correct numeral, and counted at least 20 objects with 1:1 correspondence (id. at p. 5). Results of measures of the student's adaptive behavior indicated that he exhibited adequate communication and daily living skills, and that his social/emotional, motor, and overall adaptive skills were in the moderately low range (id. at p. 4). According to the IEP, the student's motor delay and sensory concerns affected his social/emotional development and functioning in the classroom (id. at pp. 4, 6). The student's social skills were described as "inconsistent" in that although he developed simple play schemas, attended to stories, and imitated tasks performed by others, he had difficulty engaging in cooperative play with peers, did not gain peer attention appropriately, and at times became

physically aggressive with peers when upset (id. at p. 5). Additionally, the IEP indicated that the student demonstrated challenges in the areas of body awareness, self-regulation, and spatial awareness as "he constantly ha[d] his hands on others and bump[ed] into people," sought touch and movement input, and had difficulty with body regulation and awareness of personal space (id. at pp. 5, 6). Teacher reports, reflected in the IEP, indicated that deep massage and various sensory input activities helped "calm [the student] down" (id. at p. 5). Regarding physical development, the IEP indicated that the student presented with average fine and visual motor skills, but delays in stationary balance, locomotion, and object manipulation skills, as well as decreased strength, bilateral coordination, and motor planning skills (id. at p. 6).

To address the student's needs, the May 2023 CPSE recommended six annual goals for the student related to the use of sensory information to understand and effectively interact with people and objects in the school and home environments; improving attention span and focusing skills; improving balance to safely navigate the environment; improving motor planning to safely navigate the environment; demonstrating enhanced social/emotional skills as evidenced by the student's confidence in the ability to perform appropriately on a daily basis; and demonstrating improved social/emotional skills as indicated by student's ability to engage in age appropriate interactive activities (Parent Ex. N at pp. 7-11). Each annual goal included short-term instructional objectives and/or benchmarks (intermediate steps between the student's present level of performance and the measurable annual goal), criteria to measure if the goal has been achieved, methods of how the student's progress would be measured, and a schedule for when progress would be measured (id.).

The CPSE administrator testified, via affidavit, that the May 2023 CPSE reviewed the draft annual goals and determined that they were appropriate targets for the student because the goals targeted the student's areas of need and would be worked on by the SEIT, OT, and PT providers (Dist. Ex. 17 ¶ 12). On cross-examination, the CPSE administrator further elaborated that the annual goals recommended were not specific to a discipline and gave an example that a goal that was characterized as an OT goal could also be a "SEIT goal" and could "carry over into PT" (Tr. p. 196). The CPSE administrator further stated that annual goals could be interdisciplinary (id.). When questioned on how the interdisciplinary goals would be measured, specifically a goal that could be an OT goal, the CPSE administrator testified that an OT observation checklist could also be utilized by the classroom teacher, the OT provider, the SEIT provider, or anyone who is involved with the student (Tr. p. 197). The CPSE administrator stated that "[e]verybody involved with the [student] should be implementing these goals" and "aware of these goals" and thus anyone working with the student would be able to utilize the OT checklist (Tr. pp. 197-98). The CPSE administrator also testified that progress towards goals would be measured more than monthly and that the goals would be measured whenever a provider or classroom teacher saw it happening (Tr. p. 198). Though the parents cited to the CPSE administrator's testimony in their request for review to show that the goals were not appropriate, review of the IEP present levels of performance and the CPSE administrator's entire testimony leads to the conclusion that the annual goals were, in fact, appropriate to address the student's needs (see Tr. pp. 196-226; Parent Ex. N at pp. 4-6, 8-11).

Based on the foregoing, the evidence reflects that the May 2023 CPSE IEP identified the student's needs in the areas of sensory processing, attention and focus, balance and motor planning, and social/emotional skills and recommended appropriate annual goals related to the student's

needs. Accordingly, the parents' allegation that the May 2023 CPSE IEP failed to include appropriate annual goals is not supported by the hearing record.

2. Speech-Language Therapy and SEIT Services

The parents argue that the IHO erred in determining that the May 2023 CPSE IEP was appropriate, asserting that the IEP should have included speech-language therapy and that the district failed to defend the May 2023 CPSE's recommendation for seven hours per week of 1:1 SEIT services.

The parents cite to a private March 2024 speech-language evaluation to argue that the student had speech deficits and required speech-language therapy; however, the March 2024 speech-language evaluation was not completed prior to the May 2023 CPSE CSE meeting and thus would constitute retrospective evidence that cannot be used to assess the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

As indicated above, the May 2023 CPSE had sufficient evaluative information to support its recommendations in the student's May 2023 CPSE IEP, and the evaluative information available to the May 2023 CPSE indicated that the student's speech-language skills were found to be within the average range. Accordingly, I see no reason to overturn the IHO's decision that speech-language therapy was not necessary to offer the student a FAPE for the portion of the 2022-23 school year at issue (IHO Decision at p. 13).

Regarding SEIT services, in their request for review, the parents raise an issue with the CPSE administrator's testimony, arguing that it failed to establish the May 2023 CPSE recommended sufficient 1:1 SEIT services; however, a review of this testimony supports the May 2023 CPSE's recommendations.

The CPSE administrator testified, during cross-examination, that "all of the information was taken into account," that there were "many discussions with all the members of the team," and that there was "consensus" regarding the recommendation for seven hours of SEIT services per week based on the student's schedule during the day and need for support for "about an hour a day" or "a little more" (Tr. p. 189). The CPSE administrator also testified that she had the authority to recommend more SEIT support hours if necessary, but that the CPSE determined that seven hours per week was appropriate (Tr. pp. 187-89). The CPSE administrator confirmed, during re-direct, that consensus was reached at the meeting regarding seven hours of SEIT services, although she was unsure if "everybody wholeheartedly agreed" (Tr. pp. 240-41).

Additionally, in her affidavit, the CPSE administrator testified that the evaluations conducted as a part of the CPSE referral "provided comprehensive, current, and appropriate insight into the student's strengths and weaknesses and need for special education support" (Dist. Ex. 17 ¶ 5). In her affidavit, the CPSE administrator also testified that the team that made up the CPSE "was duly constituted" and they "reviewed the evaluations, draft present level of performance and goals," and "a letter from the student's doctor" that included a recommendation for SEIT, OT, and PT services (id. ¶ 6; see Dist. Ex. 3).[13] The letter from the student's doctor did not contain recommendations for the amount of SEIT services the student required (Dist. Ex. 3).

According to the CPSE administrator, SEIT services were "specifically recommended to support this student with mainly his emotional and social skills" (Dist. Ex. 17 ¶ 8). During the hearing, the CPSE administrator was asked why the CPSE did not recommend counseling if the student had difficulty with socialization (Tr. p. 195). In response, the CPSE administrator testified that the CPSE recommended OT and SEIT services instead since the student's sensory needs impacted his socialization skills as identified in the May 2023 IEP (Tr. pp. 194-96; Parent Ex. N at p. 6).

The parents do not indicate why they felt seven hours per week of SEIT services were not sufficient to meet the student's needs.[14] The parents also do not cite to evidence in the hearing record that contradicts the CPSE administrator's testimony in support of the May 2023 CPSE's recommendation. Accordingly, the evidence does not support the parents' argument that the district did not defend its recommended SEIT services.

3. 12-Month Services

The parents argue that the IHO erred in not finding that the district denied the student a FAPE because it failed to recommend special education services on a 12-month basis. Specifically, one of the parents' arguments is that the district should have evaluated the student's need for 12-month services; however, State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available

[13] The CPSE administrator testified that the evaluators "provided a draft of the student's present level of performance and goals" and that it was included in the district's initial evaluation packet (Dist. Exs. 4 at pp. 24-32; 17 ¶ 5).

[14] The IHO opined that she did not find the private neuropsychologist's testimony that the student should have received 10 hours of SEIT services rather than 7 hours during the 2022-23 school year to be "well-reasoned," and I note that the neuropsychologist evaluated the student in May 2024, one year after the student's initial CPSE meeting in May 2023 and therefore, that opinion was not available to the CPSE for consideration (IHO Decision at p. 13; Parent Exs. NN; OO ¶ 15).

at https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf).

The parents assert in their request for review that the student's July 2023 CSE IEP should have included services on a 12-month basis; however, as a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2023, if the CPSE determined that the student required such services to receive a FAPE (Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2].[15] Accordingly, the analysis on appeal focuses on whether the IHO erred by not awarding compensatory education for summer 2023 pursuant to the May 2023 CPSE IEP, because if the student qualified for 12-month services, it would have been as a preschool student with a disability "through the month of August of the school year in which the child first bec[ame] eligible to attend school pursuant to section [3202 of the Education Law]" (Educ. Law 4410[i]; NYCRR 200.1 [mm][2]).

The May 2023 CPSE determined that the student was not eligible for special education on a 12-month basis (Parent Ex. N at p. 29). According to the CPSE administrator, in order to recommend summer services, it would have had to have taken the student more than eight weeks to regain the information taught, and due to the timing of the CPSE evaluations, there was not enough time to "collect any kind of reasonable regression data" (see Tr. pp. 241-43). Further, the CPSE administrator testified that the May 2023 CPSE did not recommend summer services because "this would be [the student's] first time receiving special education support," and there was "no indication of a possibility of regression" (Tr. pp. 189-90; Dist. Ex. 17 ¶ 13). Review of the student's CPSE evaluative information supports this statement, as it shows that, while the evaluators noted that specific recommendations would be made at the CPSE eligibility determination meeting, none of the assessment results suggested that the student's needs were such that he required services over summer 2023 to prevent substantial regression (see Dist. Ex. 4 at pp. 1-23). The CPSE administrator testified that for the student, who was functioning on grade level, there was "no academic impact to his functioning . . . his cognitive functioning was on par," and "his management needs were [not] so deep that he needed any kind of summer services in any definition that the State provide[d]" (Tr. p. 243).

Additionally, according to the evidence in the hearing record, the recommendation for summer services came from the May 2024 independent OT evaluation report, which was based on an evaluation of the student conducted in April 2024, almost one year after the May 2023 CPSE IEP was developed (see Parent Ex. V at pp. 1, 23). In her testimony, provided via affidavit, the occupational therapist offered that the student required OT services "on a 12-month basis to prevent regression and ensure carry[-]over" (Parent Ex. MM ¶ 29).[16] The occupational therapist also recommended compensatory services based on 12-month programming (Parent Exs. V at p. 24; MM ¶ 30). During cross-examination, the occupational therapist testified that the student required "a 12-month" program but did not elaborate further (Tr. p. 318). None of the remaining three independent evaluations specifically recommended 12-month programming for the student

[15] Review of the request for review does not show that the parents alleged that the May 2023 CPSE IEP was deficient by not recommending that the student receive 12-month services (see Req. for Rev. ¶¶ 3, 11).

[16] The CPSE administrator testified that the student received some OT services over summer 2023 to make up for those OT services that were not delivered under the CPSE IEP (Dist. Ex. 17 ¶ 14; see Tr. pp. 230-32).

(see Parent Exs. U; W; NN). As identified above, the May 2024 OT evaluation was not completed prior to the May 2023 CPSE meeting and constituted retrospective evidence that cannot be used to assess the CPSE's recommendations (see C.L.K, 2013 WL 6818376, at *13; J.M., 2013 WL 5951436, at *18-*19; F.O., 976 F. Supp. 2d 513).

D. July 2023 IEP

Turning to the 2023-24 school year, the parents base a substantial portion of their argument on an assertion that the July 2023 CSE recommended an improper program because it did not follow the same recommendation for SEIT services as were recommended in the May 2023 CPSE IEP. However, the July 2023 CSE met, found the student eligible for special education as a student with an other health impairment for the first time, rather than as a preschool student with a disability, and developed an educational program for the student for the student's attendance in a district public school (compare Parent Ex. N at pp. 1, 31, with Dist. Ex. 12 at pp. 1, 19). The school psychologist further testified that there was a "difference[] between what [was] provided at a preschool level" and "what [was] developmentally appropriate once the [student] [] entered kindergarten" (Tr. p. 377). Additionally, review of State regulation shows that the CPSE and the CSE review different considerations and special education programming in developing educational programs for students with disabilities (see 8 NYCRR 200.3, 200.4, 200.6, 200.16). Accordingly, the parent's assertion that the recommendations made by the July 2023 CSE cannot be appropriate because they were different from those made by the May 2023 CPSE are without merit and will not be further considered. Instead the analysis of whether the July 2023 IEP offered the student a FAPE is based on the evaluative information considered by the July 2023 CSE and the appropriateness of the recommendations made by the CSE in consideration of that information for a school-aged student.

1. Special Factors – Interfering Behaviors (FBA/BIP)

The IHO determined that the district's "failure to conduct an FBA was not a denial of FAPE," and that the July 2023 IEP included behavioral strategies and counseling services to address the student's behavioral needs (IHO Decision at pp. 8 fn. 6, 14-15).

The parents argue that the failure of the July 2023 CSE to have an FBA of the student conducted and the failure to recommend 1:1 behavioral instruction and appropriate behavioral interventions denied the student a FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP.

Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to

conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

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

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

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

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

alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

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

Regarding the student's behavior concerns, the July 2023 IEP indicated that the student at times would "grab, push, knock toys out of [peers'] hands or crash down their creation," and that if other students were in the middle of a play session, the student would "push them in an effort to join them" (Dist. Ex. 12 at p. 3). According to the IEP, the student could become upset easily, and when that happened, he could "become physically aggressive to his classmates and respond with pushing, pulling, kicking," and that, reportedly, peers were "afraid of [the student] and avoid[ed] playing with him" (id.). The parent reported that the student was "not developing adequate friendship-seeking behaviors" and that she was concerned about his "aggressive behaviors towards others" (id.). The IEP also indicated that the student was "challenged in areas of body awareness, self-regulation, spatial awareness, and social interactions" (id.). In response to a question from the IHO, the school psychologist testified that the CSE did not recommend an FBA because "the behaviors that this student present[ed] with [were] not behaviors that . . . deviate[d] from the norm of what we see as social skills that need[ed] development" (Tr. p. 449). Further, the school psychologist stated that the student's behaviors "[were not] alarming" to the extent that an FBA was warranted (Tr. p. 450).

Although the July 2023 CSE decided not to conduct an FBA of the student, the school psychologist acknowledged the student did exhibit behavioral difficulties, and indicated that the CSE considered them within the totality of the student's evaluative information (Tr. pp. 392-93). For example, the school psychologist testified that the student's tendency to push individuals when he joined play sessions did not suggest a significant safety risk, as it was "not just a maladaptive behavior in isolation," but due to his challenges with body awareness, self-regulation, spatial awareness, and social interactions (Tr. pp. 392-93). The school psychologist testified that, although the student's adaptive behavior assessment standard score of 82 for "socialization skills" was "moderately low," the CSE "considered [that] a pushable score," meaning that the student was likely "able to develop these skills" through counseling (Tr. pp. 394-95; see Dist. Ex. 12 at p. 1). She indicated that if the student's "socialization skills were really lower and there was just behavior in isolation without any sensory issues that were going to be addressed, then you'd be looking at a different type of situation" (Tr. p. 394). I note that despite the student's behavior and socialization challenges, the July 2023 IEP also reflected the student's strengths, such as that he developed simple play schemas including dress up, and repeated rhymes, songs and dances for others, and that his teacher reported that "various sensory input activities [] help[ed] calm [the student] down" (Dist. Ex. 12 at p. 3). Additionally, according to the school psychologist, the student "seemed very capable," was "very intelligent," and exhibited "reasoning ability" and average communication skills, therefore, he would be able "to develop at a certain rate" (Tr. pp. 393-94, 450). She testified

that "there [we]re different ways of addressing behaviors based on where they're stemming from and what opportunities the child has had to develop pro-social behaviors" (Tr. p. 394).

The July 2023 IEP included the following management needs to help support the student's behavior concerns: structured environment; visual cues; sensory strategies, including a weighted vest; positive reinforcement for successive approximations of desired skills building; preferential seating; and built in movement breaks (Dist. Ex. 12 at p. 4). The IEP included annual goals directed at addressing the student's social/emotional and behavioral needs in the areas of improving social/emotional skills as indicated by student's ability to engage in age-appropriate interactive activities, and demonstrating confidence in the student's ability to exhibit appropriate behavior (id. at pp. 9, 10). To address the student's sensory needs, the CSE developed an annual goal to improve his use of sensory information to understand and effectively interact with people and objects (id. at p. 6). Related services to address the student's behavioral needs, some of which were a result of the student's sensory processing difficulties, included one 30-minute session per week of individual counseling to be delivered in the student's classroom, one 30-minute session per week of counseling in a group, and two 30-minute sessions per week of individual OT (id. at p. 15).

Based on a review of the information in the hearing record, although the student exhibited behaviors such that it may have been better practice to have conducted an FBA, the CSE identified the student's behavior needs and contributing contextual factors.[17] In addition, the IEP had sufficient behavior supports to address the student's behavior concerns including management strategies, annual goals, and related services, without having conducted an FBA and without the development of a BIP. Accordingly, in this instance, the failure to conduct an FBA and develop a BIP for the student would, at most, amount to a procedural violation that, for the reasons stated above, did not result in a denial of a FAPE to the student. Further, contrary to the parent's argument, the evidence did not show that the student required continuous 1:1 behavioral instruction, and I note that he would have received 1:1 behavior support during his individual counseling services once per week (see Dist. Ex. 12 at p. 15). Accordingly, the evidence in the hearing record supports the IHO's determination that the district offered a cogent and responsive explanation for its decisions, and that the July 2023 IEP included behavioral strategies to address the student's behavioral needs (IHO Decision at pp. 14-15).

[17] It is worth noting that one of the stated purposes of an FBA is to determine "how the student's behavior relates to the environment," (8 NYCRR 200.1[r]). Additionally, an FBA conducted as of July 2023, would not have been able to predict how the student's behavior would manifest in a school-age program during the 2023-24 school year, which could have differed significantly from the student's 2022-23 school year preschool program. Accordingly, although the district would not be excused for having failed to conduct an FBA during the 2022-23 school year, the value of such an FBA would have been limited to the student's functioning in the preschool environment as opposed to the recommended school-age program (M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *15 n24 [S.D.N.Y. Sept. 14, 2016]).

2. 1:1 Instruction

The parents argue that the IHO erred in finding that the removal of 1:1 SEIT services did not deny the student a FAPE for the 2023-24 school year. However, as noted above, the July 2023 CSE was not required to follow the May 2023 CPSE program recommendations.[18]

Additionally, at the outset of the discussion surrounding the parents' request for SEIT services during the 2023-24 school year, the parents argue the district has an "illegal policy" of denying SEIT services to school-age students.[19] However, State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii][emphasis added]; see Educ. Law § 4410[1][k]). Thus, to the extent that the parents believe that the student should have continued to receive SEIT services during the 2023-24 school year, when he was first classified as a student with an other health impairment instead of as a preschool student with a disability, it appears to be inconsistent with State law, which defines SEIT services as a service designed exclusively for preschool students (see Educ. Law § 4410[1][k]). During cross-examination, the school psychologist testified that

[18] The parents allege the July 2023 CSE followed a predetermined agenda when it failed to recommend 1:1 SEIT services; however, the parent was present at the CSE meeting and afforded the opportunity to participate in her son's IEP development process (see Dist. Ex. 12). The parents also concede in their due process complaint notice that they "made [it] very clear at the [July 2023 CSE] meeting that [they] disagreed with the recommendation" of the district indicating that they did participate in the CSE meeting (Parent Ex. A ¶ 101). 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 T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [stating 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"]; 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 & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

[19] The parent's assertion appears to be a general attack on the district's educational policies. Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009][noting that the Second Circuit has "consistently distinguished systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"] aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Neither the IHO, nor I for that matter, have plenary authority to pass judgment on the district implementation policies and processes that affect all students.

the July 2023 CSE recommended SETSS as opposed to SEIT services because SETSS was "the next step in the continuum of special education" for students at the school-age level (Tr. pp. 376-77).[20, 21]

The policy that SEIT services are not available to school-aged children as described above and is set forth in state law; however, that policy does not preclude a CSE from providing 1:1 instruction in a school-age program if required to offer a student a FAPE, similar to the manner in which a SEIT can provide instruction to a preschool student with a disability. Furthermore, State regulation provides explicit guidance for providing 1:1 aides that is applicable to school-age programming (8 NYCRR 200.4[d][3][vii]). The parents argue on appeal that the IHO erred in finding that the July 2023 IEP offered the student a FAPE when the CSE failed to recommend any 1:1 special education teacher services.

When asked how the July 2023 CSE determined that the student no longer required individual special education instruction, the school psychologist testified that review of the student's preschool evaluations and the discussion and recommendations at the July 2023 CSE meeting, shows "there were gains made," and to address "specific academic concerns," SETSS "was the way it would work best" within the general education classroom (Tr. pp. 376-78). According to the school psychologist, given the student's average cognitive skills, he "really didn't have such deficits that he needed one-to-one instruction" (Tr. pp. 447-48). The school psychologist further offered that the student would "benefit from something inclusive, such as SETSS, which [was] developmentally appropriate" for "kindergarten" (Tr. p. 448). According to her affidavit, the school psychologist testified that the CSE "specifically recommended SETSS in a [g]roup for th[e] student as he ha[d] shown the ability to do age-appropriate work" (Dist. Ex. 18 ¶ 10). Further, the school psychologist indicated that a "SETSS teacher would help the student with engagement

[20] The parents argue that the school psychologist's testimony was not credible and the IHO erred by relying on it. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). The parents do not cite to any non-testimonial evidence in the hearing record to support their argument and a full review of the hearing record supports the IHO's determinations and does not compel a contrary conclusion.

[21] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

and attention to academic tasks" and "the small group instruction" would "assist[] the student [with] socialization" (id.).

Therefore, the evidence supports the IHO's finding that the district offered "a cogent and responsive explanation" for the decision to recommend that the student receive SETSS for the 2023-24 school year (see IHO Decision at p. 15).

3. Implementation/Assigned School

Turning to the parents' argument that the district failed to establish it could implement the July 2023 IEP, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The parents unilaterally placed the student at the Lev Chana Early Childhood Learning Center at Hebrew Academy of Long Beach in September 2023 (Parent Ex. A at p. 1). The parents' main concern regarding implementation is the district's failure to recommend 12-month services, as the parents stated "the IHO should have found the [district] denied [the student] a FAPE when it failed to timely implement his [July 2023] IEP where he missed three months of related services" prior to his unilateral placement (Req. for Rev. ¶ 12 [emphasis omitted]). As indicated above, the hearing record does not support that the student required services on a 12-month basis to be offered a FAPE. The parents do not allege any other challenges to the July 2023 IEP regarding implementation.

Additionally, the evidence in the hearing record shows that the district sent a timely prior written notice to the parents on July 31, 2023, which indicated the public school location which would have implemented the July 2023 IEP (Dist. Ex. 14). The hearing record is devoid of any evidence that the parents contacted the proposed public school location and inquired about whether the public school could implement the IEP.

Accordingly, the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year. Since there was a finding of a FAPE, it is not necessary to address the parents' argument on appeal that the unilaterally-obtained services provided by EdZone were appropriate or whether equitable considerations favor the parents' request for reimbursement/direct funding of the cost of such services. Additionally, there is no need to address the parents' request for declaratory relief as the July 2023 CSE's recommendations were appropriate.

E. Relief – Compensatory Education

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"]).

Regarding the 2022-23 school year, the IHO used a quantitative approach to determine an award for the district's denial of FAPE (IHO Decision at p. 18). As relief, the IHO ordered the district to provide the student with an hour-by-hour award of compensatory education consisting of the services recommended in the May 2023 CPSE IEP multiplied by the number of weeks during which the DOE failed to implement these services during the 10-month 2022-23 school year beginning on May 10, 2023, and that such services should be provided by an appropriately licensed or qualified provider of the parent's choice at the provider's rate; that the compensatory services shall be based on a 10-month, 36-week calendar school year; and that the compensatory services were to be used at any time over the next two years beginning on the date of the IHO decision, which was dated October 16, 2024 (id. at p. 20). The parent does not appeal this determination but rather argues that more compensatory education should be awarded based on a variety of issues. However, for this matter, because the undersigned agrees with the IHO that the May 2023 CPSE IEP and the July 2023 IEP were appropriate and that district offered a FAPE for the 2023-24 10-month school year, but failed to implement the May 2023 CPSE IEP, the student is entitled to compensatory education only for the 2022-23 school year. Further, as noted above, the IHO's calculation of a compensatory award from the date of the May 10, 2023 CSE meeting fits within the district's obligations for having services in effect following the parents' signing consent for an initial evaluation on February 24, 2023. Additionally, the hearing record supports the IHO's decision that the student did not require speech-language therapy in order to receive a FAPE. Accordingly, it is not necessary to address the parent's further arguments requesting compensatory speech-language therapy services. Finally, the district concedes in its answer that the IHO's award was appropriate in its entirety. Accordingly, the IHO's award of compensatory education is upheld.

1. Pendency Compensatory Education

The parents also requested compensatory education based on the district's failure to implement pendency services, requesting 12 hours of each of OT and PT as compensatory pendency services.

On October 18, 2023, the district agreed that the student's pendency services during this proceeding were based on the May 2023 CPSE IEP (see Parent Ex. C). A review of the hearing record shows that the parents alleged in their December 7, 2023 amended due process complaint notice that the district did not implement the student's pendency services until December 6, 2023 (Parent Ex. D ¶ 138). During the December 7, 2023 hearing, the parents' attorney indicated that there was a delay in the student's pendency services being implemented (Tr. pp. 28-29). The district representative indicated that he had no information to add to the parents' attorney's statement and thus did not contradict the statement nor provide evidence that pendency services were not delayed or a reason for such a delay (Tr. p. 29).

In its answer the district argues that the parents are not entitled to compensatory pendency services because this was the first due process complaint notice filed for the student and thus pendency lies in an IEP to be implemented in public school and the parents filed their original due process complaint notice at the start of the 2023-24 school year; however, as indicated above, the district agreed to provide pendency services in accordance with the May 2023 CPSE IEP (see

Parent Ex. C). The district does not dispute that the student was entitled to pendency services or otherwise dispute the pendency services the student was entitled to receive. The district also did not rebut the parents' argument during the impartial hearing nor present evidence that the student's pendency servers were not delayed in being implemented The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Accordingly, the district was obligated to deliver the student's pendency services during the course of the proceeding and through the current appeal, unless the parties agreed otherwise. Having failed to take any steps during the process of the hearing to challenge the student's pendency placement or to develop the hearing record with regard to pendency services delivered to the student, and having specifically agreed to pendency services for the student based on the May 2023 CPSE IEP, the district is responsible for any failure in the delivery of the student's pendency services. The district was required to implement pendency services from the date of the due process complaint notice, September 27, 2023, through the date of this decision. Therefore, under pendency, the district is required to deliver compensatory education services to the student in accordance with the October 18, 2023 pendency implementation form.

According to the pendency implementation form, the district agreed that the student's program during the pendency of this proceeding was based on the May 2023 CPSE IEP, which consisted of seven hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT on a 10-month basis (Parent Ex. C). Additionally, as the hearing record supports finding that the student was not provided with OT and PT services pursuant to pendency between September 27, 2023 and December 6, 2023, the student is entitled to compensatory OT and PT missed during that time period which equates to approximately 10 weeks of missed services, or 10 hours of each of OT and PT services.

VII. Conclusion

Having determined that there is not a sufficient basis in the hearing record to disturb the IHO's decisions that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end. However, the IHO's compensatory education award is modified to include additional compensatory OT and PT services for services the student missed during the pendency of this proceeding.

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

THE APPEAL IS SUSTAINED TO THE EXTEND INDICATED

IT IS ORDERED that the IHO's decision, dated October 16, 2024, is modified, so that in addition to the relief awarded by the IHO, the district is ordered to provide a bank of compensatory education to the student consisting of 10 hours of individual PT and 10 hours of individual OT as compensatory pendency services, and all compensatory services shall expire within two years of the date of this decision; and

Dated: **Albany, New York**
May 8, 2025

STEVEN KROLAK
STATE REVIEW OFFICER