The University of the State of New York

The State Education Department
State Review Officer
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No. 16-081

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

Appearances:
Law Office of Erika L. Hartley, attorneys for petitioner, Erika L. Hartley, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services the respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2014-15 and 2015-16 school years was not appropriate. 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 began receiving occupational therapy (OT), physical therapy, and speech-language therapy through early intervention when he was two years old (Parent Exs. O at p. 1; X at p. 2). The student attended a 12:1+1 special class for preschool, but was placed in a general education class with related services for kindergarten (Tr. p. 286). The CSE transitioned the student back to a 12:1+1 special class for first grade and he attended a 12:1+1 special class for a total of six years, including preschool (Tr. pp. 286-87).

On June 9, 2014, the CSE convened to develop an IEP for the student for the 2014-2015 school year (Tr. p. 103; Dist. Exs. 4; 5).[1] Finding that the student remained eligible to receive special education as a student with a speech or language impairment, the June 2014 CSE recommended placement in a 12:1+1 special class for math, English language arts (ELA), and social studies, as well as related services consisting of one 30-minute session per week of counseling in a group and two 30-minute sessions per week of speech-language therapy in a group (Dist. Ex. 5 at p. 20).[2]

The CSE convened again on June 4, 2015 to develop an IEP for the student with an implementation date of June 5, 2015 (Parent Ex. N at pp. 1, 15). The June 2015 CSE recommended placement in a 12:1+1 special class for ELA and social studies and an integrated co-teaching (ICT) class for math, as well as related services of one 30-minute session per week of counseling in a group and two 30-minute sessions per week of speech-language therapy in a group (id.at p. 8).

On July 6, 2015, the district conducted a psychoeducational evaluation of the student (Parent Ex. C). Administration of intelligence testing yielded a full-scale IQ that fell within the "[a]verage" range of cognitive functioning, while administration of achievement testing yielded "[a]verage" scores on measure of calculation, spelling, word reading and reading comprehension (Parent Ex. C at pp. 1-2). The student's reading fluency fell within the "[l]ow [a]verage range (id. at p. 2). Based on the result of the evaluation, the evaluator opined that the student should be considered for a less restrictive environment (Parent Ez. C at p. 4).

In a letter dated September 2, 2015, the parent requested "a comprehensive assessment" of the student and further requested specific evaluations, including: a neuropsychological evaluation, an assistive technology evaluation, a hearing test, a central auditory processing evaluation, sensory integration testing, and an Orton-Gillingham evaluation (Parent Ex. F).

The CSE reconvened to develop an IEP for the 2015-16 school year with an implementation date of September 9, 2015 and recommended placement in an ICT class for math, ELA, and social studies, as well as related services of one 30-minute session per week of counseling in a group and two 30-minute sessions per week of speech-language therapy in a group (id. at p. 9).[3]

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[1] District Exhibits 4 and 5 are both copies of the student's June 2014 IEP; however, Exhibit 5 includes reports of the student's progress towards meeting his annual goals and as the more complete document is cited to throughout this decision.

[2] While the June 2014 IEP identified placement in a "12:1" special class for math, ELA and social studies, the school psychologist testified that this was a "clerical error" and that the student was placed in a 12:1+1 special class (Tr. pp. 126-27, 145; Dist. Ex. 5 at p. 20).

[3] The hearing record is not clear as to whether the CSE meeting took place in July or September 2015; while the IEP is dated September 30, 2015 and references the student's performance in his 5th grade class which was for the 2015-16 school year (Parent Ex. M at pp. 2, 13), the IEP also includes an attendance sheet dated July 21, 2015 and the parent testified that a CSE meeting took place in July 2015 (Tr. pp. 300-01; Parent Ex. M at p. 17).

A. Due Process Complaint Notice

In a due process complaint notice dated February 16, 2016, the parent requested an impartial hearing and alleged that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years (Dist. Ex. 1 at p. 1).[4] The parent claimed that the "challenged IEPs…relied upon inadequate data" and that the district failed to consider the parents' requests for evaluations (id.). The parent contended that the district's failure to conduct appropriate evaluations resulted in inadequate evaluative data, an IEP that offered an inappropriate program and also denied the parent meaningful participation in the development of the student's IEPs (id. at pp. 1-2). The parent also raised several issues related to lack of prior written notices, the student's lack of progress, predetermination, the annual goals, and the parent's requests for tutoring (id. at p. 2).[5]

For relief, the parent requested an order "striking the IEP meetings" held during the 2014-15 and 2015-16 school years, a "P-1 letter for special education tutoring," a "deferment to the [Central Based Support Team] for a nonpublic school placement," and interim orders for an OT evaluation, an assistive technology evaluation, a hearing test, a central auditory processing evaluation, a speech-language evaluation, a vision skills evaluation, and a visual perceptual evaluation (Dist. Ex. 1 at p. 3).[6]

B. Impartial Hearing Officer Decision

After a prehearing conference on April 12, 2016, the parties proceeded to an impartial hearing on May 17, 2016, which concluded on September 1, 2016, after four hearing days (see Tr. pp. 1-343).[7] In a decision dated October 26, 2016, the IHO concluded that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years (IHO Decision at pp. 8-10).[8] With respect to the 2014-15 school year, the IHO found that the district failed to implement a "specific mode of instruction" for the student; specifically, the district placed the student in an ICT class for math even though his IEP recommended a 12:1+1 special class for math (id. at pp. 8-9). The IHO also found that the CSE failed to "comprehensively evaluate the student," that based on his behaviors, the CSE "should have conducted an FBA [functional behavior assessment] and BIP [behavioral intervention plan]," and that "the goals were not appropriate to address the Student's

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[4] There is a second due process complaint notice included in the hearing record that was not entered as an exhibit and is identified as a "corrected request." The "corrected request" is the same as the due process complaint notice entered into evidence except for a typographic error that was corrected in the requested relief (see Dist. Ex. 1 at p. 3).

[5] However, as neither party appeals these issues, there is no need to address them in any greater detail in this decision.

[6] After a resolution session, the parties entered into a partial settlement agreement on February 29, 2016, pursuant to which the district agreed to fund an independent central auditory processing evaluation, an independent speech-language evaluation, and an independent neuropsychological evaluation, and the district also agreed to conduct an assistive technology evaluation and an OT evaluation (Parent Ex. D).

[7] The transcript of the April 12, 2016 prehearing conference is paginated separately from the rest of the hearing dates; accordingly, for purposes of clarity, all citations to the April 12, 2016 transcript in this decision include the corresponding transcript date (see April 12, 2016 Tr. pp. 1-21; Tr. pp. 1-343).

[8] The district conceded FAPE for the 2015-16 school year at the hearing (Tr. pp. 4-5, 12; IHO Decision at p. 10).

needs" (id. at p. 9). With respect to the 2015-16 school year, the IHO found that the district conceded FAPE and the IHO agreed with the district's concession that ICT services were not appropriate for the student (id. at p. 10).

As for relief, the IHO ordered that "the Student be placed in [a] small class setting, not to exceed 12 students, for all academic classes, with one special education teacher and one paraprofessional," that the class include students with "similar academic needs, and not behavioral needs," and "that the Student be provided with a shared paraprofessional" (IHO Decision at p. 12). The IHO also ordered that the CSE reconvene and amend the student's IEP to include two 30-minute sessions per week of speech-language therapy services and two 30-minute sessions per week of OT services, as well as a number of supports to address the student's management needs and accommodations (id. at pp. 12-13). The IHO further ordered 610 hours of individual tutoring, a vision skills evaluation, a visual perceptual evaluation, an AT evaluation, and reimbursement for an OT evaluation (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO incorrectly ordered that the student be placed in a 12:1+1 special class for the 2016-17 school year asserting the determination was "devoid of any factual or legal analysis," and must be annulled. The parent claims that the IHO's determination that placement in a public school was the student's least restrictive environment (LRE) did not take the evaluations in evidence and their significance into consideration. The parent also objects to the IHO's decision not to consider a November 2016 neuropsychological evaluation in deciding the appropriateness of a 12:1+1 special class for the 2016-17 school year and seeks to submit the November 2016 neuropsychological evaluation as additional evidence.

Next, the parent asserts that the IHO erred in ordering that the student's IEP be amended to include two sessions per week of speech-language therapy and two sessions per week of OT. The parent agrees that the student requires speech-language therapy and OT services but objects to the IHO's recommendations for a specific frequency of such services and instead requests that a determination regarding the frequency be made by the CSE upon consideration of all the evaluative information. The parent argues that the IHO "incorrectly referenced the central auditory processing evaluation as recommending" speech-language therapy twice a week. In addition, the parent claims that the speech-language evaluation does not recommend a specific frequency of services, and the IHO offers nothing to support her determination that two sessions per week of speech-language therapy "rises to the level of 'intensive therapy' as recommended" in the central auditory processing evaluation. Regarding OT services, the parent maintains that the IHO made her decision prematurely without "all of the results of testing being available as part of the record." Thus, the parent requests that the IHO's order directing the specific speech-language therapy and OT services to be included on the student's IEP be amended to reflect that the CSE should discuss the student's need for such services and make an appropriate recommendation.

Finally, the parent argues that several of the IHO's factual determinations must be annulled, and the IHO decision should be amended. The parent requests that the IHO decision be amended to reflect "[the student's] sensory motor integration, fine motor, [and] visuomotor/perceptual deficits." The parent also requests that the IHO's finding that parent's counsel wanted to preview the district's brief before submission to gain "a tactical advantage" be annulled. The parent further

requests that email communications between the parties and the IHO related to the parent's request for an extension to submit her closing brief be considered as additional evidence. Finally, the parent requests that the IHO decision be amended to include "the fact that the parent did not have the same information as the [t]eam" when the CSE recommended ICT services; specifically, the parent claims that ICT services were not explained to her despite her requests during and after the CSE meeting.

In an answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and agrees with the parent that the IHO inappropriately ordered a 12:1+1 special class and related services for the student for the 2016-17 school year. In response to the parent's request to include additional evidence, the district argues that the evidence should not be considered as it is not relevant to whether the district provided a FAPE for the 2014-15 and 2015-16 school years and is not needed to "render a decision on compensatory education services for the 2014-15 and 2015-16 school years." The district also argues that the parent's request to amend the IHO's factual findings is an impermissible request for a declaratory judgment since "neither party has appealed the compensatory education relief ordered by the IHO."

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. 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; 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. Florida 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]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review—Additional Evidence

The parent submits a November 2016 neuropsychological report as additional evidence to support her contention that the IHO's order placing the student in a 12:1+1 special class was inappropriate. The parent also submits e-mail communications between the parties and the IHO in support of her request that some of the IHO's factual findings be amended. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

As explained more fully below, the parent's objection to the IHO's order directing placement in a 12:1+1 special class for the 2016-17 school year is addressed without discussing the appropriateness of such a placement. Accordingly, the parent's request to submit the November 2016 neuropsychological report into evidence is denied because it is not necessary to render a decision.

Regarding the e-mail correspondence submitted as additional evidence, the parent requests that they be considered in order to contradict the IHO's statements regarding the submission of post-hearing briefs, but does not request any specific relief other than that the IHO's decision be amended to reflect this information.[9] Normally, this would not be a sufficient basis for the inclusion of additional evidence as it is not necessary to render a decision in this matter; however, in this instance, the IHO referenced the e-mail correspondence and indicated it would be attached to the IHO decision but it was not, so in order to have all of the documents relied on by the IHO, the e-mail correspondence is accepted as additional evidence.

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[9] As a final note, the parent mischaracterizes the IHO's finding that she is objecting to on appeal. The IHO did not accuse the parent of attempting to gain a tactical advantage; rather, the IHO responded to the parent's original claim that the district and IHO shared ex-parte communications by noting that parties typically submit closing briefs directly to the IHO on the day "they [are] due since they [have] until the end of the day to submit them," and the parties then exchange their briefs the following day (IHO Decision at p. 3). Furthermore, the IHO explained that "had the [d]istrict submitted it's [sic] brief and included [the parent's attorney] on the email…[she] would have had an unfair advantage with an extension" (id.). The IHO merely acknowledged that as a result of the parent's requested extension the parent would have gained an unfair advantage if the district had provided the parent with its brief at the same time it was submitted to the IHO; the IHO does not appear to suggest, as the parent claims, that the parent actively sought an unfair advantage by requesting an extension.

B. Relief

1. Prospective Placement

On appeal, the parent objects to the IHO's determination that the student be placed in a 12:1+1 special class for the 2016-17 school year. The parent also argues that there is no evidence to support the IHO's direction that the CSE recommend two sessions per week of speech-language therapy, which the parent asserts is insufficient to meet the level of "intense speech and language therapy" recommended in a May 2016 central auditory processing evaluation (see Tr. p. 191; Parent Ex. Q at pp. 1, 8). Finally, the parent argues that it was premature for the IHO to order two sessions per week of OT before she knew the results of the vision skills and visual perceptual evaluations. While the parent requested prospective placement in a nonpublic school during the hearing and in her post-hearing brief, on appeal she does not make a specific request for a prospective placement; rather, she requests that the IHO's orders directing the student's placement for the 2016-17 school year be annulled and that, in the case of speech-language and OT services, the CSE reconvene after receipt of "all evaluations" to amended those orders. The district agrees that the IHO's orders directing the student's placement for the 2016-17 school year should be annulled and further asserts that the IHO's orders directing placement were a circumvention of the CSE process and that the IHO should have ordered the CSE to reconvene to review the current evaluative information regarding the student and develop an appropriate program.

At this point in the school year, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2016-17 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IHO's order dictating that the CSE recommend a specific program for the 2016-17 school year circumvented the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is especially the case where the IHO's order directing placement was made in the absence of adequate evidence regarding the student's current needs, such as the student's most recent evaluations, including, in this instance, the November 2016 neuropsychological evaluation. Accordingly, the IHO should have limited the exercise of her authority in this matter to the remediation of past harms that had been explored through the development of the underlying hearing record rather than prospective placement for the 2016-17 school year (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year). Thus, the IHO's order directing placement in a 12:1+1 special class and specifying the frequency of speech-language and OT services is overturned, and the CSE is directed, to the extent that it has not already done so, to reconvene to review the student's most recent evaluations and revise the student's IEP accordingly.

As the CSE is directed to reconvene to review the student's most recent evaluations, a brief review of the evaluations that were agreed to or ordered during the hearing is recited for the benefit of the parties. Prior to the commencement of the impartial hearing, the district agreed to conduct an assistive technology evaluation and an OT evaluation, and agreed to fund an independent central

auditory processing evaluation, an independent speech-language evaluation, and an independent neuropsychological evaluation, (Parent Ex. D at p).[10] At the hearing, the parent also asked the IHO to determine the necessity of a vision skills evaluation and a visual perceptual evaluation (Tr. pp. 6-7). At the conclusion of the hearing, the IHO ordered the district to conduct the vision skills evaluation and the visual perceptual evaluation, as well as an assistive technology evaluation (despite already having been agreed to by the parties at the resolution meeting) (IHO Decision at p. 12; see April 6, 2016 Tr. pp. 8-10; see Parent Ex. D at p. 1). While it is unclear at this point whether the district has completed the vision skills, the visual perceptual, or the assistive technology evaluations, there is ample evaluative information regarding the student available for consideration by the CSE (see Dist. Ex. 5 at pp. 1-2; Parent Exs. C at p. 1; O at p. 1; Q at p. 1; S at pp. 2-3, 10, 13; X at p. 1; see Parent Ex. N at p. 1).

2. Factual Determinations

The parent requests that the IHO's decision be amended to properly reflect the student's "diagnoses" that were made during independent evaluations as part of the resolution agreement, that the IHO's claim that the parent's counsel wanted to obtain a "tactical advantage by previewing the [district's] brief" was incorrect, and that the factual determinations "regarding the ICT need to be amended to include the fact that the parent did not have the same information as" the June 2015 CSE during the meeting when the recommendations were made. The IDEA and State regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012], reconsideration denied, 2013 WL 1803983 [SDNY Apr. 24, 2013]).

The IHO determined that the district denied the student a FAPE for both the 2014-15 and 2015-16 school years; the IHO also awarded the student 610 hours of tutoring in reading, writing, and math, as well as requested evaluations (IHO Decision at pp. 9-10, 12-13). Here, the IHO's decision has already resolved the disputed issues in the parent's favor. The only relief the parent seeks is to amend the IHO's factual determinations.

As the parent is not seeking any relief associated with her objections to the factual findings made by the IHO, she is not an aggrieved party and she is not entitled to an appeal (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision]). The parent's appeal as it relates to these issues is dismissed.

VII. Conclusion

The IHO's order is overturned with respect to the prospective relief awarded by the IHO for the 2016-17 school year, as the IHO circumvented the statutory process under which the CSE is tasked with reviewing information about the student's progress under current educational

[10] During the April 6, 2016 pre-hearing conference, there was some confusion as to whether the assistive technology and OT evaluations were included in the resolution agreement; however, the parties ultimately agreed that they were (April 6, 2016 Tr. pp. 10-11; Tr. pp. 5-7; Parent Ex. D at p. 1).

programming and periodically assessing a student's needs (see Student X, 2008 WL 4890440, at *16). I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 26, 2016, is modified, by reversing those portions which ordered the CSE to recommend a specific placement and related services for the 2016-17 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the CSE shall reconvene within 15 school days of the date of this decision to develop an IEP for the student and to the extent that it has not already done so, the CSE shall consider the most recent evaluations of the student, including the November 2016 neuropsychological evaluation report.

Dated: **Albany, New York**
February 10, 2017

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CAROL H. HAUGE
STATE REVIEW OFFICER