The University of the State of New York

The State Education Department
State Review Officer
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**No. 18-055**

**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, by Erika L. Hartley, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which directed, as relief for respondent (the district's) failure to develop an appropriate educational program for petitioner's son for the 2017-18 school year, that respondent conduct certain evaluations of the student and develop a specific educational program for the student for the 2018-19 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

On November 25, 2013, a CSE convened to develop an individualized education services plan (IESP) for the student, who was parentally placed in a nonpublic school for the 2013-14 school year (third grade) (Parent Ex. F at pp. 1, 7; see Parent Exs. G at p. 1; L at p. 1; M at p. 1). The CSE found the student eligible for special education as a student with an other health-impairment and recommended he receive direct, group special education teacher support services

(SETSS) five times per week and group counseling services one time per week for 30 minutes (Parent Ex. F at pp. 1, 5).[1]

During the 2015-16 school year, the parent obtained private evaluations of the student including a March 2016 neuropsychological evaluation, a March 2016 occupational therapy (OT) evaluation, and a May 2016 speech-language evaluation (see Parent Exs. D; E; I).[2]

By letter dated June 7, 2016, the parent contacted the district and requested a CSE meeting be scheduled before the end of the 2015-16 school year (Parent Ex. B). In this same correspondence, the parent provided the district with copies of the privately-obtained neuropsychological, speech-language, and OT evaluation reports (id.). The parent also noted that the CSE did not convene for an annual review in "March of 2015" (id.).

Subsequently, the parent obtained additional private evaluations of the student, including a May 2017 update to the neuropsychological evaluation, and a June 2017 audiological and auditory processing evaluation (see Parent Exs. J; Q).

The student began attending a district public school for the 2017-18 school year (see Tr. pp. 130, 145; Parent Ex. O). During the 2017-18 school year (seventh grade), a CSE convened on October 23, 2017 and developed an IEP for the student with a projected implementation date of December 7, 2017 (Parent Ex. P at pp. 1, 7-8, 11).

Having found the student eligible for special education as a student with a learning disability, the October 2017 CSE recommended that the student attend a general education classroom in a community school and receive integrated co-teaching (ICT) services eight times per week in both mathematics and English language arts (ELA), and six times per week in both science and social studies (Parent Ex. P at pp. 1, 7-8, 10).[3] In addition, the October 2017 CSE recommended: one 30-minute session per week of counseling in a group; supports for the student's management needs (including graphic organizers and checklists, tasks broken down, preferential seating, guided reading instruction, reteaching of curriculum related vocabulary, and extra time for assignments and exams); an FM unit to be used by the student for all academic classes; six annual goals; testing accommodations (including extended time, breaks, revised test directions, tests read to the student, and a separate location for State assessments in a 1:1 ratio); and modified promotion criteria for ELA (17 percent of the seventh grade standards) (id. at pp. 4-5, 6-9, 11).

[1] SETSS is not identified in State regulations describing the continuum of services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]), and was also not defined by the parties during the impartial hearing.

[2] Although the neuropsychological evaluation was conducted in October 2015, the report was completed in March 2016 (Parent Ex. E at p. 1). Additionally, although the OT evaluation report is not dated, the IHO accepted it into evidence and described it as dated March 16, 2016 (see Tr. p. 25) and the district appears to concur with a date of approximately March 2016 (see Answer at p. 4 n.2). The date is further verified by the student's age at the time of the evaluation "10 year 6 month-old 5th grader" (see Parent Ex. I at p. 1).

[3] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

According to the IEP, the parent expressed concerns that he did not want the student "to 'fall through the cracks'" and that the CSE did not consider the private speech-language and OT evaluations, and he disagreed with the IEP recommendations and requested a nonpublic school placement for the student (Parent Ex. P at p. 4).

**A. Due Process Complaint Notice**

By due process complaint notice dated November 10, 2017, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year (Parent Ex. A at pp. 2-3). Initially, the parent alleged that the district had failed to conduct annual reviews for the student for several years and failed to conduct a triennial review during the 2015-16 school year (id. at pp. 1, 2). The parent noted that he obtained private evaluations of the student, shared them with the district in June 2016, then requested a CSE meeting and a "deferment," which appears to indicate a request for referral to the central based support team (CBST) to locate a nonpublic school placement for the student (id. at pp. 1, 2). According to the parent, no one from the CSE responded and the district did not provide a prior written notice (id.). The parent also alleged that the October 2017 CSE was improperly composed and refused to consider the parent's privately-obtained evaluations (id.). The parent also claimed that the October 2017 CSE predetermined the student's program, failed to consider the student's need for assistive technology, and failed to discuss the continuum of placement options, including the parent's request for a deferment (id. at p. 2).

With regard to the October 2017 IEP, the parent claimed that the recommended program for the 2017-18 school year was not reasonably calculated to provide meaningful educational benefit and denied the student a FAPE (Parent Ex. A at p. 2). Specifically, the parent contended that the IEP failed to include the student's full range of needs or information from the parent's privately-obtained evaluations (id.). The parent further alleged that the IEP masked the student's deficits and recommended inappropriate goals and an inappropriate program, as well as inappropriate accommodations and supports (id.).

As relief, the parent sought determinations that the district denied the student a FAPE for the 2017-18 school year and that the October 2017 CSE should have considered deferral to the CBST and should have recommended OT and speech-language therapy for the student (Parent Ex. A at p. 3). The parent also requested an FM unit, Fast ForWord software, and an assistive technology evaluation of the student (at an enhanced rate) at district expense (id.).

**B. Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing on January 11, 2018, which concluded on March 27, 2018, after six days of proceedings (see Tr. pp. 1-363).[4] At the January 11, 2018 hearing date, the district conceded that it failed to offer the student an appropriate program for the 2017-18 school year (Tr. pp. 3, 9).

By decision dated April 12, 2018, the IHO acknowledged the district's concession that the program recommended by the October 2017 CSE was not appropriate for the student (IHO Decision at pp. 4, 8). The IHO then found that, in accordance with the evaluative information

[4] No testimony was received during the January 11 and January 29, 2018 hearing dates.

contained in the hearing record, the student required a small classroom setting that addressed his language-based difficulties, including an evidence-based reading program, speech-language therapy, OT, and "various management techniques" (id. at p. 8). The IHO found "no reason to specifically order a non-public school program," explaining that the parent's private psychologist did not have first-hand knowledge or expertise to determine an appropriate school program and that his endorsement of a nonpublic school was based, instead, on speaking with parents, attending promotional presentations, and observing several nonpublic school sites (id.).

The IHO further determined that the district's October 2017 CSE failed to consider the student's needs in the areas of speech-language, as well as OT (IHO Decision at p. 8). The IHO also found that the evidence in the hearing record indicated that the student required a functional behavioral assessment (FBA) and an assistive technology evaluation (id. at p. 9).

The IHO ordered the district to convene a CSE within ten days of her decision to develop an appropriate IEP for the student that recommended "[a] small class setting with students of similar cognitive levels, which can provide language instruction throughout the school day in all areas of instruction, with minimal distractions, and extra support to help the student remain organized and on task" (IHO Decision at p. 10). The IHO indicated that the district would be obligated to implement this placement but, if it could not, it would be required to locate a nonpublic school to do so (id. at p. 8). The IHO also ordered that an appropriate IEP include individual speech-language therapy and individual OT, each two times per week for 30-minute sessions (id. at p. 10). The IHO further ordered that the IEP include specific supports for the student's management needs (id.).

Regarding evaluative information, the IHO ordered the district to complete an FBA, a speech-language evaluation, an OT evaluation, and an assistive technology evaluation within 30 days of her decision (IHO Decision at p. 11). The IHO indicated that the FBA should address the student's needs in the areas of focus and concentration (id.). As for the assistive technology evaluation, the IHO determined that the parent's preferred evaluator—an occupational therapist—was not qualified to conduct the ordered evaluation to the extent that it did not relate to OT, specifically referring to the audiological and auditory processing evaluation report's recommendation for consideration of certain software (id. at p. 9). The IHO also noted that the neuropsychological evaluation report did not specify a reason for an assistive technology evaluation (id.).[5] The IHO further ordered that the assistive technology evaluation be conducted in the areas of auditory and temporal processing, reading mechanics and comprehension, writing, mathematics, and organization, and that the evaluator must be "competent in the relevant areas" (id. at p. 11). The IHO also ordered that the evaluator not be limited to considering specific brands or types of assistive technology (id. at pp. 9, 11).

As a remedy for the October 2017 CSE's failure to consider the privately-obtained speech-language and OT evaluations, the IHO ordered compensatory educational services in the form of 60 30-minute sessions each of speech-language therapy and OT based on the service

[5] The IHO also found "no reason" for the district to pay the rate charged by the parent's preferred evaluator, "when equally good evaluations [we]re routinely conducted" at a lesser rate (IHO Decision at p. 9).

recommendations set forth in the private evaluations (IHO Decision at pp. 8-9, 11).[6] The IHO further ordered 125 hours of individual special education teacher instruction (id. at p. 10).[7]

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

The parent appeals and asserts that several of the IHO's findings of fact are unsupported by the hearing record. The parent also alleges that the IHO should have ordered the CSE to defer a determination about the student's placement to the CBST to locate a placement in a nonpublic school. In declining to order such deferral, the parent alleges that the IHO improperly determined that the psychologist who completed the March 2016 neuropsychological evaluation report was not qualified to recommend a nonpublic school placement. Next, the parent challenges the IHO's order directing the district to conduct a speech-language evaluation, OT evaluation, and an assistive technology evaluation. With respect to the speech-language and OT evaluations, the parent objects that the IHO did not articulate the basis for her order and asserts that the parent's privately-obtained speech-language and OT evaluations were appropriate and should have been considered by the October 2017 CSE. Specific to the assistive technology evaluation, the parent asserts that the IHO erred in ordering the evaluation in the specific area of auditory or temporal integration because the central auditory processing evaluation had already been completed and the audiologist recommended an FM unit for the student. In addition, the parent argues that the IHO erred in finding that the parent's preferred evaluator was not qualified to conduct the assistive technology evaluation. The parent also claims that the IHO should have ordered the district to provide an FM unit that it had previously agreed to obtain, and to also provide Fast ForWord software to the student.

As relief, the parent requests that: (1) a CSE be required to defer the student's placement to the CBST to locate a nonpublic school placement for the student; (2) the district be required to provide the student with an FM unit; (3) the district be required to provide the student with Fast ForWord software at an enhanced rate; (4) the IHO's order directing the district to conduct speech-language, OT, and assistive technology evaluations be reversed; (5) the IHO's order for an assistive technology evaluation in the areas of auditory and temporal processing be reversed; (6) the district be required to fund an independent assistive technology evaluation at the enhanced rate; and (7) the district be required to convene a CSE upon completion of the independent assistive technology evaluation. In addition, the parent requests that those portions of the IHO's decision be stricken that improperly found the private psychologist offered no reason for an assistive technology

[6] The IHO initially indicated that she was ordering 60 hours each of speech-language therapy and OT for the approximate number of sessions that should have been provided during the 2017-18 school year (IHO Decision at p. 9). However, in the decretal, the IHO ordered the district to provide 60 30-minute sessions of each therapy as compensatory educational services (id. at p. 11). It appears that the latter figure is the intended award as it represents a total closer to one based on the recommendations in the cited private evaluations for two 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT (see Parent Exs. D at p. 4; I at p. 6).

[7] In the body of her decision, the IHO indicated that she was awarding 125 hours of SETSS (IHO Decision at p. 9); however, in her decretal, the IHO ordered 125 hours of individual special education teacher instruction (id. at p. 11). As noted above, SETSS was not defined in the hearing record, so, while not entirely clear, the IHO's decision is read as ordering the provision of 125 hours of instruction by a special education teacher.

evaluation and that the parent's preferred evaluator was not qualified to conduct an assistive technology evaluation.

In an answer, the district responds to the parent's allegations and requests that the IHO's decision be upheld in its entirety. The district also contends that the parent's request for review should be rejected for failure to comply with the practice regulations of the Office of State Review.

**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. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[8]The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## VI. Discussion

### A. Preliminary Matters

#### 1. Compliance with Practice Regulations

The district asserts that the parent's request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.8[a][2]; [b]). Specifically, the

[8] 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., 137 S. Ct. at 1000).

district asserts that the request for review was typewritten in a text size smaller than 12-point type and thereby exceeded the ten-page limit for all pleadings before the Office of State Review.

State regulations provide that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). State regulation also states that all pleadings and memoranda of law shall be typewritten in black ink, single sided, double-spaced, and with a minimum 12-point type text size in the Times New Roman font (8 NYCRR 279.8[a][2]). Compacted or other compressed printing features are prohibited (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

I agree with the district that the request for review appears to be formatted using either line spacing or a text size smaller than that required by the Commissioner's regulations. Nevertheless, I decline, as a matter within my discretion, to dismiss the request for review on these grounds. I caution parent's counsel in the future to comply with the pleading requirements expressly prescribed by State regulations or risk dismissal.

**2. Scope of Review**

The parent's appeal in this matter is fairly narrow and focuses on aspects of the relief awarded by the IHO. As summarized above, the IHO determined that the district failed to offer the student a FAPE for the 2017-18 school year after the district conceded that the October 2017 IEP was not appropriate and awarded compensatory education services (IHO Decision at pp. 4, 8, 10-11). Additionally, the IHO ordered the district to conduct an FBA of the student and to convene the CSE and develop an IEP with a specified program to include: a small class setting comprised of students with similar cognitive levels that also provides language instruction throughout the school day with minimal distractions and extra support, speech-language therapy, OT, and specific supports for the student's management needs (IHO Decision at pp. 8, 10-11). Neither party has appealed these determinations and, accordingly, they have become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

**B. Relief**

**1. Prospective Placement**

Turning to the merits of the parent's appeal, the parent asserts that the IHO erred by failing to order the CSE to defer the student's placement to the CBST for location of a nonpublic school.

Initially, the parent did not request this particular relief in her due process complaint notice. Although the proposed resolution in the parent's due process complaint notice requested a determination that deferment to the CBST should have been considered by the October 2017 CSE, on appeal, the parent argues that the IHO should have ordered the CSE to defer placement to the CBST for location of a nonpublic school for the student going forward (compare Parent Ex. A at p. 3; with Req. for Rev. at p. 10). The difference is one of a request for declaratory relief versus a request for prospective relief to remedy a past harm.

Even assuming that the parent's request for relief had been properly raised before the IHO, the 2017-18 school year has ended and, in accordance with its obligation to review a student's IEP at least annually (and in accordance with the unchallenged and, therefore, final and binding, aspects of the IHO's decision), the CSE should have already convened to revise the student's program and should have developed a new IEP for the student for the 2018-19 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]; see also IHO Decision at p. 10). The parent's request for an order requiring a CSE to defer the student's placement to the CBST amounts to a request to circumvent 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 the 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"]).

Further, as noted above, the IHO ordered additional prospective relief, which is not challenged in this proceeding and is, therefore, final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). This includes the IHO's order that the CSE recommend a small class with specific features (IHO Decision at p. 10). The IHO specified that the CSE was required to convene within 10 days of her decision to develop an IEP in accordance with her decision (id.) and, accordingly, should already have done so. The IHO also specified that, if the district could not implement this placement, it would be required to locate a nonpublic school to do so (id. at p. 8). While not exactly the relief sought by the parent, the IHO's order crafted a remedy that is not far from what the parent seeks on appeal. While the parent would prefer the CSE be required to defer to the CBST, the CSE is already bound to recommend a specific program and should be given some latitude to craft the program—within the limits of the IHO's order—in line with the student's needs and the statutory process of the CSE. If the parent remains displeased with the CSE's recommendation for the student's program for the 2018-19 school year, he may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (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 denial of the parent's request for deferment to the CBST is affirmed.[9]

Relatedly, the parent also claims that the IHO should have ordered the district to provide an FM unit and Fast ForWord software to the student. As with the request for deferral of placement

[9] Given this determination, it is unnecessary to review the IHO's finding pertaining to whether or not the private psychologist had sufficient expertise or qualifications to recommend a nonpublic school for the student (see IHO Decision at p. 8).

to the CBST, an order for any particular device or software is also unwarranted at this juncture where the 2017-18 school year has ended, additional evaluations should have been completed, and the CSE should have met to engage in educational planning for the 2018-19 school year.[10] However, to the extent that it has not already done so, the CSE should consider an FM unit and Fast ForWord software for the student based on the information available to it.

**2. District Evaluations**

In this appeal, the parent alleges that the IHO erred by ordering the district to evaluate the student in the areas of speech-language, OT, and, as discussed further below, assistive technology. Specifically, the parent objects to the IHO's order that the district conduct the evaluations notwithstanding that the parent already obtained evaluations that the October 2017 CSE failed to review. For assistive technology, the parent specifically seeks an independent educational evaluation (IEE) at district expense by a particular evaluator; whereas, for the speech-language and OT evaluations, the parent does not seek IEEs and only requests that the IHO's order for the district to conduct the evaluations be reversed.

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 (see 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 (20 U.S.C. § 1414[a][2][b][i]-[ii]; 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C.

[10] To the extent the parent was requesting that the district provide the student with an FM unit as mandated by the October 2017 IEP (Parent Ex. P at p. 8), the district was already required to do so. That is, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). However, the parent did not seek any particular relief for an alleged failure to implement the October 2017 CSE's recommendation for an FM unit.

§ 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]).

The earliest information about the student in the hearing record is from the 2013-14 school year. At that time, the student was classified as having an other health-impairment and was receiving SETSS and group counseling (Parent Ex. F at p. 1). There is nothing in the hearing record to indicate that the CSE conducted any evaluations of the student or met to conduct any annual reviews between November 2013 and October 2017 (see Parent Exs. F; P). The evidence in the hearing record includes report cards from the 2014-15 school year, but no additional evaluative information (Parent Ex. G at pp. 3-4).

During the 2015-16 and 2016-17 school years, the parent obtained private evaluations of the student including a March 2016 neuropsychological evaluation, a March 2016 OT evaluation, a May 2016 speech-language evaluation, a May 2017 update to the neuropsychological evaluation, and a June 2017 audiological and auditory processing evaluation (Parent Exs. D; E; I; J; Q).

Specific to the need areas in which the IHO ordered the district to evaluate the student, the information in the privately obtained evaluations is as follows.

According to the March 2016 OT evaluation report, the student's visual perceptual abilities, eye-hand coordination and sensory integration were assessed via administration of the Motor-Free Visual Perceptual Test-Third Edition (MVPT-3), the Beery-Buktenica Developmental Test of Visual Motor Integration-Fifth Edition (Beery VMI-5), and caregiver responses to the Sensory Profile questionnaire (Parent Ex. I at pp. 2-4). Additional assessment took place via clinical observation (see id. at p. 4). With respect to activities of daily living (ADLs), the evaluator reported that no difficulties were observed in the student's physical capacity to complete tasks but that the student had difficulty sequencing the completion of self-management tasks (id.). In addition, the evaluator reported that, according to the parent, the student required frequent reminders to initiate, endure, and complete his morning ADL tasks appropriately (id.). The evaluator described the student's neuromuscular presentation, noting that the student had: average to low tone throughout his core and upper extremities; normal range of motion for his upper extremity joints; fair strength in his shoulders, elbows, and wrists; weakness in both hands (indicating decreased hand strength); and possible decreased stability and strength for fine and gross motor movement tasks because of compromised shoulder stability (id.). With respect to gross motor/coordination skills, the evaluator commented that the student had difficulty imitating therapist directed movement patterns (id.). The evaluator reported that the student had minimal difficulties completing tasks designed to measure his kinesthesia and characterized the student's proprioception as "fair" (id. at p. 5). The student demonstrated occasional choppy movements when completing gross motor tasks (id.). According to the evaluator, the student exhibited difficulty completing fine motor tasks with appropriate endurance and dexterity (id.). Although the student used an appropriate modified tripod grasp for writing tasks, he had difficulty with in-hand manipulation skills (id.). The evaluator noted that the student complained of hand fatigue when presented with motor coordination tasks and self-reported that his hands often got tired while writing and therefore he did not like writing tasks ( id. at pp. 4-5). With respect to visual perceptual/visual motor skills, although the student scored in the average to above average range

on standardized testing, the student demonstrated difficulties with his ocular motor/eye-pairing skills, which, the evaluator opined, were integral to his performance of reading and writing tasks (id. at pp. 5-6). According to the evaluator, although the student used an age-appropriate grasp for writing tasks, the student demonstrated poor writing posture; he would often slouch, place his head close to the table, and tilt his head during the writing portions of the evaluation (id. at p. 5). The student demonstrated appropriate letter formation and sizing; however, he wrote two words that "slightly float[ed] off the writing line" and omitted words from a sentence he was asked to write because he was rushing (id.). The evaluator indicated that the student's performance illustrated his difficulty with visual motor and visual perceptual skills (id. at pp. 5-6). The evaluator reported that the results of "formal testing" indicated that the student demonstrated "definite differences" in several sensory processing skill sets including low tone/endurance, inattention/distractibility, touch processing, multisensory processing, and modulation of sensory information affecting emotional responses (id. at p. 6). According to the evaluator, clinical observations confirmed reported behaviors from the sensory profile such as the student's frequent seeking of movement, his difficulty with attending, and his lack of awareness in an active environment (id.). The evaluator indicated that, throughout testing, the student asked questions that were not relevant to the testing demands (id.). The evaluator further indicated that the student demonstrated difficulty with executive functioning skills, "which impact[ed] his ability to complete tasks with appropriate initiation, endurance, termination of task, managing time, maintaining organization of personal and school belongings, sustaining attention and demonstrating appropriate divided attention" (id. at p. 7). The evaluator opined that the student would benefit from two 30-minute sessions of group OT per week to improve his executive functioning, visual motor, attention, and neuromuscular strength/endurance skills for increased efficiency and independence with school related tasks (id. at p. 6-7).

In addition to the OT evaluation, the student underwent a speech-language evaluation in response to a referral made by "his" psychologist (Parent Exs. D at p. 2; E at p. 13). In May 2016, a speech-language pathologist administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) and also conducted an oral peripheral examination and clinical observations of the student (Parent Ex D at p. 1). The speech-language pathologist diagnosed the student with a receptive and expressive language disorder and additionally with an other speech disturbance (id.). With respect to receptive language, the speech-language pathologist indicated that the student performed in the fifth percentile and demonstrated "disordered/delayed" skills for which the student required intensive remediation (id. at pp. 2-3). The speech-language pathologist noted that the student was able to identify body parts/clothing on himself, identify objects/pictures, follow some commands with/without gestural cues, comprehend simple "wh" questions, and understand verbs in context/simple pronouns and identify actions in pictures (id. at p. 2). However, the student exhibited inconsistencies in his ability to make inferences and understand quantitative concepts/negatives in sentences/more complex pronouns and sentences with post noun elaboration (id.). Relative to expressive language, the report noted that the student performed in the 16th percentile; and, like his receptive language skills, the student's expressive language skills were "disordered and delayed" and required intensive remediation (id.). The speech-language pathologist noted that the student was able to label pictures, demonstrate joint attention for short bursts of time, use gestures and vocalizations to request objects, and use words for a variety of pragmatic functions and three to five word phrases to express his needs (id. at p. 3). The evaluator did not identify specific expressive language deficits of the student, however, her recommended expressive language goals were related to vocabulary development (see Parent Ex. D). To improve

the student's "overall functional communication" skills, the evaluator's May 2016 report included a recommendation for two 30-minute sessions per week of speech-language therapy (id. at p. 4).

In his due process complaint notice, the parent did not request that the IHO order the district to conduct speech-language and OT evaluations (see Parent Ex. A at p. 3). While IHOs have broad authority and discretion when fashioning equitable relief under the IDEA, in the present case, the IHO did not explain her order for the district to conduct evaluations in the area of speech-language and OT (see IHO Decision at pp. 8-11). In fact, the IHO acknowledged that, at the time of the decision, if the district conducted evaluations, "it would not remedy any failure to provide related services during the 2017-2018 school year" (id. at p. 9). Accordingly, the IHO ordered compensatory educational services of speech-language therapy and OT (id. at pp. 9, 11). It may be that the IHO intended to order the district to evaluate the student as a prospective remedy to rectify the district's failure to comply with its obligation to evaluate the student at least once every three years. However, based upon its statutory obligation to evaluate the student on at least a triennial basis, the IHO's order does little to change the district's responsibility (see 20 U.S.C. § 1414[a][2][b][i]-[ii]; 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]), except perhaps to require the evaluations to go forward within the 30 days assigned by the IHO.[11] And, reversal of the IHO's order does not preclude the district from seeking to conduct evaluations of the student.

Further, while the parent's apparent position that the IHO's order for the district to conduct evaluations would somehow absolve the CSE of its obligation to consider the parent's privately-obtained evaluations is legally without merit (see 34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]), his concern in this respect is understandable given the district's concession that it failed to consider the privately-obtained OT and speech-language evaluations at the October 2017 CSE meeting and the district representative's explanation at the impartial hearing that this failure was based on the incorrect view of CSE members that the evaluations were outdated (see Tr. pp. 36-37, 40-41, 57-59, 144).

Overall, given the lack of explanation from the IHO for her order, the district's concession that it denied the student a FAPE, the absence of a request from the parent for district evaluations, the lack of evidence in the hearing record suggesting that the student required an immediate evaluation in the area of OT or speech-language, and the information regarding the student contained in the privately-obtained March 2016 OT and May 2016 speech-language evaluations, there exists sufficient basis to reverse the IHO's order.

### 3. Independent Educational Evaluation

Further discussion of the assistive technology evaluation is necessary. As noted above, since the parent seeks that a private evaluator of his choosing complete an assistive technology

[11] Further, similar to the agreement permitted by State and federal regulation, there is nothing that would have precluded the parent and the district from agreeing that the evaluations ordered by the IHO were unnecessary (see 20 U.S.C. § 1414[a][2][b][ii]; 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). If the parent was alone in his position that the reevaluations were unnecessary, he could have withheld consent (see 34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see also Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]). In any event, as discussed, herein there is sufficient reason in the hearing record to reverse the IHO's order.

evaluation of the student at district expense, the issue is whether the parent is entitled to an assistive technology IEE.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is 0not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a student was not assessed in a particular area, the parent has the right to request an IEE to assess the student in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the parent did not disagree with an evaluation conducted by the district or with the district's failure to conduct an assistive technology evaluation and, prior to the due process complaint notice, he did not request an IEE from the district. Even in his due process complaint notice, the parent did not assert his disagreement with the district's failure to conduct an assistive technology evaluation of the student (see Letter to Baus, 65 IDELR 81), alleging instead that the October 2017 CSE did not consider whether the student requires assistive technology as a special factor in the development of the student's IEP (Parent Ex. A at p. 2; see 8 NYCRR 200.4[d][3][v]; see also 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]).

Accordingly, under these circumstances, the IHO did not err by ordering the district to conduct an assistive technology evaluation in the first instance.[12] However, the parent also objects to the IHO's decision to the extent she specified that the assistive technology evaluation assess the student's auditory and temporal processing and be completed by an evaluator competent in such area (see IHO Decision at pp. 9, 11). The parent argues that the June 2017 audiological and

[12] If the parent disagrees with the assistive technology evaluation completed by the district, the parent and the district are encouraged to follow the procedures outlined in State regulations (see 8 NYCRR 200.5[g][1]).

auditory processing evaluation report already recommended an FM unit for the student, which the October 2017 CSE included in the student's IEP (see Parent Exs. P at p. 8; Q at p. 5).

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). When warranted by the student's needs, the district must assess the student's "functional capabilities" and whether they may be "increase[d], maintain[ed], or improve[d] through the use of assistive technology devices or services (34 CFR 300.5; 8 NYCRR 200.1[e]; see 34 CFR 300.6; 8 NYCRR 200.1[f]). "The evaluation should provide sufficient information to permit the [CSE] to determine whether the student requires assistive technology devices or services in order to receive FAPE" (Letter to Fisher, 23 IDELR 656 [OSEP 1995]).

State guidance provides that there are no specific credentials required to conduct assistive technology evaluations or to provide assistive technology services to students in New York State ("Assistive Technology for Students with Disabilities," at p. 3, Office of Special Educ. Mem. [Apr. 2017], available at http://www.p12.nysed.gov/specialed/documents/assistive-technology-for-students-with-disabilities.pdf). State guidance further provides that a CSE should "thoughtfully consider the skill sets required to conduct an appropriate assistive technology evaluation that meets the individual needs of a student with a disability" and that, "[i]n some cases, it might be necessary for someone with specialized knowledge of specific assistive technology devices and services to conduct the evaluation" ("Assistive Technology for Students with Disabilities," at p. 3).

The IHO cited to the appendix to the March 2016 neuropsychological evaluation report, which set forth a list of available devices and software, for the proposition that the psychologist "recommended an assistive technology evaluation to address the student's auditory and temporal processing, figure-ground listening, memory and integration, reading, decoding and comprehension" (IHO Decision at p. 5, citing Parent Ex. E at p. 18; see also Tr. pp. 336-37). Later in her decision, the IHO noted that the psychologist who completed the March 2016 neuropsychological evaluation report did not specify the area of difficulty that should be addressed by assistive technology (IHO Decision at p. 9). The IHO also pointed out that the June 2017 audiological and auditory processing evaluation report recommended consideration of "Earrobics" or "Fast ForWord" software for the student to develop temporal integration and decoding (id.).

Review of the March 2016 neuropsychological evaluation report reveals that the psychologist did not recommend an assistive technology evaluation for a specific need area, rather, he stated "an [a]ssistive [t]echnology evaluation is needed to help with providing additional help to address [the student's] difficulties. Please see appendix below for examples of resources that could be considered" (Parent Ex. E at p. 14).[13] The appendix lists a variety of assistive technology

[13] The section relied upon by the IHO is actually a subparagraph in the appendix to the neuropsychological report under the "phonological and phonemic processing software" heading, describing how a speech-language provider could use Fast ForWord "to improve auditory and temporal processing, reading, decoding, comprehension, and also, possibly, expressive language [skills]" of a different student and further cites to a parent exhibit from a

options, including use of a laptop, access to a printer at school, specific reading and writing software, use of headphones, and use of a calculator, as well as use of phonological and phonemic processing software (id. at pp. 17-18). During the impartial hearing, the psychologist testified that he recommended an assistive technology evaluation because the student exhibited "problems with . . . fine motor skills," as well as "difficulty with attention" (Tr. p. 173).

It was subsequent to the March 2016 neuropsychological evaluation report that the June 2017 audiological and auditory processing evaluation report was completed and the evaluator recommended an FM unit for the student, and that "a concentrated program to develop temporal integration and decoding" be considered, such as "Earobics or FastForWord" (Parent Ex. Q at p. 5).

Based on the foregoing, the district is directed to evaluate the student's need for assistive technology (see 34 CFR 300.5, 300.6; 8 NYCRR 200.1[e], [f]). However, there is insufficient evidence in the hearing record to require that the assistive technology evaluation be focused on the student's weaknesses in auditory and temporal processing per se. In considering assistive technology for the student, the CSE should base its determination on the student's unique needs and should not be limited to a specific area. Accordingly, the IHO's order is modified to the extent she specified particular areas of need on which the assistive technology evaluation would be required to focus.[14]

**VII. Conclusion**

The IHO's determination that the CSE not be required to defer the student's placement to the CBST is affirmed. However, the IHO's determination requiring the district to conduct speech-language and OT evaluations of the student is reversed. Additionally, the IHO's decision with respect to the district conducting an assistive technology evaluation of the student is modified as described above.

I have considered the parent's 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 April 12, 2018 is modified by reversing that portion requiring the district to conduct speech-language and OT evaluations of the student; and

different hearing record (see Parent Ex. E at p. 18; see also Tr. pp. 336-37).

[14] Based on the determinations herein—that the district will conduct the assistive technology evaluation (not an independent evaluator) and that the district is not limited in which specific areas of the student's needs are to be assessed for assistive technology—it is unnecessary to address the parent's argument that the IHO erred in finding that the parent's preferred assistive technology evaluator, as an occupational therapist, was not qualified to conduct the evaluation.

**IT IS FURTHER ORDERED** that the IHO's decision dated April 12, 2018 is modified by reversing that portion which required the district to conduct an assistive technology evaluation specifically in the area of auditory and temporal processing.

**Albany, New York**
**August 31, 2018**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**