



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-186

Application of the BOARD OF EDUCATION OF THE HARRISON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district denied the student a FAPE for the 2019-20 and 2020-21 school years and awarded respondent (the parent) compensatory educational services. The appeal must be sustained.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

During the student's early elementary school years, he received support from a special education teacher (two 45-minute sessions per week) along with a shadow aide and related services and had received diagnoses of ADHD combined type and Pervasive Developmental Disorder - NOS (Dist. Ex. 14 at p. 1). In third grade (2015-16 school year), the student's supports increased to include resource room (four 45-minute sessions per week) and a 1:1 aide, which was changed to a 1:1 teaching assistant shortly after the start of the year to support instruction in the general education setting (id. at pp. 1-2). In March of that school year, the CSE recommended a placement change to a self-contained classroom setting (id. at p. 2). During fourth grade (2016-17 school year), the student "received content area instruction in a self-contained classroom" and was "mainstream[ed] into the general education setting for specials, lunch, recess and occasional special events" (id.). The district the student was attending at the time conducted a reevaluation of the student in March 2017 (id.).

At the end of the student's fourth grade school year, the parent requested a program review to discuss a change in placement or home instruction as the parent did not feel that the program was working for the student (Dist. Ex. 14 at p. 2). Reportedly, the parent shared with the CSE that she was looking into private schools that were not New York State approved (id.). A search for a smaller program yielded three programs that were "interested" in the student, but the parent was reportedly not interested in those schools, did not go to visit, and at the start of the fifth grade (2017-18) school year the student returned to the district school he had been attending (id.). In December 2017, the parent requested a program review to discuss home instruction again and shared that she had been looking into starting the process to be approved for home schooling but ultimately determined that she would not be equipped to provide the student instruction based on her limited command of the English language (id.). The parent agreed to visit the programs that were previously interested in the student and in February 2018, the CSE recommended placement in a neighboring school district in a program that included a 12:1+1 self-contained classroom for the four core academic subjects; lunch and specials with his general education peers; and speech-language therapy, OT, counseling/social skills, and parent counseling and training services in the home (id.). Academic progress was noted at this program; however, staff indicated challenges related to tardiness and absenteeism (id. at pp. 2-3).

At the end of the 2017-18 school year, the CSE recommended a new program search as the neighboring district placement did not have a 12:1+1 middle school program (Dist. Ex. 14 at p. 3). Reportedly, since the parent did not follow through on making a school visit during summer 2018 to a school that was considering accepting the student, he started sixth grade (2018-19 school year) in the middle school of the district he had attended at the start of the 2017-18 school year in a program which included a special class for math, integrated co-teaching (ICT) services for English, daily resource room, 1:1 teaching assistant support throughout the school day, and related services including occupational therapy (OT), speech-language therapy, and counseling (id.).¹ In October 2018, the CSE convened to review the student's progress, agreed to conduct another program search to locate a smaller class setting and stressed that the parent needed to follow through on visiting potential programs (id.). The student was parentally placed in a nonpublic school in early February 2019 (Dist. Exs. 3 at p. 1; 14 at p. 3). Shortly thereafter, also in February 2019, the CSE recommended for the student a 15:1+1 special class placement outside of the school district; however, the parent informed the CSE that the student would continue to attend the nonpublic school (Dist. Ex. 14 at p. 3). The parent had reported several instances of bullying at the middle school; however, DASA (Dignity for All Students Act) investigations based on the accounts of suspected bullying did not substantiate the claims (id.).

In May 2019, a CSE convened for the student's annual review at which time the parent shared that the student was no longer attending the nonpublic school, was hospitalized twice recently for emotional reasons, was presently on medication, and was scheduled for discharge "next week" from the most recent hospitalization (Dist. Exs. 3 at pp. 1-21; 14 at p. 3). Reportedly, the parent sought services for the student from the district of location of the nonpublic school for speech-language therapy, OT, and counseling, which were available to the student and scheduled to begin in March 2019; however, the parent chose not to have the student attend (Dist. Exs. 3 at p. 2; 14 at p. 3). According to the meeting information summary attached to the May 2019 IEP,

¹ It was reported that the parent declined parent training services (Dist. Ex. 14 at p. 3).

the CSE discussed that the parent had explored outside tutoring and the student had undergone testing from the tutoring agency (Dist. Ex. 3 at p. 2).

Finding that the student was eligible for special education programming as a student with autism, the CSE chairperson proposed a program search for an alternative program for the 2019-20 school year and agreed to send out referral packets upon receipt of signed consent, with the CSE reconvening to make final recommendations upon completion of that process (Dist. Ex. 3 at pp. 1, 2). In the interim, the student continued with home instruction, which involved meeting with tutors in the community library (Dist. Exs. 3 at p. 2; 14 at p. 3). The May 2019 IEP, with an implementation date at the start of the 2019-20 school year, provided two hours of home instruction daily, speech-language therapy, OT, counseling, parent training and supports and modifications including modified assignments, directions repeated, refocusing/redirection/prompts, extra time, re-teaching, clear expectations and directions, assignments broken down, graphic organizers, a sensory diet, visual cues and feedback, preferential seating (Dist. Ex. 3 at p. 1, 14, 17-19). In addition, the CSE recommended 12-month services of three one-hour sessions per week of resource room in a group of five, two 30-minute sessions per week of speech-language therapy in a group of three, and one 30-minute session per week of OT in a group of three (id. at pp. 1, 19).

In summer 2019, the student's family moved into the district that is the petitioner in this proceeding (Dist. Ex. 4 at p. 1).

On August 20, 2019, the parent executed a placement agreement with the district in which the parent agreed and consented to the following proposed changes to the student's IEP without the necessity of a CSE meeting: ICT services for English language arts (ELA), ICT services for science, small group instruction (12:1+1 special class) social studies, small group instruction (12:1+1 special class) math, two 39-minute sessions of speech-language therapy per six day cycle, two 30-minute sessions of OT per six day cycle, one 39-minute of counseling per six day cycle, and an academic skills class daily (12:1) (Dist. Exs. 4 at pp. 1, 18; 99; see Tr. p. 1682).

In September 2019, the CSE convened at the request of the parent to review the student's program (Dist. Ex. 5 at p. 1). Reportedly, prior to the September 2019 CSE meeting the student was "trialed" in a 15:1+1 special class for English, in place of ICT services, as per parent request (id. at p. 2). According to the meeting information summary, the CSE discussed that the nonpublic school had recommended 1:1 teaching assistant support for the student, but that currently, district teachers had not seen evidence of the need for that level of support, a position with which the parent disagreed (id.). The September 2019 CSE recommended for the student the same program and services recommended within the August 2019 placement agreement, with the aforementioned change to a 15:1+1 special class for English and a change from an academic skills class to a 12:1 special class for reading (Dist. Ex. 5 at p. 2; compare Dist. Ex. 4 at pp. 1, 18, with Dist. Ex. 5 at pp. 1, 14).

In an October 15, 2019 email, the district informed the parent that her questions would be answered at the upcoming team meeting and that they "c[ould] not" and "w[ould] not" respond to daily emails and phone calls from the parent and suggested that a response one day per week was reasonable (Dist. Ex. 22 at pp. 1-2).

The parent requested mediation in November 2019 and, reportedly, the mediation center tried to contact the parent three times to schedule mediation and received no response (Dist. Exs. 6 at pp. 1-2; 25 at p. 1; 28 at p. 2).

In December 2019, the CSE reconvened for a reevaluation review and determined that the student's current IEP adequately met his needs; the CSE did not believe the student needed a "more restrictive setting" with a 1:1 teaching assistant or aide and proposed the same program and services along with an additional speech-language annual goal and a rewritten reading annual goal (Dist. Ex. 6 at pp. 2, 3; compare Dist. Ex. 5 at pp. 1-18, with Dist. Ex. 6 at pp. 1-20). The parent shared that a private evaluator conducted a neuropsychological evaluation of the student in November 2019, she disagreed with the CSE's recommendation to continue with the current program and requested a new evaluation (Dist. Ex. 6 at pp. 2, 3).

In email exchanges in early January 2020, the director of special education and support services requested that the parent share the results of the private evaluation and informed the parent that she was uncomfortable with the parent emailing and calling her and other district staff multiple times per day, noting that it was bordering on harassment (Dist. Ex. 26 at p. 1).

In a January 2020 letter to the parent, the district acknowledged that when the student moved to the district the parent had requested that the student's re-evaluation—due in March 2020—be moved up; the district complied, and as such, the district had "up-to-date testing" of the student (Dist. Ex. 28 at p. 1). In addition, the district stated that it would not be doing additional testing that year and noted that, despite district requests, the parent had not shared the private evaluation report and denied requests by the district to speak with the psychologist who completed the private evaluation (id. at pp. 1-2).

In a February 2020 email, the parent detailed her concerns that educational testing was necessary, that the current IEP did not meet the student's educational needs, that the student was showing regression and was not able to complete any of his homework, and that she was "officially" declining counseling services (Dist. Ex. 31 at p. 1).

On March 13, 2020, the parent shared, with the director of special education and support services, a handwritten note from a pediatrician indicating that the student was seen on that day reporting bullying and stating that his toes were stepped on and he was punched in the stomach (Dist. Ex. 34 at pp. 1-2). The director forwarded the message to the principal and assistant principal (Dist. Ex. 34 at p. 1; see Dist. Ex. 119 at p. 1).

Schools were closed due to the Covid-19 pandemic in March 2020 and district staff reported that the student did not access the virtual classroom with his related service providers, special education teachers, and general education teachers (Dist. Ex. 7 at p. 2).

In an April 2020 letter to the parent, the assistant superintendent addressed concerns regarding the parent's conduct toward district staff over the past several months, noting a pattern of harassing and abusive behavior which included incessantly emailing unreasonably long lists of questions, incoherent statements, and unreasonable demands, often several times per day (Dist. Ex. 42 at p. 1). The letter continued that the pattern of abusive and harassing behavior toward district staff violated the district's code of conduct and the parent was thereby directed to comply with expectations which instructed the parent to: cease and desist from engaging in the behaviors

described above, limit correspondence with district staff to factual questions about the student's educational needs and non-accusatory interactions, and remain civil and exercise better judgment in determining how often to communicate with district staff (id.). In addition, the assistant superintendent stated that if the parent failed to adhere to the expectations and continued to behave in ways that were abusive and harassing toward district staff, it may result in the superintendent of schools barring the parent from district property and/or requiring that all communications from the parent about the student's education go through a third party (id. at p. 2).

In response to the district's concern that they had not heard from the student in "quite some time" and that he had not been engaging in schoolwork, a police officer conducted a wellness check and was reportedly told that the parent was homeschooling the student (Dist. Ex. 44). In a May 2020 email the director of special education and support services explained to the parent that home schooling involved contacting the superintendent's office and receiving approval of an individualized home instruction plan (IHIP) and not helping the student at home with the work that the district was providing and that the district expected the student to access and be a part of his education (id.).

In May 2020, the CSE convened to conduct the student's annual review and to develop a program for the student for the 2020-21 school year (Dist. Ex. 7 at pp. 1-16). The CSE recommended the same program and services for the student found in the prior year's IEP with changes to service location for speech-language therapy and OT and removal of OT consultation (compare Dist. Ex. 6 at pp. 1, 16-17, with Dist. Ex. 7 at pp. 1, 12).² In addition, the CSE determined that the student no longer needed a sensory diet but continued to need frequent movement breaks and changed the heading of the support regarding access to fidget toys and movement breaks throughout the school day from "Sensory Diet" to "Allow Fidgeting & Legitimate Movement" (Dist. Ex. 7 at p. 2; compare Dist. Ex. 6 at p. 18, with Dist. Ex. 7 at p. 13). Reportedly, the parent requested a change to the student's classification as per the pediatric neurologist's report and disagreed with the CSE's decision not to recommend 12-month services (Dist. Ex. 7 at p. 2).³

A State Complaint findings letter, dated July 15, 2020, found that the district completed the evaluations the parent requested in an August 2019 letter, albeit three days late, and required no further action and did not sustain the parent's allegation that the district failed to develop an IEP that met the student's needs for the 2019-20 school year (Dist. Ex. 48 at pp. 1-8).

In response to an August 2020 email from the district informing the parent that the student could attend school "in-person every day" and requesting confirmation that the student would be attending school every day, the parent requested that teachers meet the student at the community library three hours daily and further requested that related service providers also meet the student at the library (Dist. Ex. 50). The district informed the parent that they were "unable to do this" (id.). In a follow up email, the parent, citing concerns with respect to the student's seasonal

² While the May 2020 CSE continued the recommendation of social skills counseling and parent training, reportedly, the parent did not believe that she or the student needed the services and refused them (Dist. Ex. 7 at pp. 1, 2, 12-13).

³ The May 2020 CSE meeting comments indicated that the student would have access to the summer programs the district was running virtually for all students who had struggled during the pandemic but that the student would have to commit to joining the virtual platforms (Dist. Ex. 7 at p. 2).

allergies and difficulty tolerating a mask, again requested the library option and the district replied that "we cannot provide what you are asking" (*id.*). In a subsequent August 2020 email, the district invited the parent to provide a doctor's note stating the reasons why the student could not wear a mask so that they could "do [their] best to make reasonable accommodations" (Dist. Ex. 51). Via a September 2020 email, the parent, citing "unsettle[d] issues from 2019-20 school year," informed the district that the student would be "virtual learning" fulltime (Dist. Ex. 52).

In a September 2020 letter acknowledging the parent's decision for the full virtual option for the 2020-21 school year, the district provided the parent with the following practices for virtual instruction: the student must have his video camera on when he is streaming into the classroom, parents are to refrain from speaking to and interacting with the teacher or another student during virtual instruction, teachers and students should only see the student's face not the parent's face, and that the recording of any virtual sessions was strictly prohibited (Dist. Ex. 53). In addition, the district reminded the parent of the conduct expectations between the parent and district staff that the district had set forth in an April 2020 letter and was attached again for the parent's reference (*id.*).

In a subsequent September 2020 email, the parent informed the district that she had moved and did not have internet service, she had contacted the student's pediatrician for a doctor's note regarding not tolerating a mask, and she had plans to send the student to school "tomorrow" (Dist. Ex. 54). In a reply email, the district informed the parent that she would need to drive the student to school and pick him up the next day and that the district would set up transportation as soon as possible (*id.*). However, in an email dated the following day, the parent indicated that she hoped that the district could provide internet service so that the student could "join tomorrow" the virtual classroom (Dist. Ex. 55).

In a September 10, 2020 email, the district extended an offer to meet with the parent to hear her concerns and "see if we can make sure that [the student] has a good year" and the parent agreed to attend (Dist. Ex. 57 at pp. 1-2).

District staff met with the parent on September 17, 2020 to discuss ways to help the student "virtually," effective communication between the parent and district, as well as concerns of the parent and to provide support in connecting to the virtual classroom (*see* Dist. Exs. 57 at pp. 1-2; 61; 63 at p. 1; 65).

In a September 29, 2020 letter to the parent, the principal acknowledged the meeting held on September 17, 2020 regarding the student's status as a remote learner and shared concerns about the student's lack of participation in his virtual learning as the student had not attended any virtual sessions or extra help since the school year began, was missing instruction, and was not engaging in school (Dist. Ex. 73 at p. 2). The principal further stated that it was essential that the student participate in his entire program regularly and be on time to all of his virtual classes, noting that a schedule outlining the classes for both odd and even days had been shared with the parent by his teachers and the director, and the principal requested that the parent take the steps necessary to ensure that the student participate in his virtual lessons and complete the work assigned by his teachers (*id.*). The principal reiterated that the parent "should not and cannot" be visible on screen for the student's classes, that it was important that the teachers saw the student on screen when he was participating in virtual learning, and that the parent could not post comments on the virtual

classroom or impersonate the student to post comments on the virtual classroom noting that this was a direct violation of the assistant superintendent's letter dated April 21, 2020 (id.).

On October 1, 2020, the CSE reconvened to conduct a requested review to consider the parent's request to change the student's classification (Dist. Ex. 8 at p. 1). According to the meeting information summary, in September 2020 the parent submitted a letter from a pediatric neurologist dated April 29, 2020, which indicated a diagnosis of semantic pragmatic language disorder (Dist. Ex. 8 at p. 1; see Parent Ex. H at pp. 1-2). It was reported that although the CSE still felt the student showed symptoms of autism spectrum disorder, the CSE reached a consensus to change the student's classification to a student with a speech or language impairment (Dist. Ex. 8 at p. 1). In addition, the October 2020 CSE meeting information noted that the parent chose the "all virtual" option for the year but that the student had not engaged in any of his virtual instruction, that the parent stated that virtual learning was not working and had decided to send the student to school, and that the CSE shared that the student could start "as soon as tomorrow" (id. at p. 2). Reportedly, the parent asked if she could volunteer to work as an aide for the student; however, the CSE informed the parent that the district did not have volunteers during the time of Covid-19 and noted that the student did not need an aide at that time since the student was successful in his program last year, but the CSE also stated that if the student began to show signs of needing more support the CSE would reconvene and reconsider his needs (id.). Lastly, the meeting information stated that while the CSE continued to recommend parent training and social skills counseling for the student, the parent disagreed with the recommendation and would not be accessing the services (id.).

The special education teacher relayed an incident that occurred on the morning of October 5, 2020, which was later identified by the director of special education and support services as "the one" that caused removal of all virtual options, in which the parent reportedly appeared in the virtual classroom and started screaming at the teacher in a "visibly angry" manner (Dist. Ex. 75 at p. 1). The special education teacher stated that it was "very uncomfortable and upsetting for all in the room" and that she was apprehensive to let the student back into the virtual classroom as she did not want to be yelled at by the parent in front of the other students again (id.).

In an October 6, 2020 letter to the parent, the superintendent of schools informed the parent that she had continued to violate the district's code of conduct by repeatedly using the virtual platform inappropriately and by interacting with district staff in a harassing and abusive manner (noting the recent October 5, 2020 incident), that she had received three letters from the district detailing this inappropriate conduct and district expectations for virtual learning, had an in-person meeting with district staff discussing district expectations for the student participating in virtual learning, and had received repeated emails sharing these expectations (Dist. Ex. 76; see Dist. Ex. 42 at pp. 1-2; 53; 73 at pp. 1-2). The superintendent continued in stating that since the parent had repeatedly failed to follow district guidelines for virtual instruction, the district was no longer extending an all-virtual option for the student and stated that the student must come to school every day for his in-person education starting on Thursday October 8, 2020 with transportation provided by the district (Dist. Ex. 76). The superintendent stated that the district would send staff to assist the parent in getting the student up, dressed, and on the bus (id.). In a handwritten reply to the district dated the following day, the parent stated that due to the worldwide pandemic she did not feel comfortable sending the student to school and that "virtual learning must continue" (Dist. Ex. 77).

A. Due Process Complaint Notice

By due process complaint notice dated November 30, 2020, the parent asserted concerns regarding the district's programming for the student beginning in August 2019 (Parent Ex. A at pp. 1-6). The parent's concerns are summarized here focusing on her concerns with the district programming and omitting the parent's chronology of events that occurred during the 2019-20 and 2020-21 school years (see id.).

As an initial matter, the parent asserted that the district refused to approve a 1:1 teaching assistant for the student, noting that the student had a 1:1 teaching assistant in the prior school district and that because the prior district IEP was the only "legal IEP," the district was required to implement it (Parent Ex. A at p. 2). Additionally, according to the parent, the district failed to conduct necessary educational testing to render the September 2019 IEP "legal"; she argued that that student required a change in his classification (citing an October 2018 report that stated the student was not autistic), and she asserted that the student's IEP's annual goals were not concrete and achievable (id. at pp. 2, 4).

The parent alleged that the district was not implementing the student's IEP during the 2019-20 school year, that graphic organizers were not offered to the student, that the "current" IEP was not meeting the student's needs, and that the use of a calculator was not beneficial to the student (Parent Ex. A at pp. 3-4). According to the parent, the student had not made progress on two motor skills annual goals (id. at p. 4). Additionally, the parent asserted that the district failed to respond or "do anything" about reported incidents of bullying (id. at pp. 4-5).

Next, the parent alleged that although she had requested an independent educational evaluation (IEE) on multiple occasions, the district did not grant her request (Parent Ex. A at pp. 5, 6).

The parent argued that after the March 2020 closing of schools the student was only "invited" for virtual learning from 12:00 noon to 12:30 pm, that during the summer the student's teacher stopped providing virtual instruction, and that the missing services for speech must be made up (Parent Ex. A at p. 6). The parent argued that on October 5, 2020, the district illegally refused to allow the student to participate in virtual learning (id.).

As a resolution, the parent requested that the student repeat the eighth grade, that the student meet with a teacher "at library" for math, science, social studies, and related services as reflected on the student's IEP, and that reimbursement for private tutoring at a cost of \$2,000 be provided (Parent Ex. A at p. 6). In addition, the parent argued that an OT evaluation was needed to prove that the student required a sensory diet (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 18, 2021 for a prehearing conference to identify the issues in dispute, followed by three hearing dates to address the district's application for the appointment of a guardian ad litem, and eight additional days of proceedings to address the merits of the case, concluding on May 12, 2021 (IHO Decision at pp. 4, 7; see Tr. pp. 1-2819).

After the conclusion of the January 18, 2021 prehearing conference, the IHO summarized the issues for the 2019-20 school year as the elimination of a sensory diet in the May 2020 IEP, a dispute that the annual goals were vague and not measurable, a failure to address and remedy a bullying issue that began sometime in January 2020, services missed after March 13, 2020, a failure to provide OT and speech-language services at the frequency indicated in the student's IEP, and that the student did not make progress towards two annual goals (IHO Ex. I at p. 1). For the 2020-21 school year, the issues were identified as a shutdown of the student's Google classroom during the summer, a failure to recommend a sensory diet for the student, the annual goals were repetitious and vague, a failure to offer remote instruction after October 6, 2020, and the adequacy of the recommended speech-language services (id. at pp. 1-2). In addition, the IHO noted that the parent's request for an IEE (encompassing neurological, speech-language, and OT evaluations) (id. at p. 2). Finally, the IHO indicated that the parent raised issues regarding the provision of a 1:1 teaching assistant, the student's classification, and an objection to the use of a calculator in her due process complaint notice and requested that the parent confirm if she wanted to pursue those claims (id.).⁴

On February 8, 2020, the district made an application for the appointment of a guardian ad litem to protect the interests of the student (IHO Ex. III).

In a February 18, 2020 email, after the second day of the hearing, the IHO sent the parties a memorandum outlining her interim order that the district arrange for an independent psychiatric examination and that the district arrange to have its technology director and a teacher or other member of the student's education team make an appointment with the parent to evaluate the student and determine the reasons that the student had not been able to log onto his classes and participate and receive his instruction remotely (IHO Decision at p. 14; IHO Ex. X).

In a February 24, 2021 email to the parties, the IHO stated that she ordered the appointment of a guardian ad litem during the hearing that took place that day (IHO Ex. XI at p. 1). The parent responded indicating that she was pleased with the appointment of a guardian ad litem because she would receive help with understanding the governing State regulations and with the denial of FAPE (id.). She also indicated that she "[u]nderstand[s] I cannot interfere with [d]ecision making for [the student's] [e]ducational needs" (id.).

In an interim decision dated March 21, 2021, the IHO determined the parent's interests were inconsistent with those of the student and authorized the district to appoint a guardian ad litem (March 21, 2021 Interim Decision at pp. 16, 19). In addition, the IHO ordered the continuation of the student's remote instruction; requested that the CSE reconvene to review the two independent evaluation reports submitted by the parent; directed the CSE to consider assigning the student a full-time aide to monitor, identify, and offer support to address any behaviors (of the student or the parent) that prevented the student from accessing his instruction and to collect data to allow the district to conduct a functional behavioral assessment (FBA); and called for the parties to cooperate in securing a psychiatric evaluation (id. at pp. 16-17).

⁴ The district submitted a response to the parent's due process complaint notice, dated January 18, 2021 (Dist. Ex. 2).

At the March 11, 2021 hearing, the parties again discussed limiting the scope of the proceeding (Tr. pp. 848-878). The IHO found that the parent agreed to drop her claims regarding the annual goals for the 2019-20 school year, her claims regarding a classification of autism, and her requests for IEEs (except for a speech-language evaluation), and the parent also indicated that she "hoped" the use of a calculator was no longer an issue (Tr. pp. 873, 874-75).

In a decision dated July 21, 2021, the IHO found the student was denied the opportunity to receive a FAPE since the time schools closed in March 2020 (IHO Decision at pp. 1-89).⁵ With respect to the missed services during the 2019-20 school year, the IHO stated that she could rely on the testimony of the director of special education and related services when she testified that the student had "not been learning at all... in any measurable way since March 2020" (*id.* at p. 62). The IHO found that the student's need for 1:1 assistance upon his entry into the school district in September 2019 was well documented and "even compelling" and further found the CSE's failure to reconvene, reconsider, and revisit the student's need for a higher level of support after receiving the first report of bullying in March 2020 and again in September 2020 as an example of a missed opportunity and further evidence of a continuing denial of the student's right to a FAPE (*id.* at pp. 69-70). The IHO found that the district's failure to refer the matter regarding bullying to the CSE to evaluate the student and to develop, in September 2020, a transition plan to address his fears and to prevent a recurrence, was a violation of his right to a FAPE (*id.* at p. 62). However, the IHO also found no testimony or documents offered by the parent that rose to the level of cyber bullying or bullying as defined in law (*id.* at p. 61). Further, the IHO concluded that the student did not access any of his related services during this time and found that it reflected the much larger issue of the failure to access or receive any meaningful instruction from mid-March 2020 when remote instruction began through early May 2021 when the student returned to school (*id.* at pp. 62-63).

The IHO found that the superintendent's decision to exclude the student from remote instruction after October 6, 2020 constituted a disciplinary change of placement and found no evidence that the district followed proper procedures before invoking it and further found that this not only impeded the student's right to a FAPE but also significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (IHO Decision at pp. 72-75).

The IHO also addressed a number of issues in which she did not find in favor of the parent. Based on her review, the IHO found nothing that required a separate document referred to as a "sensory diet" to meet the student's needs and found that the accommodations included in the 2020-21 IEP, including natural movement breaks every 40 minutes, were appropriately designed to meet the student's sensory needs (IHO Decision at p. 59). Regarding the parent's allegation that her son's summer 2020 program was terminated early, the IHO found that the district met its burden of proof on this issue when it represented that although available, it appeared that the student did not access the program and further noted that the services offered were not recommended special

⁵ As a preliminary matter, the IHO found that the parent "agreed to eliminate all issues involving the IEP for the 2019-2020 school year, and her request for IEEs, except for a speech and language evaluation" (IHO Decision at p. 22). However, earlier in the decision the IHO noted that the district's attorney correctly asserted that there had not been a request for an independent speech and language evaluation in the parent's due process complaint notice (*id.* at p. 4 n. 7).

education services or compensatory services and therefore there was no basis to find a violation of the IDEA or State regulations (*id.* at pp. 63, 71). The IHO further found that the annual goals on the IEPs developed for the 2020-21 school year were neither repetitious nor vague and included all necessary elements (*id.* at pp. 63-64). The IHO found no basis to support the parent's claim that the student's speech-language services were inadequate (*id.* at p. 64). In addition, the IHO noted that the issues involving the denial of an IEE request, classification, and use of a calculator were resolved (*id.* at p. 64). The IHO also declined to order the district to reimburse the parent for the cost of tutoring she acquired for her son almost immediately after he enrolled in the district (*id.* at p. 71).

Based on her findings, the IHO ordered the district to provide the student with a "[c]ontinuation of placement in a 12:1:1 class with the same level of 1:1 teacher support as previously offered," psychological counseling twice a week and parent training at least once a week, an assigned psychologist to serve as the student's case manager, continuation of speech-language services at a minimum of two sessions per week, continuation of OT services, social skills training at least once per week, a 1:1 aide assigned during all unstructured activities, an additional aide/assistant assigned to the student's class, a resource room program no less than three times per week, development of keyboarding and word processing skills, a vocational assessment to identify the student's areas of interests and skills, biweekly team meetings for the first two months of school (including assignment of a consulting psychiatrist), a team interview with the student (after the first few weeks of school) to identify any behaviors that interfere with his learning, and a psychiatric evaluation (IHO Decision at pp. 79-82).

As compensatory services, because the student was unable to access remote instruction between mid-March to the end of the 2019-20 school year, the IHO ordered the district to provide 60 additional speech-language sessions (once per week extending through the 2020-21 school year), once per week direct or indirect consultations for OT, and additional instructional services for 120 hours to include the equivalent of two hours of 1:1 or small group instruction with a maximum of three students with similar needs (IHO Decision at pp. 84-85).

For instruction missed between October 7, 2020 and January 4, 2021, the IHO awarded the student 250 hours of compensatory education in addition to 185 sessions of speech-language services and 185 sessions of "consult OT services" (IHO Decision at pp. 86-87). Additionally, the IHO ordered the CSE to meet to amend the student's 2020-21 IEP accordingly (*id.* at p. 87).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision and alleges that "[t]he IHO acted in a biased, arrogant and imperious fashion towards the [d]istrict and its legal counsel," engaged in improper communications with the parent and rendered multiple interim determinations based on materials not properly admitted into the hearing record. The district argues that the IHO erred in denying the district's recusal application.⁶

⁶ Prior to receiving the district's request for review, the parent sent the Office of State Review a letter dated August 11, 2021, which was received on August 13, 2021. The Office of State Review responded to the parent's letter on August 16, 2021, with a copy to counsel for the district. As part of the August 16, 2021 letter, the parent was directed to the instructions for preparing, serving, and filing an answer available on the Office of State Review's

The district argues that the IHO erred in deciding issues that were not before her and in awarding relief that was neither requested nor appropriate. The district alleges that the IHO found that the parent withdrew her claims regarding the 2019-20 school year and does not appeal from that finding; however, according to the district, the IHO thereafter inappropriately made findings with respect to the manner in which IEP services were provided to the student during the 2019-20 school year. The district noted that the IHO determined that the only issue related to the 2019-20 school year was the district's response to a March 2020 bullying allegation; however, the district asserts that the IHO erred in going beyond the allegation of bullying in that after determining the district's findings regarding the incident were not invalid, the IHO went on to find that the district's failure to refer the matter back to the CSE to evaluate the student and develop a transition plan constituted a violation of the student's rights to a FAPE.

The district argues that the IHO's finding that the CSE denied the student FAPE when it failed to recommend that he be provided a 1:1 aide upon his initial entry into the district schools or to thereafter revisit the issue during a time that the student was reportedly doing well within the CSE-recommended program was unsupported by the hearing record. The district also argues that after finding that the parent acted in a manner that was inconsistent with the student's interests, the IHO erred and found that the student's failure to access such educational supports required an order of compensatory education regardless of fault.

With respect to the IHO's findings regarding the period after October 5, 2020 when the district ended the remote learning option for the student, the district argues that the IHO erred in determining that there was a governor's order that provided parents an unqualified "right to choose whether to return their children or continue remote instruction for the 2020-2021 school year." In addition, the district argues that the IHO erred and improperly determined that the superintendent's decision to remove the virtual educational option based upon repeated violations of the district's code of conduct and to instead offer the student the very program that was set forth in his IEP constituted an unlawful disciplinary action.

Turning to the district's arguments regarding the relief awarded to the parent, the district argues that the IHO improperly determined that it was within her jurisdictional mandate to fashion an academic program that would address all of the student's academic and social needs regardless of whether such needs were at issue before her.

The district argues that the IHO's finding with respect to compensatory OT and speech-language services ignored the fact that the district continuously offered the student a full day in-person educational program for the entirety of the period between September 2020 through June 2021 and that the hearing record "unequivocally" demonstrates that there was no loss of services during this time period. The district argues, notwithstanding the fact that the 2019-20 claims were withdrawn, that the IHO's compensatory education award was "wholly irrational" and otherwise not supported by the hearing record.

The district argues that the IHO improperly considered IEEs that were not before the CSE at the time the challenged IEP was developed and the challenged actions took place, and as to which no amended due process complaint was filed. The district argues that the IHO's award of

website.

compensatory OT and speech-language services was irrational and unsupported by the hearing record.

Lastly, the district argues that the IHO denied the district fundamental due process by issuing a decision on the record at the last hearing date while disingenuously stating that she had not made up her mind as to the hearing issues and inviting the parties to engage in the "farical and futile act" of submitting post hearing briefs.

The district contends that the State Review Officer should sustain the instant appeal and find that the IHO's conduct of the hearing denied the district fundamental due process, that the IHO erred as a matter of fact and as a matter of law in denying the district's recusal application, and improperly decided issues that were not before her and fashioned relief that was neither requested nor appropriate. In addition, the district asserts that the IHO's finding that the district denied the student a FAPE from March 2020 through the date of the order and her findings with respect to OT, speech-language services, and the provision of a 1:1 aide were not supported by the hearing record; that the IHO's compensatory education analysis was legally flawed, irrational, and not supported by the hearing record; and that the IHO's order that the CSE meet and develop an IEP was unlawful and otherwise unsupported by the hearing record.⁷

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

⁷ The parent did not file an answer with the Office of State Review; however, in a letter to the Office of State Review dated September 20, 2021, the parent requested that "the state review stop." In an additional letter dated October 8, 2021, the parent requested that the decision of the State Review Officer be expedited to "close" the case.

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" (Andrew 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 Andrew 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. Scope of Impartial Hearing

The district argues that the IHO "erred in deciding issues that were not before her" (Req. for Rev. ¶4). More specifically, the district asserts that the IHO found the parent withdrew any claims related to the 2019-20 school year, then inappropriately went on to make findings regarding the implementation of the student's IEP for the 2019-20 school year. The district asserts that the claim regarding the denial of access to remote instruction should be limited to the period from October 8, 2020, when the district removed the virtual option, through January 4, 2021, when the student was permitted to resume virtual instruction. In addition, the district contends that the IHO improperly expanded the scope of the hearing in going beyond the March 2020 bullying allegation by making findings as to the district's failure to refer the matter back to the CSE to evaluate the student and develop a transition plan. The district asserts that the IHO should have limited her decision to the specific issues the IHO identified as being raised.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has 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" (Andrew F., 137 S. Ct. at 1000).

authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

As noted by district counsel during the hearing, the parent's due process complaint notice in this matter "wasn't a model of clarity in terms of the issues that it sought to address at the hearing" (Tr. p. 911; see Parent Ex. A). Accordingly, a large portion of the hearing was devoted to attempting to narrow down the issues presented for the hearing with some success and with some inconsistencies (see Tr. pp. 1-123, 848-78, 911-32; IHO Exs. I; X; XIII; XIX; see also IHO Exs. XX-XXVI).

For example, counsel for the district was exasperated at one point during the hearing, commenting that "[the issues] continue[] to morph even as to today. Each time we discuss the issues, they appear to change" (Tr. p. 878; see Tr. pp. 848-78; IHO Exs. I at pp. 1-2; XIII at pp. 1-2). Counsel for the district's frustration culminated in a string of complaints regarding the conduct of the hearing process, focused on the length of the preliminary conference and subsequent hearings on the appointment of a guardian ad litem, the IHO's acceptance and responses to numerous emails sent by the parent during the hearing, the IHO's interim decisions regarding the student's placement during the proceeding and involvement in a DASA investigation, and counsel's impression that the IHO was acting more as a "special master" than an IHO and "assumed to take jurisdiction over those issues that [she was] inviting the parent to file an amended due process complaint about" (Tr. pp. 911-21). Counsel for the district concluded by requesting that the IHO recuse herself, citing the IHO's statement during the hearing that the student not receiving instruction was an "ongoing wrong on the part of the district that must be the subject of a compensatory education order" regardless of the reason for the student not receiving instruction (Tr. pp. 921-22; see Tr. pp. 903-06).

In response, the IHO declined to recuse herself and noted that she believed her actions during the hearing were appropriate "because the nature of this complaint is one of ongoing issues, ongoing issues that involve a student who both parties have agreed and I have found that both parties agreed he has been without instruction for the better part of a year" (Tr. p. 922). The IHO further indicated that although the parties could spend days "discussing whether or not [the student's] goals are correct, whether an independent evaluation, whether the parent requested them and was denied an independent evaluation for speech and language, the use of a calculator, et cetera . . . the real issue is whether or not [the student] returns immediately—it's the new IEP, if you will, or the old IEP" (Tr. pp. 924-25). The IHO went on to state that she "continue[d] to see some of these issues as continuing and ongoing" and that she "ha[d] an unrepresented parent and a complaint with ongoing issues" (Tr. pp. 926, 927-28).

Despite the contentious exchange during the hearing, the IHO clearly set forth the issues to be resolved during the hearing on multiple occasions (IHO Exs. I; XIII; IHO Decision at pp. 4-5). Additionally, for the most part, the IHO addressed the issues that she identified as being a part of the proceeding in her decision; for the 2019-20 school year, the IHO addressed the lack of a recommendation for a sensory diet, the lack of a recommendation for a 1:1 teaching assistant,

reimbursement for private tutoring, the March 2020 bullying allegation, and missed services from March 13, 2020 through the end of the school year, and for the 2020-21 school year, the IHO addressed the shutdown of access to the student's Google classroom during the summer, the failure to recommend a sensory diet, the sufficiency of the student's annual goals, the adequacy of the recommendation for speech-language services, the lack of a recommendation for a 1:1 teaching assistant, and the district's failure to offer remote instruction after October 6, 2020 (IHO Decision at pp. 58-75).

Initially, while the district contends that the IHO erred in addressing any issues related to the 2019-20 school year and awarding compensatory education for services missed during that school year, after finding that the parent withdrew her claims related to the 2019-20 school year, a review of the hearing record shows that the parent only withdrew certain claims, which were properly identified in the IHO Decision as being withdrawn (see Tr. pp. 873, 874-75; IHO Decision at pp. 4, 22-23, 64, 70).

The district's primary contention with the issues addressed by the IHO appears to be that after finding the March 2020 bullying allegation to not be supported by the hearing record, the IHO went on to address the parent's concerns about sending the student back to school in September, ultimately finding a denial of FAPE for not referring the matter to the CSE to evaluate the student and develop a transition plan to address the student's fears (IHO Decision at pp. 61-62). Upon review, the issue identified as being a part of the hearing was clearly specified as "the March 2020 incident" (see IHO Ex. I; XIII; Parent Ex. A at pp. 4-5); having addressed the March 2020 incident, the IHO went outside the scope of the hearing in finding that the district was required to conduct an evaluation of the student and draft a transition plan in anticipation of the parent sending the student back to school in September 2020. Accordingly, these issues were outside the scope of the impartial hearing and are outside the scope of review in this appeal.

The district's final remaining contention regarding the scope of the hearing relates to the relief awarded by the IHO rather than the issues presented. The district asserts that the IHO went outside the scope of the hearing in awarding relief that was not requested by the parent. As discussed above, the due process complaint notice included a request for limited, specific items of relief—that the student repeat the eighth grade, that the student meet with a teacher "at library" for math, science, social studies, and related services as reflected on the student's IEP, reimbursement for private tutoring, and an OT evaluation to prove that the student needed a sensory diet (Parent Ex. A).⁹ As relief, the IHO awarded compensatory educational services, as well as a detailed list of specific items that the district was required to include on the student's IEP going forward (IHO Decision at pp. 79-88). Additionally, the IHO noted that while an IHO may not address issues that were not included in the parent's due process complaint notice, she did not find anything to limit her authority to order remedies consistent with law and designed to address violations of a student's

⁹ In a couple of emails sent to the IHO during the hearing, the parent requested a temporary placement for the student (Parent Exs. AA; FF). The first, dated March 15, 2021, requested that the student be placed at a BOCES (Board of Cooperative Education Services) school (Parent Ex. AA). The second, dated April 26, 2021, requested that the student resume remote instruction, or if that was not possible, home instruction with related services (Parent Ex. FF). Also, in her closing statement, the parent asked for a prospective program for the student, including 1:1 support, resource room, and writing supports, as well as that the student be evaluated annually (Tr. pp. 2738-41). To the extent that the parent wants the student to be evaluated annually, she is entitled to request that the student be evaluated each year (see 34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]).

right to a FAPE (IHO Decision at p. 78). With respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice to state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Accordingly, it was understandable that with the IHO's belief that there were ongoing violations, the relief may not have been known or available to the parent at the time of the due process complaint notice.

However, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, such as the IHO's order in this matter directing the specific contents of a future IEP, under certain circumstances, has the effect of circumventing 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 Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [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"]). In ordering a specific set of directives required to be included in a future IEP for the student, the IHO improperly stepped into the role of the CSE (see Application of a Student with a Disability, Appeal No. 19-018 (explaining that it is far less problematic for an IHO to order discrete forms of compensatory education because it is expected that such remedial services will be provided in a setting in which the CSE will also continue to have the responsibility to develop and implement a comprehensive IEP taking into account all aspects of the student's needs)).

Additionally, at this point, the school years at issue—2019-20 and 2020-21—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2021-22 school year (see Eley v. Dist. 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 school year]). In fact, the hearing record shows that the CSE convened on two occasions subsequent to the parent's November 2020 due process complaint notice, in February 2021 and March 2021; both meetings held during the 2020-21 school year and conducted at the IHO's request (see Tr. pp. 264, 986-87; Dist. Ex. 105; 112). The IHO acknowledged these two CSE meetings in her decision and further acknowledged that she did not have jurisdiction over the IEPs developed at those CSE meetings and that she was not making a determination as to the student's then-current programming (IHO Decision at p. 72 n. 82). Under these circumstances, it is difficult to understand how the IHO's directive to alter the student's IEP going forward was not circumventing the CSE's review of information about the student's progress and assessment of the student's needs to formulate a program. It is especially troubling, as the IHO directed a program that, for the most part, was not requested by the parent or acceded to by the district. In the instances, where State level review has found an award of a prospective program as an appropriate remedy, those decisions have tended to include a finding that the awarded program is viewed as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review, with the parent assuming the

risk that unforeseen future events may render the relief undesirable (see Application of a Student with a Disability, Appeal No. 19-018).

Based on the above, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored as part of the underlying proceeding and a resulting award of compensatory education, if necessary, which was also awarded by the IHO. Accordingly, the IHO's award of a prospective placement was not an appropriate remedy under the circumstances presented in this matter.

2. Conduct of the Impartial Hearing

Congruent with the district's objections to the IHO reaching issues that were not properly before her, the district further objects to the manner in which the IHO conducted the impartial hearing asserting that the IHO denied the district fundamental due process. According to the district, the IHO "abandoned her role as an impartial hearing officer and improperly assumed the roles of counsel for the district, counsel for the parent and student, social worker and overall Special Master for all matters involving the student" (Req. for Rev. ¶2). The district's more specific objections relate to the IHO engaging in improper communications with the parent, denying the district's application for the IHO to recuse herself, and issuing a decision on the record at the last hearing date.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Despite the wide latitude afforded to an IHO with respect to conducting the impartial hearing and ensuring that there is an adequate and complete hearing record, as discussed above, it is well settled that adherence to the fundamental tenets of due process require that an IHO refrain from unilaterally expanding the issues before him or her without the express consent of the parties, particularly where the complaining party has not formally moved to amend the due process complaint notice. Moreover, I am not aware of any authority that supports expanding the IHO's already flexible role to encompass an oversight capacity with respect to alleged continuing violations by the district as they occur in real time. Relatedly, while email can be a convenient method of addressing scheduling issues and, in some instances, evidentiary issues that arise during an impartial hearing, there is likewise a dearth of support for the notion that an IHO's authority to conduct the hearing within his or her broad discretion extends to the conduct of substantive aspects of the impartial hearing via email, essentially "off-the-record," without the same due process protections as the swearing in of witnesses, ability to assess testimonial credibility, entertain real-time objections or to allow each party the equal, or at least, equivalent, opportunity to be heard on an issue. Here, the IHO engaged in extensive email communications with the parties during the course of the impartial hearing and, particularly with respect to the parent, essentially encouraged an "open door" policy regarding the content and frequency of the emails she received. While the IHO ultimately admitted these emails into the hearing record, they are not so easily incorporated with the more official record of the impartial hearing which consists of sworn testimony and documents properly admitted into evidence. Indeed, by engaging so readily in email communications with the parent, the IHO ran the risk of creating a de facto parallel proceeding with its own factual representations, evidentiary rulings and impact on orders which were issued during the "official" impartial hearing.

However, given that the IHO otherwise clearly identified the issues to be addressed at the hearing and the district was afforded the opportunity to present witnesses and evidence and to assert arguments and objections within the official proceedings, I do not find that the district's right to due process was so compromised that it was unable to defend against the parent's claims or that recusal by the IHO was warranted. Additionally, I note that the IHO made repeated efforts to ensure that the district was copied on the parent's emails and periodically solicited briefing from the district with respect to issues raised by the parent via email. Nonetheless, the district's concerns regarding the extensive email correspondence initiated by the parent and largely indulged by the IHO, however, is wholly legitimate. While it would not be sufficiently illuminating to the substantive issues raised in this appeal to summarize the approximately 300 pages of emails at issue (see IHO Exs. X; XI; XII; XIII; XIV; XV; XVII; XVIII; XIX; XX; XXI; XXII; XXIII; XXIV; XXV; XXVI), a review of the emails reveals a consistent and disturbing pattern whereby the parent, sometimes multiple times a day, would email the IHO with an amalgam of accusations against the district, and the district's counsel, concerning alleged violations of her rights and the student's rights, screenshots of computer screens, video and audio recordings, photographs and documents, sometimes copying the district's counsel and the district staff and administration, sometimes not (and sometimes directly addressing the district and district's counsel but copying the IHO). The IHO would then attempt to clarify the parent's claims and whether she intended to seek admission of additional evidence into the official record which would lead to more email exchanges and additional claims and documents sent and so on. Accordingly, the "continuing violation" referred to by the IHO was never part of the official hearing with respect to the issues initially raised by the parent in her due process complaint notice or identified by the IHO at the outset of the impartial hearing, further clarified during it and ultimately addressed in her decision,

but was instead a product of the parent's continuous claims and assertions, in real time via email, of alleged wrongdoing by the district.

Accordingly, the email exchanges, rather than serving a clarifying function, provided a constant background thrum of allegations that never made it into the official proceedings but nonetheless had a visible impact on the IHO's conduct of the impartial hearing, including, as one example, her interim directives that the CSE meet in February and March of 2021. While the IHO's concern with the student's continued absence from instruction during the pendency of the hearing was understandable, and this matter perhaps represented several unique elements which are unlikely to be repeated, I feel compelled to emphasize that despite the flexibility and discretionary aspects of the role, the IHO is nonetheless subject to certain restraints, namely the general mandates of due process and impartiality, which must inform the particularities of an IHO's decision making with respect to his or her conduct of the impartial hearing process.

B. 2019-20 School Year

As an initial matter, since the IHO determined that the parent agreed to "drop" certain of her claims regarding the 2019-20 school year, identified such claims in her decision and the parent has not answered and contested this finding, it is final and binding and these claims do not require further analysis (see IHO Decision at pp. 4, 22). Accordingly, the claims before me on appeal with respect to the 2019-20 school year are limited to the lack of 1:1 instruction for the student and implementation of the student's IEP for part of the school year, both of which shall be discussed below.

1. Need for 1:1 Support

The district appeals from the IHO's finding that the student required a 1:1 aide when he entered the school district and thereafter.¹⁰ The IHO determined that multiple reports, including the draft IEP from the prior school district (Dist. Ex. 3), as well as an August 2019 psychological evaluation report (Dist. Ex. 14), indicated a need for 1:1 support (IHO Decision at pp. 65-70). The IHO further determined that the student's IEP contained a special alert indicating the student "require[d] close supervision when in unstructured environments due to his social needs" (IHO Decision at pp. 68-69). The IHO appears to have indicated that an appropriate support to address this need would have been a 1:1 aide (id.). The IHO found that the student's need for 1:1 assistance upon his entry into the school district in September 2019 was well documented and "even compelling" (IHO Decision at p. 69).

¹⁰ Although used interchangeably throughout the hearing a teacher aide is different from a teaching assistant, although both are considered supplementary school personnel (see 8 NYCRR 200.1 [hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58 [a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

In arguing that the student needed a 1:1 aide, the parent pointed to school reports and meeting comments attached to the May 2019 IEP which included that the student relied on "aide support" for academic tasks, benefitted in the past from 1:1 support, and that the student's nonpublic school reported that the student required, among other supports, a 1:1 aide to be successful and requested an aide from the parent all of which contributed to the parent's argument that she believed the May 2019 IEP included the recommendation for a 1:1 aide (Tr. pp. 2100-04, 2107-11; 2016-18; see Parent Ex. Y at p. 2; Dist. Ex. 3 at pp. 2-4, 12).

Within the August 2019 psychological evaluation report, the evaluator stated that a review of educational records indicated that the student had had several academic supports including 1:1 support during his elementary school years and that the student tended to rely heavily on the support of his 1:1 teaching assistant (Dist. Ex. 14 at pp. 1-3).

As noted earlier, the hearing record shows that the student had 1:1 teaching assistant support throughout the day as recently as fall 2018 while he was attending a program in another district which included special class math, ICT services in English and daily resource room (Dist. Ex. 14 at p. 3). At a February 2019 CSE meeting, in response to the parent's inquiries into the student's need for a 1:1 aide, the other district's CSE explained to the parent that if the student attended the recommended 15:1+1 special class program the student would no longer need a 1:1 aide due to the staffing in the classroom which could address his needs appropriately and further noted that the CSE would monitor the student's need for additional adult support (Dist. Ex. 3 at pp. 3-4).

In summer 2019 the student's family moved into the district involved in the instant matter with an existing IEP (May 2019) from his prior school district (Tr. p. 935; Dist. Ex. 4 at p. 1).

The district director of special education and support services (director) testified that when the student was first registered in the district in August 2019, the CSE conducted a transfer meeting where they met with the parent, related service providers, and the secondary supervisor of special education; reviewed the "sending" district's IEP; shared "all the records we had for him" and discussed how they could implement the prior IEP as closely as possible and "put the program in place" (Tr. pp. 207-10, 935-37). Also, the director stated that the CSE planned to reconvene soon after to see how the transition had gone and make any revisions to the student's IEP (Tr. pp. 208, 210-11, 936). The director stated that prior to the parent registering the student in the district in August 2019 the student was in a variety of placements and testified that it was her understanding that in the last few years the student had not had a 1:1 aide (Tr. pp. 935, 941-42).

The May 2019 IEP present levels of performance included teacher reports that the student needed a great deal of support to stay organized and learn classroom rules and routines, and that he also needed assistance with daily procedures, retrieving the necessary materials needed for a lesson, and in reviewing class material and preparing for exams (Dist. Ex. 3 at p. 10). Reportedly the student was easily distracted by internal thoughts, displayed low stamina during assignments and complained frequently about fatigue, and needed a great deal of prompting and verbal praise to complete assignments (id.). In addition, the IEP reflected that the student needed visual schedules, personal anchor charts, flowcharts, and visual models to remain on task and be academically successful; clear behavioral and academic expectations; and to work on completing assignments independently and taking more accountability for his work (id.). Further, reports from the private parental placement stated that there were times when the student appeared to ignore the

teacher's directions and that it was unclear whether the student was ignoring the direction because he did not understand what was being asked of him, because he was distracted and was not fully attending to the teacher's directions, or because he chose not to complete the task that his teacher requested (*id.* at p. 12). The May 2019 IEP's present levels of performance identified the following environmental and human or material resources needed to address the student's needs; modified assignments, directions repeated, refocusing/redirection/prompts, extra time, re-teaching, clear expectations and directions, assignments broken down, graphic organizers, a sensory diet, visual cues and feedback, preferential seating, and the support of speech-language therapy, OT, and counseling (*id.* at p. 14). The parent reported that the student needed support for organization skills especially with noting assignments in his planner, relied on aide support for academic tasks, and received teacher support with transitions and adjusting to a new environment (*id.* at p. 2). The student's aunt reported that the student engaged in self-destructive behaviors at home which could not be addressed in that setting and was "spoiled" (*id.* at p. 2).

A review of the student's May 2019 IEP included the special alert that the student required close supervision when in unstructured environments due to his social needs and a number of supports and accommodations including frequent feedback from teachers and/or teacher assistants and preferential seating to access instruction and receive support from the teaching assistant, but did not call for or make the recommendation for a 1:1 teaching assistant or aide (Dist. Ex. 3 at pp. 1-21).

A number of evaluations of the student were conducted in summer 2019. Specifically, the student was seen for an OT re-evaluation in July 2019 due to parental concerns with the student's current programming and to determine his need for OT services (Dist. Ex. 12 at p. 1). Reportedly the student was then-currently receiving one 30-minute session per week of OT as 12-month services (*id.*). Overall evaluation results indicated areas of weakness including visual motor, visual perceptual, motor coordination, and bilateral coordination (*id.* at p. 4). The evaluator noted that the student was regulated for most of the testing, was pleasant to work with, and put forth his best effort (*id.*).

An August 2019 social history update indicated that the student was home schooled during the 2018-19 school year (Dist. Ex. 11 at p. 1). According to the social history update, while parentally placed in a private school from February to May 2019, the student was recommended to attend a classroom with eight students with a 1:1 teaching assistant (*id.* at pp. 1-2). The parent described the student as "about" three years developmentally delayed with eight-year-old play skills (*id.* at p. 2).

Results from the August 2019 psychological evaluation indicated that the student's overall intellectual functioning, using the Woodcock-Johnson Tests of Cognitive Abilities, 4th Edition (WJ-IV), fell into the very low range, which the evaluator noted was significantly lower than the full-scale IQ obtained three years earlier using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) (Dist. Ex. 14 at p. 11). The evaluator noted that the student's decline in his fund of acquired and vocabulary knowledge necessary for verbal reasoning could be the result of lack of exposure to new information both academic and experiential (*id.* at pp. 11-12). The student's short-term auditory working memory abilities were found to be a relative strength while his processing speed skills fell into the significantly below age level expectations and represented the student's weakest area of cognitive processing (*id.* at p. 12). With respect to social/emotional and behavioral functioning, the evaluator found that validity indices were indicated as cautionary for

both respondents (parent and student)¹¹, nonetheless reported that according to the parent, anxiety, attention problems, and functional communication were elevated to the clinically significant level and that the student's responses indicated that depression, atypicality, social stress, locus of control, and self-esteem were elevated on the self-report scale (id.).

The evaluator noted that the student's educational history was significant for difficulties related to performing academic tasks on grade level, specifically encoding and retaining grade level content materials (Dist. Ex. 14 at p. 11). The evaluator found the student's attention toward tasks was variable and waned on some as the difficulty level of the task increased and noted that the student requested, and was granted, the opportunity to visit with his parent several times over the two-day testing sessions (id.).

As discussed earlier, on August 20, 2019 the parent signed and consented to a placement agreement to the following proposed changes to the student's IEP without the necessity of a CSE meeting: ICT services in ELA and science, small group instruction (12:1+1 special class) social studies and math, two sessions of speech-language therapy per six-day cycle, two sessions of OT per six-day cycle, one session of counseling per six-day cycle, and a daily academic skills 12:1 special class (Dist. Ex. 99; see Dist. Ex. 4 at p. 18). The August 2019 IEP included a number of accommodations and supports for the student including providing structure and predictable routines, refocusing and redirection, frequent feedback from teacher and/or teaching assistant, breaking down long-term assignments into manageable tasks, use of graphic organizers, modified assignments, directions repeated and rephrased, use of adaptive writing paper, additional time to complete assignments, sensory diet, visual supports, and preferential seating in order to access instruction and receive support from the teaching assistant (id. at pp. 19-20).

In September 2019 the CSE reconvened to review the student's program (Dist. Ex. 5 at p. 1). Reportedly, prior to the CSE reconvene the student was "trialed" in a 15:1+1 special class for English, in place of ICT services, as per parent request (id. at p. 2). The student's special education teacher shared that the student's transition to his new school was going very well and noted that the student transitioned well throughout the building (id.). In addition, the special education teacher noted that the student sometimes needed reminders to look at his schedule, used self-talk to guide himself, was able to get to his classes independently, sat with students in his small class, and asked questions when needed and that while he occasionally needed reminders to open to a certain page he responded quickly to such prompts (id.). The student's general education science teacher indicated that the student followed and responded well to prompts and provided an example of when the classroom aide provided the student with a prompt one day and then the student was able to be independent with the task the following day (id.). The science teacher added that the student worked well with others, participated, and asked good questions (id.). The school psychologist reported that in counseling the student was friendly and willing to share and that there had been no social conflicts and no behavioral concerns raised by the student's teachers (id.).

The September 2019 CSE recommended for the student the same program and services recommended within the August 2019 IEP, with the aforementioned change to a 15:1+1 special

¹¹ The evaluator noted that the parent was not responding consistently, and the student was responding in a way which indicated that he was either experiencing extraordinarily high levels of maladaptive behavior or emotional distress or he was presenting his problems as being more severe than they were (Dist. Ex. 14 at p. 12).

class for English and a change from an academic skills class to a 12:1 special class for reading (Dist. Ex. 5 at p. 2; compare Dist. Ex. 4 at pp. 1, 18, with Dist. Ex. 5 at pp. 1, 14).

According to the meeting information summary, the parent raised concerns at the September 2019 CSE meeting that the student's previous IEP had recommended a 1:1 teaching assistant to redirect the student and keep him on task; however, the CSE chairperson explained that the discussion of an aide came from a nonapproved parental placement and that the student's current teachers did not see evidence that the student needed that level of support, noting that the small classes and the program aide were appropriately supportive and that a 1:1 aide would be overly restrictive (Dist. Ex. 5 at p. 2). The September 2019 meeting information indicated that all CSE members, including the parent, agreed with the program recommendations but for that the parent was in disagreement regarding the need for a 1:1 aide (id.).

In December 2019 the CSE reconvened for a reevaluation review as the district had conducted an educational evaluation and a speech-language evaluation in fall 2019 and the parent indicated that the student recently was taken for a private neuropsychological evaluation (Dist. Ex. 6 at pp. 2, 5; see Dist. Exs. 15 at pp. 1-13; 16 at pp. 1-6).¹² Results of the November 2019 educational evaluation showed the student performing in the average range on word recognition fluency and decoding fluency; in the below average range on letter and word recognition, nonsense word decoding, reading comprehension, reading vocabulary, silent reading fluency, and math concepts and applications; in the low range on math computation, math fluency, and spelling; and in the very low range on written expression and written fluency (Dist. Ex. 15 at pp. 1-13). A November 2019 speech-language evaluation found the student performing within the average range on all tests and subtests with the exception of the areas of understanding spoken paragraphs, listening comprehension, and pragmatic language on which the student performed in the low range, very low range, and below average range, respectively (Dist. Ex. 16 at pp. 2-6).

Teacher reports shared at the December 2019 CSE meeting indicated that the student continued to transition well without reminders and was receptive to redirection, worked well with both students and adults, and that between the teacher and the classroom aide the student was appropriately responding to refocusing and redirection (Dist. Ex. 6 at p. 2). Reportedly, the December 2019 CSE reviewed all evaluation results, determined that the student's current IEP adequately met his needs, did not believe the student needed a "more restrictive setting" with a 1:1 teaching assistant or aide, and proposed the same program and services along with an additional speech-language annual goal and a rewritten reading annual goal (Dist. Ex. 6 at pp. 2, 3; compare Dist. Ex. 5 at pp. 1-18, with Dist. Ex. 6 at pp. 1-20). The parent disagreed with the CSE's recommendation to continue with the current program and requested a new evaluation (Dist. Ex. 6 at p. 3).

In addition, the hearing record includes a State Complaint findings letter, dated July 15, 2020, which did not sustain the parent's allegation that the district failed to develop an IEP that met the student's needs for the 2019-20 school year (Dist. Ex. 48 at pp. 1-8).

¹² The hearing record reveals that at the time of the December 2019 CSE meeting, the parent had not shared the results of the private testing with the district (Dist. Exs. 6 at p. 2; 28 at pp. 1-2).

Given the discussion above, the evidence in the hearing record shows that the August 2019 IEP was developed with the consent of the parent and included recommendations for small group instruction, related services, and accommodations to provide the student with an appropriate level of support. Further, the hearing record reveals that the CSE reconvened within the first month of school and again in December 2019 to review the student's programming, and that teacher reports shared at those meetings indicated the student had successfully transitioned to the recommended program without an assigned 1:1 aide. Therefore, the hearing record does not support the IHO's finding that the district denied the student a FAPE during the 2019-20 school year by failing to recommend a 1:1 aide (see IHO Decision at pp. 68-69).

2. Implementation

While the district appeals from the IHO's determinations regarding the 2019-20 school year on the basis that they were outside the scope of the hearing, as noted above, the IHO correctly addressed the implementation of the student's educational program after schools were closed in March 2020 due to the Covid-19 pandemic. The IHO then found that the student did not "receive any meaningful instruction from mid-March 2020 when remote instruction began, through early May 2021, when he returned to school" (IHO Decision at p. 63). However, as was discussed during the hearing, the IHO did not assess this finding as a denial of FAPE, but under the impression that the student is entitled to compensatory education due to missing services during the pandemic, "regardless of the reason" (Tr. pp. 903-05). Nevertheless, in her written decision, the IHO noted that to the extent guidance suggests that parental refusal should be considered in finding a denial of FAPE, the IHO found "no evidence that the Parent refused to access remote services at any time after schools were closed down" (IHO Decision at p. 85).

Pertinent to this issue, federal guidance, contemporaneous with the closure of the district's schools in March 2020, noted that the IDEA does not specifically address an school closure of more than ten days, and further indicated that if a district closed its schools and did not provide any educational services to the general student population, then the district would not be required to provide services to students with disabilities during that same period of time ("Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak," at p. 1, Dep't of Educ. [March 2020], available at <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/#Q-A-5>). However, once school resumed, the district would be required to make every effort to provide special education and related services in accordance with the student's IEP (id.). The guidance further indicated, in response to a question about selective school closures, that if a student did not receive services during a closure, the CSE "must make an individualized determination whether and to what extent compensatory services may be needed" (id. at p. 4).

Additionally, State guidance regarding the use of remote learning during the Covid-19 pandemic indicates that "the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically" ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 3, Off. Of Spec. Educ. Policy Memo [March 27, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). Additionally, in planning for continuity of learning, districts must consider ways of ensuring that students with disabilities have access to the remote instruction, "including strategies

to ensure that students with disabilities have equal access to the continuity of learning and receive educational benefits that are comparable to those received by others in the program and modified, or separate, aids and services necessary to provide access to students with disabilities" (*id.*). According to the guidance, "educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students" and that "if online or virtual learning is part of a school closure recommendation, the school district would not be required to amend students' IEPs as online or virtual learning would be considered an alternate mode of instructional delivery" (*id.* at pp. 3, 5).

Further State guidance provided that it was important to make every effort possible to provide required special education programs and services as this was the most effective way to mitigate the need to provide compensatory services ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers, at p. 5, Office of Spec. Educ. Policy Memo [April 27 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf>). The guidance further noted that it was also "important for school personnel and parents to work collaboratively and creatively during the period schools [we]re closed" (*id.*). The guidance continued describing that districts must communicate with parents in their preferred language, document outreach efforts, and maintain documentation on the instruction and services that were provided to each student (*id.*).

A full review of the hearing record in this case demonstrates that during the time that schools were closed from March 2020 to the end of the school year, the district considered and employed practices such as distance instruction, teletherapy and teleintervention, and meetings held on digital platforms and made appropriate efforts to ensure that the student had equal access to the same educational opportunities provided to the general education population.

At the time schools closed in March 2020, the student was receiving services pursuant to the December 2019 IEP. The December 2019 IEP recommended a 15:1+1 special class for ELA, ICT services for science, small group instruction (12:1+1) for social studies, small group instruction (12:1+1) for math, a 12:1 special class for reading daily, two 39-minute sessions per six-day cycle of speech-language therapy in a small group, two 30-minute sessions per six-day cycle of OT in a small group, and one 39-minute session per six-day cycle of counseling in a small group (Dist. Ex. 6 at pp. 1, 16-17).

The director of special education and support services testified that from September through March of the 2019-20 school year the student was thriving, navigating the building, progressing on his IEP annual goals, learning, and doing well (Tr. pp. 953-955). In addition, the director stated that multiple measures indicated progress with respect to the student's attentional control, his behaviors, and his ability to control and refocus and redirect (Tr. p. 955).

The parent argues that from March 2020 through the end of the school year the only instruction the student received was from 12:00 pm to 12:30 pm (Tr. pp 2407-08).

The director of special education and support services stated that because of the Covid-19 pandemic, the district modified its instructional offerings and went fully remote on or about March 16, 2020 (Tr. p. 955). The director explained that the fully remote instruction included a

combination of synchronous instruction, meaning live instruction using a virtual learning platform, and asynchronous assignments that were posted online for the student to work on independently (Tr. pp. 956, 1410). For the asynchronous instruction the director explained that the students were supposed to work on the posted assignments either with the support of the parent or independently and then submit and share those assignments with the special education teacher and the teacher of record (Tr. p. 957). The director explained that because the district believed that asynchronous work was not educationally appropriate for their special class students, the majority of the student's program was the live learning experience (synchronous) and she also shared that the student's related services were also delivered live (Tr. pp. 957-58; see Tr. p. 1410).

The director of special education and support services explained that for the synchronous instruction the student needed to "get on" and turn on his camera and explained that parents were asked to "not be visible and not engage," but that they could be off camera and support the student as necessary (Tr. pp. 956-57).

The parent acknowledged in a March 2020 email to the district that remote learning was challenging for a student with an IEP and "[m]ore so challenging" for her since she was not a teacher or tutor and she noted that she was overwhelmed with the expectations regarding the amount of work the student needed to complete (Dist. Ex. 35 at pp. 1-3).

The director of special education and support services testified that the student did not do well in the virtual classroom from March 2020 until the end of June, explaining that despite multiple trainings, home visits, conversations, and phone calls with the parent trying to get the student and the parent to understand how to sit in front of the computer, the student would not show his face or participate in the virtual learning (Tr. pp. 213-14, 241-42, 959-60; see Dist. Exs. 7 at pp. 2; 35 at pp. 1-3; 36; 37 at pp. 1-3; 38; 39; 40 at pp. 1-2; 41). The director testified that because the student was not accessing his virtual learning, she was in constant communication with the student's entire team regarding the supports the parent and student would need in order to engage in virtual learning (Tr. p. 1351).

The director of special education and support services stated that, before the pandemic, district staff used virtual learning platforms and saw that the student could log on and participate in the technology with quite some skill (Tr. pp. 216, 959). In addition, the director testified that in response to parent concerns regarding the student's ability to log in to the virtual classroom, the director of technology met with the parent and the student several times and he was able to watch them log in, he watched the student work with some faculty, and noted that "all the technological things were in place" (Tr. pp. 216-17; see Dist. Ex. 39). The hearing record reveals that the student was comfortable with computers and technology and that the student and parent were not having technology problems (Tr. pp. 216, 268, 285, 353, 357-58, 502-03, 508, 513-14, 692; Parent Ex. H; Dist. Ex. 107 at p. 1). The parent testified that the technology problem was on the district's end and that the district intentionally prevented the student from accessing remote instruction (Tr. pp. 353, 356-58).

Indeed, as reported by the director of special education and support services, the issue relating to the virtual learning was not the student's ability to log in, since that was happening and teachers "let him" into the virtual classroom; instead, the teachers saw the parent and not the student in front of the camera and sometimes the teacher heard from the parent or the student covered the camera (Tr. pp. 238-40). The director stated that the teachers tried to give the student

some encouragement and time, but because the teachers had a class to teach, they had to remove the student from the virtual classroom after a time (Tr. pp. 239-40).

The parent acknowledged that she was aware of the policy requirement that the student "should be in camera" to be connected with his instructional program and that she should not be on camera during instruction (Tr. pp. 331, 344, 569-70).

The director stated that despite repeated sharing of expectations with the parent in terms of her involvement in virtual instruction, the parent talked to the teachers during the virtual instruction and did not allow the student to connect with the teachers and the director noted that it was "alright" seeing both of them, with the parent sitting to the side of the student and helping, but that the teachers did need to see the student (Tr. pp. 218-20).

The hearing record also indicated that another obstacle to the student's learning during spring 2020 was the parent's conduct toward district staff, consisting of a pattern of harassing and abusive behavior which included emailing unreasonably long lists of questions and unreasonable demands, often several times per day, which violated the district's code of conduct (Dist. Exs. 36; 40 at p. 1; 42 at p. 1).

The occupational therapist testified that she provided in-person services to the student during the 2019-20 school year from September to March in accordance with his IEP (twice every six-day cycle) and that when the schools closed, she offered sessions in the same exact mandate (Tr. pp. 1276, 1278). With respect to the time period when schools were closed from March to June 2020, the occupational therapist stated that first she emailed the parent and offered virtual sessions "synchronously" (Tr. pp. 1278-79, 1311). The occupational therapist noted that she never heard back from the parent and so then she created a virtual classroom for the student, as well as for other middle school students and posted activities for the student to complete in accordance with his IEP (Tr. pp. 1279, 1311). The occupational therapist testified that she knew that the student was able to access the virtual classroom and the documents and lessons she had posted because she could see that he had accepted her "invitations" and she noted that the student logged into some of the documents, that he completed some, and that he did not look at some of the posts (Tr. pp. 1280-81). The occupational therapist stated that to her knowledge no one had contacted her on behalf of the student, to tell her that they were not receiving invitations, or they could not open documents (Tr. p. 1281).

The director of special education and support services testified that the speech-language therapist contacted families, including the parent, in March 2020 to inform them that they would be providing teletherapy via a virtual learning platform and asked whether the family would be accessing the virtual sessions or, if not, the speech-language therapist would post assignments that were aligned with the student's IEP annual goals (Tr. p. 1350). In addition, with respect to speech-language therapy, the director stated that since schools closed in March, she had provided home visits to "support the schedule," provided the schedule to include all of the student's related service providers, provided and posted individual schedules, created "our own" virtual classroom for the student, and the speech-language therapist posted a reminder in the virtual classroom with the link each morning there was a session (Tr. pp. 1352-53). The director further explained that she made sure all of the related service providers and special education teachers were offering services and implementing the student's IEP (Tr. pp. 1350-51).

The director of special education and support services testified that there were several virtual meetings with the special education teacher throughout the day (Tr. p. 958). The director noted that between March and June 2020, the student did not access any virtual/synchronous lessons but that he did complete some posted assignments (Tr. pp. 1352, 1384). The parent testified that during "lockdown" instruction included lessons and videos that were posted with an opportunity to review and relearn and that provided the student the opportunity to go at his own pace (Tr. pp. 486, 646). The student testified that in finishing the seventh grade (2019-20 school year) he had received some instruction (Tr. p. 690).

The student's June 2020 progress report reveals that some of the student's instruction was not delivered during spring 2020 as it included the comment that while engaged in distance learning, study skills annual goals involving selecting necessary materials to participate in lessons and working steadily on a task were not able to be addressed (Dist. Ex. 96 at p. 2). However, the student's June 2020 progress report also included the comment that the student "minimally accessed remote learning during the school closure" under most of his academic annual goals, included the comment that the student "minimally accessed remote speech and language therapy during the school closure despite it being offered," indicated that the parent declined services to address the student's social/emotional/behavioral annual goals, and showed that the student had achieved his motor skills annual goals (Dist. Ex. 96 at pp. 1-6).

Based on the above, the hearing record supports a finding that the district offered the student an appropriate virtual program consistent with the program recommended in the December 2019 IEP. Based on the hearing record, the program was made available to the student and the parent, the parent was aware of the program and what needed to be done to access it; however, the parent, through her actions, declined to take advantage of the offered program by making the student available for instruction. Finally, while the hearing record indicates that the IHO believed that the reason for the student's failure to access the instruction that was available did not matter in determining whether or not she could award compensatory education, compensatory education is a remedy available to make up for a district's denial of a FAPE (Newington, 564 F3d at p. 123)—not a remedy to make up for a parent's actions that have served to impede the district's delivery of instruction and services to the student. Additionally, as discussed above, the student was technically savvy enough to log into his classes and participate, and at this time it did not appear that he was losing instruction time due to his disability, but rather due to circumstances outside of the student's and the district's control. Accordingly, as the district offered the student an appropriate program, there was no basis for awarding the student compensatory education for the 2019-20 school year.

C. 2020-21 School Year

1. Need for 1:1 Support

As the IHO's discussion of the student's need for 1:1 support intertwined findings regarding both the 2019-20 and 2020-21 school years, and the district has appealed from this finding, some further discussion of this issue is necessary with respect to the 2020-21 school year. The IHO stated in her decision that she found no testimony or documents offered by the parent that rose to the level of cyber bullying or bullying as defined in law. However, at the same time, the IHO found that the lack of any response to the bullying allegations, at the very least, represented a missed opportunity to address the underlying issues (IHO Decision at p. 61). Specifically, in

addition to her findings regarding the 2019-20 school year, the IHO further found that the CSE's failure to reconvene, reconsider, and revisit the student's need for a higher level of support after receiving the first report of bullying in March 2020 and again in September 2020 as an example of such a "missed opportunity," as well as evidence of a continuing denial of the student's right to a FAPE (id. at pp. 69-70).

The district argues that although the IHO determined that there was nothing in the hearing record to contradict the district's findings regarding the March 2020 bullying allegation, she then erred in finding that the district's failure to thereafter refer the matter back to the CSE to evaluate the student and develop a transition plan to a program that would address the student's fears and prevent a recurrence of any incident similar to that which had already been determined not to qualify as bullying, constituted a violation of student's right to a FAPE. Although the issue as to the need for a transition plan and referral back to the CSE for an evaluation are outside the scope of the proceeding as discussed above, a review of the bullying allegation and the district's response is necessary to fully address the IHO's findings.

A review of the evidence in the hearing record regarding the incident at issue and the district's response does not support the IHO's findings that the district's response constituted a denial of a FAPE, particularly with respect to its decision not to recommend 1:1 support for the student during the 2020-21 school year.

On March 13, 2020 the parent shared with the director a handwritten note from a pediatrician indicating that the student was seen on that day reporting bullying and stating that his toes were stepped on and that he was punched in the stomach (Dist. Ex. 34 at pp. 1-2). The director forwarded the message to the principal and assistant principal (id. at p. 1). The director testified that the assistant principal looked into the claim in March of 2020 and that it was her understanding that there were investigations and discussions and that the assistant principal had tried to contact the parent to hear her concerns but never got a return call (Tr. pp. 982-83; see Dist. Ex. 123 at pp. 2-6).

The assistant principal testified that this was not one specific incident, but it was an ongoing issue in the cafeteria during lunch with a group of female students and the student (Tr. p. 1199). The assistant principal stated that he and district staff were aware of the issue the day before the district heard from the parent as the group of female students went to their guidance counselor asking for help managing and navigating some issue they were having at lunch (Tr. pp. 1199; see Tr. pp. 981-82). The assistant principal testified that the female students described some texts or contact via various social media platforms from the student over time and his pursuit of them in various ways ranging from chasing them to texting them both during lunch and then outside of school (Tr. pp. 1199-1200). The assistant principal explained that the students brought the issue to the guidance counselor when the parent had joined the "chat" and had sent some messages that surprised and concerned them (Tr. pp. 1200-01).

The assistant principal stated that on the day that the girls brought the issue to their guidance counselor, and again the following day, he reached out to the parent by phone to check-in and share that they were going to "work on this" but noted that he was not able to get through or leave a message (Tr. pp. 1203-04; see Dist. Ex. 123 at pp. 2-6). He stated that at that time there was not "any sort of action" as the girls were just asking for help and the girls did not "even come to me" (Tr. p. 1203).

The parent testified that starting in or around January 2020 "all of a sudden" a group of girls were pretending to be very friendly to the student, that the student was getting "bombarded" with texts, and that the girls were teasing the student in "an inappropriate way" (Tr. pp. 2130-34, 2145-46). The parent stated that while she did show the texts to a pediatrician, she did not save or keep a record of the texts (Tr. pp. 2135-36, 2517). According to the parent, in March 2020 she texted the girls and told them to stay away from the student and stop texting him, and that she also changed the student's phone number and told him not to give out his number without the parent's permission (Tr. pp. 2141, 2515-17). The parent stated that the texting stopped, but that she believed that when she told the female students not to talk to the student, that was when they hit him (Tr. pp. 2143, 2517-18). The parent testified that she spoke to the principal on March 12, 2020 and she showed him the doctor's note (Tr. p. 2148; see Dist. Exs. 34 at pp. 1-2; 104 at p. 5). The parent testified that the principal asked the parent to file a DASA report and that on March 26, 2020 she emailed a DASA report "probably" to the assistant principal and principal but acknowledged that she did not make the email transmitting the DASA report part of her exhibits at the hearing (Tr. pp. 2537, 2539-40, 2542-43).¹³ Also, the parent testified that she sent the doctor's note "much later with the DASA together" (Tr. p. 2528). In addition, the parent acknowledged that she did not remember following up with the district regarding the March incident again until September 2020 (Tr. pp. 2543-44).

The parent stated that she sent the DASA form to the principal after the September 17, 2020 meeting with the district (Tr. pp. 2555-56). Both the assistant principal and the director testified that the DASA incident report dated March 2020 was completed by the parent in September 2020 at a meeting with district staff and stated that there was not a similar form filed in March 2020 (Tr. pp. 977, 979-81, 1205-07; see Dist. Ex. 104 at pp. 1-5). Once the report was received from the parent in September 2020, according to testimony the assistant principal did a "full investigation" following the district's "typical proceedings for a DASA investigation" (Tr. pp. 983, 1207-08).

The assistant principal testified that he first reached out to the parent, noting that while he had the DASA form from her, at that point he wanted to speak to and interview her for this process but that he was unable to reach her (Tr. pp. 1208-09). In addition, the assistant principal testified that he spoke to the guidance counselor involved and the female students (id.).

The assistant principal testified that his findings and accompanying response from the investigation into the incident were found in a DASA report dated September 30, 2020 (Tr. pp. 1213-15, 1218-19; see Dist. Ex. 100 at pp. 1-3). The September 2020 DASA incident report included the parent's claim that a group of female students, who sat with the student at lunch, pressured him to join various social media outlets, made comments to the student threatening to "break his iPad" and that one of the students kicked the student on his foot (Dist. Ex. 100 at p. 3; see Dist. Ex. 104 at pp. 1-5). In detailing the specific incident and investigation, the assistant principal stated that numerous female students who were allegedly involved were interviewed regarding the specific incident and any related involvement with the student (Dist. Ex. 100 at p. 3). Reportedly, each of the students independently reported that the student had at or around the time of the reported incident sat at the same lunch table with the other students and had requested phone numbers and social media usernames to participate in "group-chat" with them (id.).

¹³ The parent also stated that she did not "have any official DASA complaint" (Tr. p. 2542).

Subsequently the student joined their group on various social media platforms and repeatedly made comments both online or in person at lunch that made the other students uncomfortable and reportedly the parent made threatening comments to the female group of students on the social media platforms, all of which the students shared with the school counselor (*id.*). The assistant principal noted that none of the students interviewed recounted anything about any physical contact between the girls and the student (*id.*). The September 2020 DASA report indicated that when the parent was contacted for further details regarding the incident the parent declined to allow the student to communicate with school officials (*id.*).

The parent testified that because the district did not do anything about the bullying, her concern was that the student would be bullied again (Tr. pp. 366-67). However, the assistant principal testified that the conclusion he reached was that the complaint was unfounded (Tr. p. 1217). Also, as discussed at length above, reports from when the student was attending school in-person before the closure in March 2020 indicated the student did well in his recommended program and therefore the CSE did not have cause to change the student's program to include a 1:1 aide (Dist. Exs. 5 at p. 2; 6 at p. 2).

During the 2020-21 school year, the parent obtained a private evaluation of the student (Parent C at p. 1). Within the February 2021 neuropsychological evaluation report, the clinical psychologist stated that the student required an executive function coach who could "break down assignments into component parts and enable him to have support every step of the way" on a daily basis (*id.* at p. 27). The clinical psychologist further explained that the coach would also function as an emotional facilitator to enable the student to ultimately function more autonomously (*id.*). The clinical psychologist testified that the 1:1 support "probably is necessary" for the student initially, as she thought there would be a lot of resistance on the student's part getting back into the school building (Tr. p. 1868).

In addition, the clinical psychologist reported the student required, among other things, an educational program with a group of students with similar learning profiles so that instruction would target the student's specific needs, a highly trained team of special and general educators, smaller class sizes with no more than 12 students, onsite clinical staff, a specialized program contained within a public school building so that the student had opportunities to gradually integrate into the larger community (Parent Ex. C at p. 27). The clinical psychologist acknowledged that her background information was limited to what the parent provided her and that she did not have any contact with anyone from the district (Tr. p. 1878). The clinical psychologist also acknowledged she did not know if the IEP the parent provided was the most current IEP and that she assumed there was a more current one "because of the date," but in asking for more information the parent said that was all she had (Tr. pp. 1878-79).

The hearing record reveals that the CSE reconvened in February 2021 and that to support the student's "transition back" to in-person instruction initiated the use of a program aide to supervise the student in the hallways and at lunch (Dist. Ex. 105 at pp. 1, 2; *see* Tr. pp. 984-85). At that time, the parent specifically stated that the student did not need additional supervision in the classroom because of the presence of a teacher and an aide (Tr. p. 985; *see* Dist. Ex. 105 at p. 2).

In addition, the hearing record shows that all of the student's IEPs that covered the 2020-21 school year called for refocusing and redirection, frequent feedback from teacher and/or

teaching assistant and preferential seating for the student to access instruction and receive support from the teaching assistant (Dist. Exs. 7 at pp. 12-13; 8 at pp. 13-14; 105 at pp. 14-15; 112 at pp. 16-17).

Here, the hearing record shows that the district appropriately developed the student's May 2020 IEP with small group instruction, a classroom teaching assistant and a number of supports and accommodations to support instruction and appropriately responded to the student's needs in February 2021 by adding the support of a program aide to supervise the student during less structured times. Therefore, the evidence in the hearing record does not support the IHO's finding that the level of 1:1 support provided to the student constituted a denial of a FAPE during the 2020-21 school year.

2. Implementation

The district appeals from the IHO's determination that the district's failure to provide the student with remote instruction from October 7, 2020 through May 2021 warranted an award of compensatory education and from the IHO's finding that there was no evidence the student received OT or speech-language therapy. The district asserts that the IHO erred in determining that an order by the Governor provided the parent with the right to choose whether to continue remote instruction for the 2020-21 school year and further erred in finding that the district's decision to remove the virtual education option constituted a disciplinary change in placement.

Initially, the district argued that there was no order requiring the district to provide remote services, and that "[t]he virtual option was a privilege that was subject to revocation for good cause" (Dist. Mem. of Law at p. 20). As argued by the district, the IHO did not provide any reference or citation for her statement that "[a]ccording to a Governor's Order, Parents had the right to choose whether to return their children or continue remote instruction for the 2020-2021 school year" (IHO Decision at p. 2 n. 2). Additionally, at first glance, in reviewing the executive orders related to the pandemic, there does not appear to be any specific order creating a parent option for remote instruction for the 2020-21 school year (see Executive Order [A. Cuomo] 202.37, 202.45, 202.60 [9 NYCRR 8.202.37, 8.202.45, 8.202.60]). However, the executive order addressing the reopening of schools for special education for summer 2020 required that any school providing in-person services "must follow State and Federal guidance" and the order permitting schools to reopen on September 1, 2020 indicated it was "subject to adherence to Department of Health issued guidance and directives" (Executive Order [A. Cuomo] 202.37, 202.60 [9 NYCRR 8.202.37, 8.202.60]). For summer 2020, the Office of Special Education of the State Education Department issued a response to a question about whether a district was required to provide remote services, stating "parents may decide not to have their children receive programs and services in-person. In the event a parent declines in-person services, students would continue to be entitled to receive 2020 ESY programs and services on a remote basis" ("Supplement #3 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State: Questions and Answers," Office Of Special Educ. Memo [June 20, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-3-covid-qa-memo-6-20-2020.pdf>). In addition, for the ten-month school year, the New York Department of Health issued guidance establishing minimum guidelines for the submission of reopening plans by each school district in the State ("Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools During the Covid-19 Public Health Emergency," Dept. of Health

[August 2020, updated June 2021], available at [https://www.governor.ny.gov/sites/default/files/atoms/files/Pre-K to Grade 12 Schools MasterGuidance.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/Pre-K%20to%20Grade%2012%20Schools%20MasterGuidance.pdf)).¹⁴ As part of that guidance, it was encouraged to prioritize efforts to return all students to in-person instruction; however, it was also noted that some individuals may not feel comfortable returning to in-person instruction and that they should be allowed to participate in educational activities with accommodations, such as "remote learning or telework, modified educational or work settings, or providing additional PPE to individuals with underlying health conditions" (*id.* at pp. 2, 4). In addition, the State Education Department issued comprehensive guidance for the reopening of schools ("Recovering, Rebuilding, and Renewing: The Spirit of New York's Schools," [July 16, 2020], available at <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>). The State Education Department guidance provides "if the parents/guardians choose not to send their child back to school, schools will need to provide instruction remotely" (*id.* at p. 31). Accordingly, although the IHO did not provide any citations for her position, based on review of the executive orders and available guidance, it appears the IHO was correct in her assessment that the parent had the option to continue remote instruction for the 2020-21 school year and that it was not just a privilege subject to revocation.

Turning to the facts leading up to the dispute concerning the student's access to remote learning during the 2020-21 school year, via a September 1, 2020 email, the parent, citing "unsettle[d] issues from [the] 2019-20 school year," informed the district that the student would be "virtual learning" fulltime (Dist. Ex. 52). In a September 8, 2020 letter acknowledging the parent's decision for the full virtual option for the 2020-21 school year, the district provided the parent with the following practices for virtual instruction; the student must have his video camera on when he was streaming into the classroom, the parent is to refrain from speaking to and interacting with the teacher or another student during virtual instruction, teachers and students should only see the student's face not the parent's face, and the recording of any virtual sessions was strictly prohibited (Dist. Ex. 53). In addition, the district reminded the parent of an April 2020 letter the district had previously sent the parent regarding her past conduct during virtual instruction and the expectations for what conduct was acceptable moving forward, which the district noted was attached again for the parent's reference (*id.*; *see* Dist. Ex. 42).

The evidence in the hearing record reveals that the parent did not follow the above expectations and engaged in conduct that included posting to the virtual classroom and appearing in the virtual classroom (Dist. Exs. 60; 65; 68 at p. 1; 70; 71; 116 at p. 3-4, 6, 8-9).

In a September 29, 2020 letter to the parent, the school principal shared concerns about the student's lack of participation in his virtual learning, as the student had not attended any virtual sessions or extra help since the school year began, was missing instruction, and was not engaging in school (Dist. Ex. 73 at p. 2).¹⁵ The principal further stated that it was essential that the student

¹⁴ I was unable to locate a copy of the original August 2020 guidance document prior to the issuance of this decision as it did not appear to be available online at the Department of Health or Governor's websites.

¹⁵ According to the September 29, 2020 letter, the principal, along with the assistant superintendent of human resources, the director of special education and support services, and the director of technology met with the parent on September 17, 2020 to discuss the student's remote learning (Dist. Ex. 73 at p. 2).

participated in his entire program regularly and be on time to all of his virtual classes, noting that a schedule outlining the classes for both odd and even days had been shared with the parent by his teachers and the director of special education and support services, and requested that the parent take the steps necessary to ensure that the student participated in his virtual lessons and completed the work assigned by his teachers (id.). The principal reiterated that the parent "should not and cannot" be visible on screen for the student's classes, that it was important that the student's teachers saw the student on screen when he was participating in virtual learning, and that the parent could not post comments on the virtual classroom or impersonate the student to post comments on the virtual classroom noting that this was a direct violation of the assistant superintendent's letter dated April 21, 2020 (id.).

The parent testified that at a September 17, 2020 meeting with district staff, they discussed the rules with respect to remote instruction (Tr. pp. 2550-51). The parent confirmed that she understood the rules of engagement of remote learning but that she never understood that her son was only to be given two opportunities to sign in and appear on camera in each class before he was removed from instruction (Tr. pp. 332-33).

The director of special education and support services explained the rule that the students had to show themselves on the camera and that parents could not interfere in the learning or instruction of others was a rule for all students (Tr. p. 1034). The director explained that the "two tries" rule was implemented because of the disruption to the learning environment of the other students and that the formal process of two attempts did not start until later in the 2020-21 school year—around January 2021 or later—because the teacher team needed direction about how to address the situation and also needed to continue to teach the students that were sitting in front of them (Tr. pp. 1033-37). The director noted that the two attempts were per class, so in an eight period school day, the student had 16 opportunities to participate (Tr. p. 240). The director further explained that teachers provided several warnings and made attempts to engage the student and would say things like; "please turn your camera on," "you can't walk away from the screen," "mom, please do not talk to us," "mom, please get away from the screen," but that when the student and parent were not listening, "we did remove him" (Tr. pp. 1036-37).

While the district did not provide any formal written policy on remote instruction, the hearing record reveals that the parent was informed of the remote learning policies and that the parent and student understood the policies (Tr. pp. 301, 331, 344, 347, 552, 554-55, 559, 567-70, 696-97, 699; Dist. Ex. 38; 53; 57 at pp. 1-2; 61; 65).

Although the hearing on the merits had not yet taken place, in her March 21, 2021 interim decision, the IHO found that "apart from offering some early assistance to address the problems, recommending counseling and parent training, referring the case to Child Protective Services on grounds of educational neglect, and ultimately terminating the Student's access to virtual instruction for almost three months while demanding the student return to school, the district offered little to avert the mounting crisis" (March 21, 2021 Interim Decision at p. 19). A comprehensive review of the hearing record does not support this position.

In September 2020, the district extended offers to help the parent and student with remote learning and to meet with the parent to hear her concerns and "see if we can make sure that [the student] has a good year" (Dist. Ex. 57 at pp. 1-2; 61; 116 at pp. 1-2, 7). District staff met with the parent on September 17, 2020 to discuss ways to help the student "virtually," effective

communication between parent and district, and any concerns of the parent and to provide support in connecting to the virtual classroom (see Dist. Exs. 57 at pp. 1-2; 61; 64 at p. 1; 65).

The district also took reasonable steps to provide the student with his recommended program remotely as selected by the parent. The student's special education teacher for the 2020-21 school year stated that she had "virtual" students and "in-person" students in her class (Tr. p. 1685). She explained that for the students whose parents had chosen the virtual option, the curriculum was the same, but was made "more virtual friendly" in the way the technology was used to access it (Tr. p. 1684). She also explained that she could see the student's screen and work, she could use "breakout rooms" for small group instruction, and she had a classroom aide who might check in with the virtual students while she was working with the students "in front of her" and they could switch; she noted it was a "little different" but that everyone got attention and "that interaction" (Tr. pp. 1684-85). The special education teacher stated that the students who were receiving their instruction virtually received their class instruction at the same time as the in-person students with the one exception that "specials" would only meet on the "cohort day" (Tr. p. 1687). The special education teacher stated that there was a schedule sent from guidance and that she also created a schedule for the student which included when to log on and links to the virtual classroom, which she sent to the parent and "posted" and she noted that the schedule was emailed multiple times that year (Tr. p. 1688; see Dist. Ex. 115 at pp. 1-2).

The special education teacher stated there were times that during science class she would get an alert that the student was in a different virtual classroom and that the student did not regularly appear in classes at the time that the schedule called for him to appear (Tr. pp. 1693-94). As a result, the special education teacher stated that staff started to prepare daily schedules for the student and that she had reached out to the student in September and offered to meet with the student to go over his schedule, but still the student was not following his schedule (Tr. p. 1693; see Dist. Ex. 116 at pp. 1, 7).

On September 15, 2020, the student's special education teacher sent the student an email noting that he needed help in math and offered an opportunity for the student to receive help in a virtual session (Dist. Ex. 116 at p. 5).

The special education teacher stated that she did not remember seeing the student in the waiting room of the virtual classroom in the first few months "much at all" (Tr. p. 1694). The special education teacher stated that on the occasions when the student did appear in the waiting room, she let him in but his camera would be off, he would not answer and that after a few prompts, she removed the student and instructed him to come back in with his camera on (Tr. pp. 1695-97). The special education teacher stated that this could happen a few times each period and that it was disruptive as the other students were waiting for her to come back to teaching (Tr. pp. 1696-98).

The director of special education and support services noted that the all-virtual option had been "disastrous" for the student as he was not accessing his education and the district had essentially begged the parent to send the student to school in-person (Tr. pp. 235-36). The district reminded the parent that the student was welcome to come to school each day and noted that they incorporated mask breaks and would be flexible with the student regarding his mask (Dist. Ex. 71).

In addition, the director of special education and support services explained that the CSE had recommended parent counseling and training and counseling for the student but that the parent refused both services (Tr. pp. 287-90; see Dist. Ex. 7 at pp. 11, 12). The director explained that the district continued to recommend counseling and social skills training but the parent declined them (Tr. p. 1039). In addition, the director stated that they tried home visits, technology support, and tutorials for the parent (Tr. p. 1041).

The student's first marking period progress report for the 2020-21 school year, dated December 7, 2020, included the following comment for all but one of his annual goals; the student began the year as an all-virtual student and did not join his classes or related services via the virtual platform (Dist. Ex. 97 at pp. 1-6). The progress report continued in stating that on October 8, 2020 the student was supposed to start attending school in person everyday as the virtual option was no longer available to him per the superintendent of schools and the student had not come to school and the report also noted the student had not submitted enough asynchronous assignments to inform progress on his IEP goals (id.). The one remaining annual goal, addressing the area of social/emotional/behavioral, included the comment that the parent had declined counseling services despite the CSE's recommendation (id. at p. 5).

The occupational therapist testified that during the 2020-21 school year she posted on the virtual classroom twice every six-day cycle a link for the student to join her for in-person, synchronous, OT sessions and stated that the student never showed up for a session (Tr. p. 1327). The occupational therapist further explained that while she had not received any communication from the parent regarding the student's failure to receive those services, she had made multiple attempts to reach out to the parent through email (Tr. p. 1327). The occupational therapist stated that she had not seen the student for OT services since March of 2020 and explained that she waited for the student in the virtual classroom on those scheduled dates and noted that the student had access to the service; if he logged in at any time during his scheduled time slot, she would have let him in the waiting room and would have seen him (Tr. pp. 1334-36).

Regarding speech-language therapy, the director of special education and support services explained that starting in the 2020-21 school year because the district had in-person instruction and therapy, assignments were no longer being posted but, for every virtual session, the district sent an email reminder and a link to the virtual classroom (Tr. pp. 1353-54). The director testified that while staff had tried to prompt the student to access his services through "day of" emails, individual lessons, individualized charts, and an individual virtual classroom, the student did not access his virtual speech-language services during the 2020-21 school year (Tr. pp. 1354-55).

Speech-language attendance for the 2020-21 school year shows that therapy was provided on just one occasion from the start of the school year until January and the daily log indicated that the student did not show his face or participate (Dist. Ex. 101 at pp. 2-3).

In October 2020, the district removed the virtual option for the student and, as discussed above, in the beginning of the school year, leading up to the removal of the virtual option, there were a number of difficulties with providing remote instruction to the student.

Within her interim decision regarding the appointment of a guardian ad litem, the IHO stated that "the record makes it clear, beyond any doubt, that this student desperately needs instruction outside his home as soon as possible" (March 21, 2021 Interim Decision at p. 18).

Similarly, in her final decision, the IHO found the student's difficulties accessing his education remotely were significantly affected by disability related issues and that it was "virtually impossible" for the student to sit still, concentrate, and stay on camera for 40 to 50 minutes at a time, particularly in view of his documented attentional issues and the distractions he faced at home (IHO Decision at pp. 56-57).

Indeed, the IHO noted that the parent observed her son's difficulties with the manner in which remote instruction was being delivered – "too many emails ...too fast ...the length" (IHO Decision at p. 57; see Tr. p. 646). Additionally, the IHO noted that the parent observed that the student's experience with live on-camera instruction beginning in September 2020 was quite different from his instruction during "lock down" from March through June 2020 when he had his own smart board and could review and pause the instruction and go back to it again, giving him the opportunity to go at his own pace (IHO Decision at p. 57; see Tr. pp. 575-81, 646).

The parent acknowledged in a March 2020 email to the district that remote learning was challenging for a student with an IEP and "[m]ore so challenging" for her since she was not a teacher or tutor and she noted that she was overwhelmed with the expectations regarding the amount of work the student needed to complete (Dist. Ex. 35 at pp. 1-3). In a July 2020 email to the district, the parent requested to be allowed to participate during virtual classroom sessions because the student needed prompts to stay focused and required redirection constantly during lessons (Dist. Ex. 47). In September 2020, the parent noted the student was overwhelmed with the process of virtual learning and acknowledged that virtual learning was not working for the student (Tr. pp. 485-86; Dist. Exs. 68 at p. 2; 71).

The October 1, 2020 CSE meeting information noted that the parent chose the "all virtual" option for the 2020-21 school year but the student had not engaged in any of his virtual instruction, and further, that the parent stated that virtual learning was not working (Dist. Ex. 8 at p. 2). The meeting information also indicated that the director of special education and support services encouraged the parent to send the student to school in-person, that the parent decided to send the student to school, and that the student could start as soon as the next day (id.). The parent testified that there did come a time in fall 2020 that she advised the district that she planned on sending the student to school in person noting that she really wished to send the student back to school (Tr. p. 480); however, this did not occur.

The special education teacher relayed an incident that occurred on the morning of October 5, 2020, which was later identified by the director of special education and support services as "the one" that caused removal of all virtual options, in which the parent reportedly appeared in the virtual classroom and started screaming at the teacher in a "visibly angry" manner (Dist. Ex. 75 at p. 1). The special education teacher stated that it was "very uncomfortable and upsetting for all in the room" and that she was apprehensive to let the student back into the virtual classroom as she did not want to be yelled at by the parent in front of the other students again (id.).

In an October 6, 2020 letter to the parent, the superintendent of schools informed the parent that she had continued to violate the district's code of conduct by repeatedly using the virtual platform inappropriately and by interacting with district staff in a harassing and abusive manner (noting the recent October 5, 2020 incident), that the district already sent the parent three letters detailing her inappropriate conduct and district expectations for virtual learning, that the September 17, 2020 meeting with the parent and district staff included an additional discussion of

the expectations for the student participating in virtual learning, and that the parent was also provided with these expectations repeatedly via email (Dist. Ex. 76; see Dist. Exs. 42 at pp. 1-2; 53; 73 at pp. 1-2). The superintendent continued in stating that since the parent had repeatedly failed to follow district guidelines for virtual instruction, the district was no longer extending an all-virtual option for the student and the student was required to come to school for in-person instruction starting on Thursday October 8, 2020 (Dist. Ex. 76). The superintendent informed the parent that district staff would be at the parent's home on the morning of October 8, 2020 to assist the parent in getting the student up, dressed, and on the bus (id.). In a handwritten reply to the district, dated the following day, the parent stated that due to the worldwide pandemic she did not feel comfortable sending the student to school and that "virtual learning must continue" (Dist. Ex. 77).

The director of special education and support services stated the student had been offered to be given his program in person every single day during the 2020-21 school year and that, at the time of the February 2021 hearing date, the student had not participated in the in-person program (Tr. p. 235). The director stated that when the superintendent removed the virtual learning option for a period of time, asynchronous assignments were posted for the student (Tr. p. 1417). In a December 11, 2020 letter to the parent, the superintendent informed the parent that since the district had removed the virtual option for the student on October 6, 2020, the parent had not sent the student to school and that since the parent was unable or unwilling to send the student to school for in-person instruction and based on an overriding concern for the student's well-being and education, starting January 4, 2021 the student would be allowed to engage in his "Zoom sessions" from home (Dist. Ex. 84). The superintendent noted that the district strongly believed the student would benefit more from in-person learning and that the option of having the student attend virtually was being made available according to conditions specified within the letter (Dist. Ex. 84).

Within a February 23, 2021 home visit report the district school psychologist noted that the student needed constant prompting and redirection from two professionals (the district director of technology and herself) in order to engage in his virtual lesson (Dist. Ex. 118 at p. 3). The school psychologist stated that in her opinion the student was craving interaction with others outside of his home as evidenced by his responsiveness and level of engagement with the district staff during the home visit (id.). The school psychologist stated that the student was disengaged, distracted, fidgety, and inattentive to the content of the virtual lesson and she felt that the student did not learn the content during the remote session (id.). In addition, the school psychologist reported that she had later learned that the student did not consistently engage in his virtual learning after the district staff had left (id. at p. 3). In sum, the school psychologist stated that virtual learning was not an appropriate modality for the student and that it was clear that this was a dire situation where the student was unable to be educated virtually (id.).

Considering the above, the district took reasonable steps in order to provide the student with remote learning during the 2020-21 school year, and was ready, at all times during the school year, to provide the student with the program recommended in his IEP at school. Additionally, while the parent had the option to continue remote instruction for the 2020-21 school year, the guidance that provided the parent with that option did not contemplate a situation, such as the one presented here, where a parent chose remote learning for the school year but repeatedly failed to comply with a clear code of conduct for how to engage in remote learning. Additionally, the same

guidance offered that a school reopening plan should "consider[] in-person services a priority for high-needs students and preschool students with disabilities whenever possible" and should also "address meaningful parent engagement in the parent's preferred language or mode of communication regarding the provision of services" ("Recovering, Rebuilding, and Renewing: The Spirit of New York's Schools," at p. 113, [July 16, 2020], available at <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>). The guidance further indicates that effective communication includes working collaboratively and creatively to help ensure the parent understands the school's efforts to provide services consistent with the recommendations on the IEP and monitor student progress and communication in the parent's preferred language or mode of communication and documentation of outreach efforts (*id.* at pp. 116-17). Additional State guidance provides that "[i]t is also very important for school personnel and parents to work collaboratively and creatively to ensure there is an understanding of the efforts to provide services consistent with the recommendations on the IEP and monitor student progress" ("Supplement #3 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State: Questions and Answers," Office Of Special Educ. Memo, at p. 4 [June 20, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-3-covid-qa-memo-6-20-2020.pdf>). As outlined above, the district explained how it had attempted to deliver the student's program through the virtual learning option on multiple occasions and informed the parent what was expected of the student and the parent; however, the parent failed to comply with the district's expectations (*see* Dist. Exs. 35; 38; 42; 47; 52; 53; 57; 60; 61; 65; 68; 70; 71; 115; 116). Under the circumstances presented, the parent's selection of the virtual option and then subsequent actions that prevented the student from receiving instruction through the virtual model offered by the district should not be held against the district. Accordingly, with the remote learning option failing for the student and the disruption the parent was causing for the other students in the class, the superintendent's decision to remove the virtual option and to try to get the student to return to school in person was an appropriate action (*see* Dist. Exs. 8 at p. 2; 75; 76).

Additionally, the IHO's finding that the removal of the student from virtual learning due to the parent's infractions of the district's code of conduct and the removal of the virtual option constituted a disciplinary change in placement requiring a manifestation determination was erroneous (*see* IHO Decision at pp. 72-75).

A disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; *see* 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2]; [c]; 300.536[a]). If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct a manifestation determination review (MDR) meeting "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]).

However, the student's educational program at the time the district removed him from remote instruction was the program set forth in the October 2020 IEP, which included a 15:1

special class for ELA, ICT services for science, a 12:1+1 special class for math and social studies, a 12:1 special class for reading, as well as two sessions per six-day cycle of speech-language therapy in a small group, one session per six-day cycle of OT in a small group, and one session per six-day cycle of counseling in a small group (Dist. Ex. 8 at pp. 1, 13). The IEP also included multiple supplementary aids and services, program modifications, and accommodations (*id.* at pp. 13-14). Nothing in the student's IEP indicated that the student would receive the recommended program remotely, other than notations in the meeting information that the parent had selected the all-virtual option for the 2020-21 school year, that it was not working for the student, and that the parent had decided to return the student to school in-person (Dist. Ex. 8 at pp. 1-2). Guidance, since the beginning of the pandemic, has indicated that the provision of online or virtual learning is considered an alternate mode of instructional delivery and does not require any changes to students' IEPs (Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State, Office of Special Educ. Policy Memo, at p. 5 [March 27, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). Additionally, as noted above, the student's special classes consisted of students who received instruction in-person, as well as students who received instruction remotely (Tr. pp. 1684-85). Accordingly, the decision not to provide the student with a remote learning option was not a change in the student's educational placement. The district continued to offer the student the same programs and services and the student remained in the same class. The IHO's decision on this point must therefore be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record supports finding that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 21, 2021, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years and awarded the parent compensatory educational services and prospective relief.

Dated: Albany, New York
October 22, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER