



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-204

Application of the BOARD OF EDUCATION OF THE WILLIAMSVILLE 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:

Harris Beach PLLC, attorneys for petitioner, by Jeffrey J. Weiss, Esq., and Andrew R. Mark, 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 educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2020-21 school year was not appropriate. 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

For the 2018-19 school year, the student attended a regular education third grade class (Parent Ex. B2 at p. 1).¹ The student received four 30-minute sessions per week of academic intervention services (AIS) from a reading specialist, which targeted skills such as fluency and comprehension (Dist. Ex. 37 at pp. 1-6).

According to the 2018-19 report card, during all three marking periods the student's language arts skills, comprised of reading and writing/composing skills, were below grade level;

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in their content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

the student demonstrated satisfactory progress with decoding, vocabulary development, and cursive skills, and his fluency, comprehension, spelling/word study and grammar/punctuation skills were in need of improvement (Parent Ex. B2 at p. 1).² For the first marking period the teacher commented that the student struggled with decoding and reading fluency, and that he participated in discussions regarding read aloud texts but often chose less relevant details (id.). According to the teacher's comments, the student took extended time to complete written responses to test even after class discussions, and he struggled with spelling patterns and grade level core words in daily writing (id.). During the second marking period, report card teacher comments included that the student was not yet reading on grade level despite many interventions, he made an effort to respond to comprehension questions but did not often find enough detail, spelling and fluency were areas of particular difficulty, and he struggled with certain vowel sounds (id.). The student reportedly had the most success with math but did have "some trouble reading word problems" (id.). The final marking period report card teacher comments indicated that the student continued to struggle most with spelling and phonics skills as well as reading fluency; he was not yet reading at the third grade level (id. at p. 2). According to the teacher, the student's comprehension was good when discussing texts, although he had difficulty putting his ideas in writing due to spelling issues (id.). Additionally, the teacher indicated that the student struggled to read math problems independently (id.).³

According to a summary report, the student participated in the 2019 summer session which addressed reading skills including phonological awareness, decoding, fluency, vocabulary, and text comprehension and writing skills such as spelling/word study, organization, content/idea development, and grammar/punctuation (Dist. Ex. 27). During this period the student received 150 minutes daily of AIS instruction from a regular education teacher, which targeted skills such as fluency, vocabulary, comprehension, writing, and decoding (Dist. Ex. 37 at pp. 7-12).

For the 2019-20 school year, the student attended a regular education fourth grade class (Parent Ex. B3 at p. 1). For the first two marking periods of the 2019-20 school year, in reading, the student performed below grade level and needed improvement in the areas of application of decoding, fluency, vocabulary development, reading engagement, and comprehension (id.). In writing and composing, the student performed satisfactorily at grade level for the first marking period and performed at grade level but needed improvement for the second marking period (id.). The student's cursive was reportedly satisfactory but the student's spelling and word study as well as grammar and punctuation were described as needing improvement for both marking periods (id.). The student performed satisfactorily at grade level overall in math but needed improvement in the area of fact fluency (id.). For the first marking period, the student's classroom teacher described the student as "struggling to adjust to the more independent routines, structure, and pace

² In the third marking period the student's grammar and punctuation skills were satisfactorily progressing (Parent Ex. B2 at p. 1).

³ Regarding math skills, the student's 2018-19 report card reflected that during the course of the school year the student's overall performance level was satisfactory at grade level, although his fact fluency skills were in need of improvement (Parent Ex. B2 at p. 1). Teacher comments included that the student was making progress in math, he was able to see connections and was very good at mental math, and he thought through problems and contributed to math lessons (id. at pp. 1, 2). Additionally, the teacher reported that the student needed to practice his math facts, and that he had difficulty reading math word problems independently (id.).

of fourth grade" (id.). The student was noted to be below grade level for decoding, fluency and comprehension (id.). The classroom teacher indicated that the student was working on his "ability to both comprehend a text and to dig deeper in the text to make appropriate inferences" (id.). The student reportedly continued to have difficulties with spelling patterns and vocabulary acquisition (id.). In writing, the student was continuing "to work on successfully moving through all of the steps of the writing process by practicing staying on topic, using relevant details, and demonstrating proper use of writing conventions" (id.). The student was able to process math computations mentally and had a very strong number sense (id.). The classroom teacher reported that "when it comes to copying from the Smartboard and completing [m]ath homework with difficult and detailed written directions [the student] tends to give up on the assignment" (id.).

The student was evaluated on January 24, 2020, by a developmental optometrist (private evaluator) at the request of the parent (Dist. Ex. 12 at p. 1). In a report dated February 6, 2020, the parent's private evaluator recommended that the student wear prescriptive lenses for use during all sustained near visual activities (id. at p. 6). The private evaluator stated that a program of vision therapy was not recommended at that time noting that most of the student's visual skills and abilities were appropriate (id.). The private evaluator further explained that addressing the slow processing speeds, poor timing and rhythm, and challenges with short term visual memory were part of the work done in optometric vision therapy but noted that there may be services available through the district that could help with these challenges and noted that, should appropriate services be unavailable, his office could help the student gain these important skills (id.).

For the second marking period of 2019-20, the student's classroom teacher reported that the student "had a very strong marking period" (Parent Ex. B3 at p. 2). The classroom teacher described the student as "working so hard" and having "a new confidence with his glasses" (id.). It was noted that, although the report card reflected that the student was below grade level in reading, the student "began wearing his glasses after the halfway point of the marking period" (id.). The classroom teacher also reported improvement in writing and math (id.).

On February 24, 2020, the district conducted an occupational therapy (OT) screening of the student (Parent Ex. C1 at p. 3). In an email dated February 24, 2020, the district's child support team and 504 team leader (team leader) wrote to the parent stating that the student had been screened by a district occupational therapist as suggested in the parent's private evaluation that she had shared with the district (id. at p. 1). The district's team leader reported that the occupational therapist was given a copy of the private vision evaluation report to review and found that the student completed each of the screening tasks within the average range including near and far point copying (id.). The district's team leader indicated that the private evaluator's testing reflected visual/perceptual skills within the average range and the student's visual acuity was 20/20, as a result neither the district's occupational therapist nor the district's vision specialist recommended further evaluation in those areas (id.).

In an email dated March 2, 2020, the parent replied to the district, indicating that she had watched the student struggle to read during the private evaluation and "knew [that] something was wrong" (Parent Ex. C1 at p. 1). The parent further stated that she knew "the district looks for the minimum ability for a child to get by" and that she had "a hard time with this" (id. at p. 2). The parent indicated that she saw the student's "great struggle and kn[e]w he need[ed] help" (id.). The

parent concluded that she would submit a formal request in writing for district evaluation of the student (id.).

A district OT screening report dated March 3, 2020, reflected teacher concerns regarding the student's visual motor needs such as writing legibility, copying, and amount of time needed to complete handwriting assignments; visual perception needs such as omissions and additions in writing, directional concepts, and visual memory; and organization needs such as organization of work space, difficulty organizing numbers, sequencing of steps, managing his backpack, and following routines (Parent Ex. C1 at p. 3). The March 3, 2020 OT screening report indicated that the student was cooperative and wore his glasses during the observation (id.). The district's occupational therapist reported that the student was able to write his first and last name and used a mature, static tripod grasp of his right hand to hold a pencil, and used his left hand to assist (id.). The March 3, 2020 OT screening report further reflected that the student was able to write the upper and lower case alphabet, draw an age appropriate picture of himself and copy age appropriate designs (id.). The student reportedly was able to copy accurately from a near and far point sample with good legibility (id.). The occupational therapist also noted some inconsistencies in the student's handwriting and recommended a handwriting contract and use of graph paper (id.). The March 3, 2020 screening report reflected that it was reviewed with the student's classroom teacher on February 24, 2020 and with the parent on February 28, 2020 (id.).

By letter dated March 5, 2020, the parent, through her advocate, referred the student to the CSE for an evaluation and a determination of eligibility for special education programs and services (Parent Ex. D1 at p. 1).⁴ The referral referenced the private vision evaluation obtained by the parent and noted that vision therapy was not needed (id.). The advocate stated that the parent was concerned about the student's reading, reading comprehension, writing, and math skills and requested an initial evaluation including evaluations in the areas of speech-language, auditory processing, OT with sensory integration, comprehensive reading, writing, spelling, reading comprehension and mathematics, and assistive technology (id. at pp. 1, 2). The parent along with her advocates signed the referral letter; according to letter, the parent's signature was included in order to provide the district with written consent to evaluate the student (id.).

By email dated March 6, 2020, the district acknowledged receipt of the referral to the CSE and indicated that the process would be initiated by sending the parent "appropriate documents including the initial consent for evaluations" (Parent Ex. D2). On March 6, 2020, the district sent the parent prior written notice of a proposed referral for evaluation and request for consent to evaluate (Parent Ex. D4 at pp. 1-3). The March 6, 2020 prior written notice referenced enclosures of the parent guide to special education, consent for initial evaluation form, and a procedural safeguards notice (id. at p. 3).

The parent signed the written consent to evaluate on March 8, 2020, which was sent to the district by the parent's advocate on March 12, 2020, in a letter asserting that the parent was not required to provide an additional written consent on the district's form and that the official date of the student's referral to the CSE was March 5, 2020 (Parent Ex. D3 at pp. 1-2). By letter dated March 16, 2020, the district provided the parent with a list of the district's evaluators who would

⁴ The referral letter was sent to the district via email on March 5, 2020 (Parent Ex. D2).

be conducting the student's initial evaluation along with their respective disciplines (Parent Ex. D5).

On March 16, 2020 the district's schools closed due to the COVID-19 pandemic (Parent Ex. B1 at p. 5). The student's 2019-20 report card reflects that students did not receive specific progress reports or performance level indicators from the time period of March 16, 2020 through June 12, 2020 and that the student "met expectations" for the third marking period (Parent Ex. B3 at p. 1). For the final marking period, the classroom teacher stated that the student "showed that he [wa]s an independent learner during distance learning" (*id.* at p. 2). The student also received two 30-minute sessions per week of AIS from a reading specialist targeting skills such as fluency, comprehension, and writing from March 2020 through June 2020 (Dist. Ex. 37 at pp. 13-18).

By email and letter dated August 24, 2020, the district notified the parent that the student would be evaluated by district staff at the middle school since the student was enrolled in fifth grade and provided a list of evaluators noting that the student's evaluation would continue with the reopening of schools (Parent Ex. D6 at pp. 1-2).

By notice dated September 22, 2020, the parent was invited to attend a CSE meeting scheduled for September 30, 2020 (Parent Ex. C2 at p. 3). By email dated September 24, 2020, the parent's advocate notified the district that it had failed to share all of the evaluations conducted as part of the student's initial evaluation with the parent and, as such, the CSE meeting had to be rescheduled (*id.* at p. 1). In emails dated September 25, 2020, the district notified the parent's advocate that the evaluation results were still being assembled into a multidisciplinary report and that the assistive technology evaluation could not be conducted "due to grades 5-12 going fully remote recently" (*id.* at pp. 1-2). The district agreed to reschedule the CSE meeting (*id.* at p. 2).

A child support team summary indicated that testing related to the student's initial evaluation was completed on September 28, 2020 and that the testing was delayed due to the COVID-19 pandemic (Parent Ex. E12 at p. 1).

By email dated October 1, 2020, the district requested that the parent bring the student to the middle school to participate in a short reading assessment with the middle school's reading specialist (Parent Ex. C3 at p. 1). By letter dated and sent via email on October 2, 2020, the parent's advocate indicated that the student would not participate in the reading assessment until the district provided the requested evaluations as well as additional information about the reading assessment (Parent Ex. C4 at pp. 1, 3-4).

In an email dated October 2, 2020, the district provided a draft copy of the multidisciplinary report and notified the parent and advocate that the reading specialist previously disclosed to the parent wanted to add an additional reading inventory to her assessment and the reasons for doing so (Parent Ex. C4 at pp. 1-2).

By notice dated October 13, 2020, the parent was invited to attend a CSE meeting on October 21, 2020 (Dist. Ex. 16). By notice dated October 14, 2020, the parent was invited to attend a CSE meeting on October 28, 2020 (Parent Ex. D7).

By letter dated and sent via email on October 26, 2020, the parent's advocate provided the district with a revised private vision evaluation report dated October 20, 2020, which now recommended vision therapy for the student (Parent Ex. C6 at p. 1; E1 at pp. 1, 4, 9; Dist. Ex. 18).

By email dated October 26, 2020, the district acknowledged receipt of the revised private vision evaluation report and advised that the CSE did not have enough time to fully consider the revised recommendation prior to the scheduled October 28, 2020 CSE meeting but would "certainly attempt" to include this information in the discussion (Parent Ex. C6 at p. 1).

A CSE convened on October 28, 2020 to determine the student's eligibility for special education and related services (Parent Exs. B1; D10). The October 2020 CSE found the student eligible as a student with a learning disability and recommended a 10-month program of integrated co-teaching (ICT) services for math, science, and social studies, a 15:1 special class for English language arts (ELA), small group OT, small group speech-language therapy, and small group hearing services in an IEP with an implementation date of November 11, 2020 (Parent B1 at pp. 1, 11). By prior written notice dated October 28, 2020, the district notified the parent of its initial eligibility determination, recommendations, and requested consent for the initial provision of special education services (Parent Ex. D9). On October 30, 2020, the parent provided written consent for the initial provision of special education services (Parent Ex. D8).

By letter dated and sent via email on November 6, 2020, the parent's advocate advised the district that the parent disagreed with the October 2020 CSE's refusal to recommend vision therapy and specially designed reading instruction and disagreed with the district's multidisciplinary report (Parent Exs. C7 at p. 2; C8 at p. 1). The parent's advocate further asserted that the district failed to conduct all of the evaluations requested by the parent in her initial referral and requested independent educational evaluations (IEEs) in the areas of comprehensive reading, OT with sensory integration, speech-language, comprehensive auditory processing, and assistive technology (Parent Ex. C7 at pp. 2-3). The parent's advocate requested reimbursement for the private vision evaluation previously provided to the CSE (id. at p. 2). By email dated November 9, 2020, the district responded that the IEE requests were "forwarded on" to be fully approved and processed (Parent Ex. C8 at pp. 1-2). In a November 13, 2020 letter to the parent, the assistant superintendent granted the parent's request for IEEs and requested that the parent forward a copy of the original and revised vision evaluation reports, if the parent wanted the CSE to consider the information (Parent Ex. C9). By letter dated November 20, 2020, the parent's advocate stated that the parent had already supplied the district with the vision evaluation reports and that the parent would initiate an impartial hearing if the district failed to reimburse the parent for the vision evaluation, provide vision therapy with the private evaluator, and provide specially designed reading instruction (Parent Ex. C10 at pp. 1, 2).

The student was assessed on December 7-9, 2020 as part of an independent reading evaluation (Parent Ex. E2). In an undated report, the evaluator indicated that the student had dyslexia, offered a diagnosis of a learning disability, and recommended, among other things, intensive instruction using Orton-Gillingham or Wilson methods consisting of "daily, one-hour, individual, year-[]round reading therapy by an appropriately trained specialist" (id. at pp. 28-29).

A. Due Process Complaint Notice

By due process complaint notice dated December 11, 2020, the parent "disagree[d] with the procedural and substantive non-compliance with applicable law" and alleged that the district failed to comprehensively evaluate the student in all areas of suspected disability, including by failing to conduct a physical examination and speech-language, visual processing, reading, writing, mathematics, OT, sensory integration, and assistive technology evaluations (Parent Ex. A1 at p. 2). The parent further asserted that the district failed to recommend resource room services, specially designed reading instruction, appropriate vision therapy, or appropriate OT, and failed to generate measurable annual goals based on the student's needs (*id.*). As a proposed resolution, the parent requested the provision of appropriate vision therapy once per week for 50 minutes by the parent's private evaluator, reimbursement for the costs of a private vision evaluation and for the student's prescriptive lenses, provision of individual specially designed reading instruction utilizing a phonics-based program such as Orton-Gillingham for 60 minutes per day, daily resource room services, assistive technology for the student to use to read grade level texts, graphic organizers and writing applications, and for the CSE to convene to review IEEs and generate an appropriate IEP (*id.* at pp. 2-3). The parent further requested the provision of timely and accurate meeting notices, prior written notice, procedural safeguards notice, and all other required notifications as well as access to the student's educational records (*id.* at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 7, 2021, and concluded on July 12, 2021, after five days of proceedings (Tr. pp. 1-637).⁵ When the parties reconvened on May 14, 2021, the district agreed to provide some of the parent's requested relief (Tr. p. 18). Specifically, the district agreed to (1) provide daily resource room services, (2) provide 50 minutes per week of vision therapy delivered by a provider of the district's choosing, (3) provide certain forms of assistive technology, (4) provide OT focusing on the student's sensory needs, (5) reimburse the parent for the cost of a privately obtained vision evaluation, (6) reconvene the CSE to review the parent's privately obtained reading evaluation, and (7) provide prior written notice and procedural safeguards notices in a timely manner (Tr. pp. 20-22, 29-31, 33, 34). The parent affirmed that although the due process complaint notice alleged that the district failed to evaluate the student in all areas of suspected disability, she was not seeking further evaluation of the student as relief (Tr. p. 19). The parent did not agree to the provision of vision therapy by a provider of the district's choosing (Tr. p. 33). The IHO determined that the parties were in agreement with providing the student vision therapy once per week for 50 minutes, and that she would limit her consideration of this issue to the qualifications of the parties' proposed providers (Tr. pp. 33, 35).

By decision dated September 2, 2021, the IHO found that the district did not meet its burden to prove that it provided the student with a free appropriate public education (FAPE) for the 2020-21 school year (IHO Decision at p. 20). The IHO further found that the district violated its child find obligations by failing to offer evidence that explained whether the AIS the student received

⁵ The IHO's decision indicated that a prehearing conference was held on March 10, 2021 and a status conference was held on March 31, 2021 (IHO Decision at pp. 5-6). The first day of the impartial hearing was adjourned due to technical difficulties (Tr. pp. 1-12). The parties reconvened on May 14, 2021 to continue the proceedings (Tr. pp. 13-282).

was part of the district's response to intervention (RtI), "whether it followed guidelines, what tier the [s]tudent was at, or whether written notification was provide[d] to the [p]arent" about AIS and the parent's right to request an evaluation (id.). Next, the IHO found that the district failed to evaluate the student within 60 days of obtaining parental consent for an initial evaluation (id. at pp. 20-21).

The IHO then determined that the student's October 2020 IEP "as written" did not offer the student a FAPE (IHO Decision at p. 23). Specifically, the IHO found that one reading annual goal was not sufficient to address the student's needs and that provision of AIS was not a substitute for the district's obligation to provide special education (id. at pp. 21-22). The IHO noted that there was no evidence that extra supports were discussed at the October 2020 CSE meeting and found that the student's need for additional reading supports demonstrated that the October 2020 IEP was inadequate (id. at pp. 22-23). The IHO further determined that AIS should have been included on the student's IEP (id. at p. 23). The IHO found that the student did not make meaningful progress "especially in light of the fact that he was receiving additional supports not documented in his IEP" (id. at p. 25). For those reasons, the IHO determined that the district did not offer the student a FAPE for the 2020-21 school year.

With regard to the issue of a vision therapy provider, the IHO found that the district did not present any evidence related to its developmental optometrist and did not present any evidence regarding its right to choose a provider (IHO Decision at p. 25). The IHO found that the parent was entitled to vision therapy services utilizing her private evaluator (id. at p. 26).

As further relief, the IHO found that the student was "entitled to compensatory academic and reading services due to the delay in completing the initial evaluation of the [s]tudent and the implementation of services" (IHO Decision at p. 26). The IHO denied the parent's request for reimbursement of the student's glasses (prescriptive lenses) and declined to address any claims related to the 2021-22 school year as outside the scope of the parent's due process complaint notice (id.). In conclusion, the IHO ordered the relief to which the parties agreed (daily resource room services, assistive technology delineated in a March 2020 evaluation, OT including sensory integration two 30-minute sessions per week, reimbursement in the amount of \$595 for a privately obtained vision evaluation, a reconvene of the CSE to consider IEEs, and the provision of timely procedural safeguards) and further ordered the district to fund vision therapy for 50 minutes per week by the parent's private evaluator, 1:1 reading instruction for one hour per day by a certified reading specialist in Orton-Gillingham for a 12-month school year, 30 hours of compensatory 1:1 reading instruction by a certified reading specialist or special education teacher of the parent's choosing, and 30 hours of compensatory academic instruction by a special education teacher of the parent's choosing (id. at p. 27).

IV. Appeal for State-Level Review

The district appeals and requests that the IHO's decision be reversed in its entirety. The district argues that the IHO improperly considered issues that were not raised in the parent's due process complaint notice or during the impartial hearing. The district further contends that the IHO applied incorrect legal standards and awarded relief that was not requested in the parent's due process complaint notice or during the hearing.

With regard to issues outside the scope of the impartial hearing, the district alleges that the IHO erroneously found that the district violated child find, failed to timely conduct an initial evaluation of the student, and improperly awarded 12-month services. To further compound these errors the district argues that the IHO found the district denied the student a FAPE without first determining whether the purported procedural violations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. The district alleges that the IHO then improperly awarded compensatory 1:1 reading instruction and academic instruction that was not requested by the parent and failed to specify which relief was awarded for violations of child find. The district further argues that the parent improperly raised the timeliness of the initial evaluation and requested 12-month services and compensatory education for the first time in her closing brief.

The district also argues that the IHO applied an incorrect legal standard when determining that the district violated child find, failed to consider the student's progress in the general education setting, and faulted the district for providing AIS before classifying the student. The district alleges that the IHO erred by finding that the student regressed in reading while the district conducted an initial evaluation. The district asserts that the IHO misconstrued the testimony of the student's special education teacher.

Next the district alleges that the IHO erroneously found the October 2020 IEP failed to provide the student a FAPE because it lacked a reading comprehension annual goal and further erred by finding that the student did not make meaningful progress. The district argues that the IHO erred by considering the student's progress after the development of the October 2020 IEP and that the hearing record demonstrated that the student made meaningful progress. The district also contends that the IHO improperly considered a December 2020 reading evaluation that was not available to the October 2020 CSE to determine that the student was below grade level in May 2021. The district argues that the IHO failed to consider the programs and services actually recommended on the October 2020 IEP and inappropriately determined that the provision of AIS rendered the October 2020 IEP inappropriate.

The district further asserts that the IHO failed to consider the student's progress before awarding compensatory educational services. The district also alleges that the IHO improperly ordered prospective relief of 1:1 reading instruction using Orton-Gillingham for one hour per day for a 12-month school year and vision therapy delivered by the parent's private evaluator. The district argues that there was no evidence that the student required 12-month services, 1:1 instruction, or a specific reading methodology in order to make progress. The district contends that the student demonstrated progress utilizing the district's reading programs and instruction. The district argues that the hearing record reflected that the district's vision therapy provider was qualified and the IHO disregarded the evidence and that the district has the discretion to select a provider when funding a particular service.

As relief, the district requests a finding that the student was offered a FAPE for the 2020-21 school year and that the IHO's awards of prospective 12-month 1:1 reading instruction using Orton-Gillingham, use of the parent's vision therapy provider, 30 hours of compensatory reading instruction, and 30 hours of compensatory academic instruction be reversed.

In an answer, the parent alleges that the district's request for review should be dismissed for failing to comply with the practice regulations and argues that the IHO's decision should be upheld in its entirety.⁶

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

⁶ The parent's answer does not specify how the district's request for review fails to comply with the practice regulations; accordingly, this allegation will not be further discussed.

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of Review

It is first necessary to identify what issues are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The IHO ordered the relief to which the parties agreed in her decision and neither party has appealed from that part of the IHO's decision. The parent does not cross-appeal from the IHO's denial of her request for reimbursement of the cost of prescriptive lenses. Therefore, those aspects of the IHO's decision have become final and binding and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Scope of the Impartial Hearing, Child Find, and Timing of the Initial Evaluation and Provision of Special Education Services

Next, it is necessary to address whether the parent raised claims in her due process complaint notice alleging that the district violated its child find obligations, failed to timely conduct the student's initial evaluation, and failed to arrange for special education services within the regulatory timeframes and, therefore, whether the IHO erred in determining that the student was denied a FAPE on these grounds and in awarding compensatory educational services to remedy the same.

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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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 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]).

The parent's due process complaint notice does not include any allegations related to child find or to the timeliness of the district's initial evaluation or implementation of services (see Parent Ex. A1). The due process complaint notice indicated that "[t]he CSE met on Oct. 28, 2020 for an initial referral from a March 5, 2020 [p]arental referral to [the] CSE" and further stated that the parent was requesting an impartial hearing based on her disagreement with "the procedural and substantive non-compliance with applicable law which includes, but is not limited to" six specific issues with which the parent disagreed, none of which were related to child find or the timeliness of the district's initial evaluation or provision of special education services (*id.* at pp. 1-2). The parent argues that her disagreement with the procedural and substantive noncompliance with applicable law was all-encompassing and that the district did not challenge the sufficiency of the parent's due process complaint notice. The parent further argues that the IHO clearly determined that the student was denied a FAPE based on the district's failure to complete an initial evaluation within the required timelines. The district argues that the IHO improperly considered these issues that were not raised by the parent in her due process complaint notice and further erred in finding a denial of a FAPE and awarding compensatory educational services without first determining whether any procedural violations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. In order to properly consider the parties' positions, a discussion of the district's obligations under child find and the regulatory timeframes for conducting an initial evaluation and providing special education services is warranted.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], *aff'd*, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational

agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

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

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). Upon receipt of a written request of a referral, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1]-[3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). State regulations do not prescribe the form that a referral by a parent must take but do require that it be in writing (8 NYCRR 200.4[a]). It has been held "that general expressions of concern" cannot be deemed to "constitute a 'parental request for evaluation' under the plain terms of the statute" (D.K., 696 F.3d at 247 n. 5 [emphasis in the original], citing 20 U.S.C. § 1415[d][1][A][i]).

Reviewing the due process complaint notice in light of the foregoing, the parent did not allege that the student should have been referred to the CSE prior to the parent's March 5, 2020 referral nor did the parent allege that the district was required to initiate a referral based on the student's failure to make adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

Thus, based on the due process complaint notice in this matter, the IHO improperly determined that the district violated its child find obligations; moreover, upon review of the hearing record, there is no indication that the district subsequently agreed to add issues related to child find and the parent did not attempt to amend the due process complaint notice to include such issues.

Turning to the issue of the timeliness of the district's initial evaluation and implementation of services, upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]).⁸ After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).⁹

The IHO found that the district failed to evaluate the student within 60 days of obtaining parental consent for an initial evaluation and awarded 60 hours of compensatory educational services due to the district's delay in completing the initial evaluation of the student and delay in implementing special education services (see IHO Decision at pp. 20-21, 26).

The parent's due process complaint notice does not include allegations that the district failed to complete an initial evaluation within 60 days of receipt of parental consent, or that the district failed to arrange for appropriate special programs and services within 60 school days of the receipt of consent to evaluate (see Parent Ex. A1). In an opening paragraph reciting factual information in the due process complaint notice, the parent stated "[t]he CSE met on Oct. 28, 2020 for an initial referral from a March 5, 2020 [p]arental referral to [the] CSE" (id. at p. 1). The due

⁸ State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, AIS, and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

⁹ A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

process complaint notice does not include any other reference to the parent's referral or to the timing of the district's initial evaluation or provision of special education programs and services. Upon review of the hearing record, the district did not subsequently agree to add issues related to the failure to timely conduct an initial evaluation or to timely arrange for special education services and the parent did not attempt to amend the due process complaint notice to include these issues.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

The hearing record reflects that the district did not elicit testimony related to child find or to the district's obligation to arrange for special education programs and services within 60 school days of receiving the parent's consent to evaluate and, therefore, the district did not open the door to those issues (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Accordingly, child find and the timeliness of the district's provision of special education are issues that were raised for the first time by the IHO in her decision and are outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

However, the hearing record reflects that the district opened the door to the issue of the timeliness of the student's initial evaluation. During the district's case in chief, the district's coordinator of special education (coordinator) was asked if she was familiar with the rules for completing evaluations for initial referral (Tr. p. 81). The coordinator testified that the district had a specific timeline within which to conduct evaluations after receiving consent, that seven months was beyond the timeline, and that evaluations were put on hold while schools were closed due to the COVID-19 pandemic (Tr. pp. 81-83). The coordinator further testified that some evaluations were conducted remotely while schools were closed "on a very individual basis and working with families" and "very minimally" during summer 2020 (Tr. pp. 83-84). The coordinator also testified that in-person evaluations began when school started in September 2020 and that, according to her recollection, evaluations "were acted on pretty timely and moved forward as soon as they possibly could" (Tr. pp. 84-85). The coordinator did not provide any testimony as to why the student in this matter was or was not considered for an initial evaluation conducted remotely or during the summer. During the time period when schools were closed due to the COVID-19 pandemic, school districts were afforded flexibility in the manner in which they conducted initial evaluations, evaluations and reevaluations, however, the regulatory timeframe by which these evaluations were to be completed remained in force absent a "mutually agreeable extension[] of time" ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2020], available at [17](http://www.p12.nysed.gov/specialed/publications/2020-</p></div><div data-bbox=)

[memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf](#); see also 8 NYCRR 200.4[b][1][ii], [iv]). The hearing record reflects that the parent consented to an initial evaluation on March 8, 2020 (Parent Ex. D3 at p. 2; Dist. Ex. 15 at p. 1). Assessments related to the student's initial evaluation were completed on September 28, 2020, and the CSE convened to determine the student's eligibility for special education on October 28, 2020 (Dist. Exs. 6 at pp. 1-2; 9 at p. 1). Thus, the hearing record reflects that the district did not complete the student's initial evaluation within 60 days from receipt of the consent to evaluate (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]; [j][1]). Nor is there any indication that the parent consented to an extension of the timeline.

Where a district fails to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd 700 Fed. App'x 25 [2d Cir. July 7, 2017]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501 [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]). Having found that the district failed to comply with the regulatory timeframe for completing an initial evaluation, the IHO erred by awarding compensatory educational services without determining whether the district's failure deprived the student of a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

The district correctly asserts that the IHO improperly awarded 60 hours of compensatory 1:1 reading instruction and compensatory academic instruction as relief for the district's untimely initial evaluation and as relief for claims not raised in the due process complaint notice. The IHO's compensatory education award must be reversed. As discussed below, it is not necessary to consider whether the district's procedural violation rose to the level of a denial of a FAPE in this instance because the hearing record demonstrates that the October 2020 IEP offered the student a FAPE. Moreover, even if the delay in the evaluations resulted in a denial of a FAPE, no compensatory education would be warranted in this instance. That is, the evidence in the hearing record of the student's progress would not support an award of compensatory relief. The district's contention that the IHO also improperly awarded 12-month services, which were not requested by the parent in her due process complaint notice will be addressed below in the discussion of the student's needs.

Having reversed the IHO's award of 30 hours of 1:1 reading instruction and 30 hours of 1:1 academic instruction, the scope of the district's appeal is limited to review of the IHO's finding that the October 2020 IEP failed to offer the student a FAPE and the IHO's awarded relief of 12-month services of 1:1 reading instruction utilizing Orton-Gillingham for one hour per day and for the student's vision therapy to be provided by the parent's private evaluator.

C. FAPE - October 28, 2020 IEP

As discussed above, the IHO erred by awarding compensatory educational services for a procedural violation of the IDEA without determining whether such violation rose to the level of a denial of a FAPE. A review of the transcript from the impartial hearing indicates that the district's attorney's litigation strategy focused primarily on demonstrating the student's overall progress with the services he received during the 2020-21 school year, which included both regular education AIS instruction in addition to special education programs and services set forth in the student's October 2020 IEP. This was likely due to the district's agreement to provide much of the parent's requested relief at the outset of the impartial hearing and was presented in an effort to demonstrate that the student was not entitled to any further relief.

However, this strategy undoubtedly contributed to the IHO's failure to analyze whether the district offered the student a FAPE based upon the special education programs and services recommended in the student's October 2020 IEP and without the services delivered outside of the IEP—here, the AIS reading supports. While the IHO set forth the correct legal standards, she did not apply those standards correctly. Instead of determining whether or not the recommended 15:1 ELA special class addressed the student's special education needs, the IHO simply found that, because the district provided AIS instruction to the student in addition to the 15:1 ELA special class, this alone demonstrated that the October 2020 IEP was insufficient to meet the student's needs and resulted in a denial of a FAPE (IHO Decision at pp. 22-23). The IHO further erred by considering the student's progress during the 2020-21 school year in finding the October 2020 IEP denied the student a FAPE (*id.* at pp. 24-25). That is, retrospective evidence of the district's provision of AIS to the student or of the student's progress may not be relied upon to evaluate the appropriateness of the October 2020 IEP (see *C.L.K. v. Arlington Sch. Dist.*, 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; *F.O. v New York City Dep't of Educ.*, 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

A thorough review of the entire hearing record demonstrates that the recommended 15:1 special class and the student's reading annual goal addressed the student's reading needs and that the October 2020 IEP offered the student a FAPE. The IHO erred by finding a denial of a FAPE and by awarding compensatory educational services of 12-month, 1:1 Orton-Gillingham-based reading instruction for 60 minutes per day.

As described above, the student received regular education supports during the 2018-19 and 2019-20 school years, prior to his referral to the CSE on March 9, 2020. The student received four 30-minute sessions per week of AIS instruction from a reading specialist during the 2018-19 school year, which targeted the student's reading needs in the areas of fluency and comprehension (Dist. Ex. 37 at pp. 1-6). During the 2018-19 school year, the student's classroom teacher indicated concerns regarding the student's performance in the areas of decoding and phonics skills, reading fluency, spelling, math fact fluency, and reading math word problems (Parent Ex. B2 at pp. 1-2). The classroom teacher also reported that the student required more time to complete tasks than the other students in his class (*id.* at p. 1). According to the classroom teacher, at the end of third grade the student was not reading at grade level (*id.* at p. 2). The student received AIS instruction

during summer 2019 for 150 minutes per day, five days per week delivered by a regular education teacher, which addressed the student's reading needs in the areas of fluency, phonological awareness, vocabulary, comprehension, writing, and decoding (Dist. Exs. 27; 37 at pp. 7-12).

According to a summary of reading data collected from September 2019 through March 2020 (fourth grade), which was also included on the multidisciplinary report, a Teachers College Running Record given in September indicated the student had passed level N, which was commensurate with functioning at a November of third grade level (Parent Ex. E12 at p. 6; Dist. Ex. 9 at p. 6 10 at p. 1). Performance on that measure and other measures led to the "general interpretation" that the student was "slightly below grade level, particularly in the areas of spelling/phonics and oral reading fluency" (Parent Ex. E12 at p. 6; Dist. Ex. 10 at p. 1). The student was placed in a reading group from October through January (Parent Ex. E12 at p. 6; Dist. Ex. 10 at p. 1). Reading data collected in January 2020 reflected that the student was functioning approximately at an end of third grade level and the reading specialist reported that the student demonstrated his ability to "close the gap" and that progress monitoring of his oral reading fluency showed "good growth," which was one indicator that the student may be released from intervention groups (Parent Ex. E12 at p. 6; Dist. Ex. 10 at pp. 1-2). The reading specialist indicated that the student's comprehension skills were in question due to a lack of progress reflected in the student's reading inventory score and that his score on the Fast Bridge CBM of 110 WPM put the student at the 20th percentile, which could qualify him for AIS but also noted that all areas were considered before adding or discontinuing direct instruction (Parent Ex. E12 at p. 7; Dist. Ex. 10 at p. 2; see Tr. p. 360). Within the data collection report the reading specialist stated that, since the student had "passed" the third grade ELA State examination with a "3" and had shown considerable growth from September, the student was placed in a group with an educational aide who was monitored by both reading specialists assigned to the fourth grade (Dist. Ex. 10 at p. 2; see also Parent Ex. E12 at p. 7). Additionally, the reading specialist noted that the student's group was limited to two students and that weekly meetings with the aide were held and that the plan supplied by the reading specialists were "tweaked" to accommodate the student's needs (Parent Ex. E12 Dist. Exs. 9 at p. 7; Dist. Ex. 10 at p. 2). Lastly, the reading specialist indicated that the student started wearing his glasses at the end of February and that the student's classroom teacher reported an immediate improvement of the student's oral reading of texts and results of classroom tests (Parent Ex. E12 at p. 7; Dist. Ex. 10 at p. 2).

On January 24, 2020 the parent's private evaluator conducted a "complete visual developmental and processing evaluation" of the student (Dist. Ex. 12). In a report dated February 6, 2020 the parent's private evaluator indicated that the student's visual acuities were 20/25 in the right eye, 20/20 in the left eye, 20/20 with both eyes together at distance without the aid of compensatory lenses, and 20/20 at near in all conditions (id. at p. 1). The February 2020 vision evaluation report indicated that the student's eyes appeared healthy and free of organic disease and degenerative conditions, that external examinations revealed no gross muscle imbalances, and that the student had a tendency to over-converge his eyes when looking at a near target and met the criteria for a convergence excess diagnosis (id. at pp. 1, 2, 5). Along with the recommendations previously described above, the parent's private evaluator's classroom suggestions included encouraging eye contact with the speaker, minimizing chalkboard to desk copying, giving spoken instructions singularly, visualized, and executed before the next instruction was issued, providing additional time for all tests, reducing the time spent on and quantity of written homework, "back

tracing" to assist the visualization of letter formation and spelling of short words, using a sloping worksurface for reading and writing, and using lenses as prescribed (*id.* at pp. 6-7).

According to the student's fourth grade classroom teacher, the student began wearing glasses after the halfway point of the second marking period and despite his below grade level performance, the student had shown improvement in his ability to complete his written work fully, more legibly, and in a timelier manner and that in math the student had "shown the most growth this marking period" (Parent Ex. B3 at p. 2). The teacher also noted that the recommended interventions had brought out the potential in the student (*id.*). The student's fourth grade teacher provided information for the multidisciplinary report utilized by the CSE to determine the student's eligibility (Dist. Ex. 11 at pp. 1-4; see also Parent Exs. E8-E11; E12 at pp. 1-2).¹⁰ The fourth grade classroom teacher reported that the student was beginning to show "a lot" of progress at the end of the second marking period, that wearing glasses helped the student to be more successful with his fluency and comprehension, and that before wearing glasses the student would not do well on spelling tests or with spelling within written pieces, he had difficulty organizing his thoughts into logical, cohesive, structural writing, and that his handwriting was large with large spaces between words (Dist. Ex. 11 at p. 1). Additionally, the teacher noted that the student took a long time to grasp new material in math, that reading social studies and science texts was difficult, completing written answers was an area of need, and that "in our at home learning" when the student needed to copy from the smart board or read and process independently, he tended to have more difficulty with comprehension (*id.* at p. 2). The fourth grade classroom teacher stated that the student needed reminders to wear his glasses, check-ins and organizational support, and needed to be near visual displays (*id.* at p. 3). The fourth grade classroom teacher also reported that the student had difficulty completing assignments, required frequent reminders, was easily distracted, required a highly structured classroom setting and benefitted from both visual and auditory exemplars in writing (*id.* at pp. 3-4). The teacher noted that the student started wearing glasses toward the end of the second marking period and started using a slant board and that these interventions in the short term resulted in excellent improvement in the student's ability to hand in good quality, on grade level work in a timely manner (*id.* at p. 3). Reportedly the student was receiving five 30-minute sessions per week of small group AIS support in the areas of reading and writing prior to school closure (Dist. Ex. 11 at p. 2; see also Parent Ex. E12 at pp. 1-2).

From March 2020 through June 2020 the student was receiving two 30-minute sessions per week of AIS instruction from a reading specialist, which targeted skills such as fluency, comprehension, and writing (Dist. Ex. 37 at pp. 13-18). The reading specialist stated that she had closely followed the student's progress during "our time away from the building," reported that the parent had opted to do much more reading with the student in trade books rather than doing all of his work on the computer, and that the student had completed "just about all of the work" assigned

¹⁰ Pursuant to the parent's request to receive copies of the assessments conducted as part of the student's initial evaluation as they were completed, the parent received several copies of assessments, each of which was entered into evidence as an individual exhibit (see Parent Exs. E8-E11). The final copy of the multidisciplinary report—which was entitled "Child Support Team Summary" and referred to as the "WITS report" in exhibit lists and testimony—although dated November 2, 2020, was utilized by the October 2020 CSE when considering evaluative information for the student (Tr. pp. 58, 85, 86, 87, 127, 158, 164, 194, 267-68; Parent Ex. E12). For purposes of this decision, only parent exhibit E12 will be cited where the content is duplicative of the other copies of the assessments in the hearing record.

through the virtual classroom, especially the writing, noting that his responses were "clear and easy to read" (id. at p. 15).

A September 2020 reading specialist report indicated that the student was able to read 20 of 20 words from a grade four word list and 15 of 20 words from a grade five word list (Dist. Ex. 39 at pp. 1, 5-6). The reading specialist noted that miscues occurred with multisyllabic words and that the student was attentive to initial sounds or syllables but inattentive to ending sounds or syllables (id. at p. 1). On a grade four reading passage the reading specialist noted that the student lacked automaticity, paused throughout to identify words, used active decoding strategies in order to identify words within the passage, that much of the passage was read word by word, and that the student was able to answer nine of ten comprehension questions (id. at pp. 1, 8). Regarding a grade five reading passage the reading specialist noted that the student read mostly word by word, that there were no self-corrections or repetitions, that omissions and substitutions were more frequent and impacted the student's understanding of the text, that while the student was at a frustration level it was clear that he was still able to make some meaning from the text, that his fluency impacted his understanding of what he was reading, and that he was able to correctly answer six and a half of ten comprehension questions (id. at pp. 1, 10).

According to the final multidisciplinary report dated November 2, 2020, evaluative information considered by the October 2020 CSE also included results of an August 2020 psychological evaluation, an August 2020 social history, an August 2020 academic achievement evaluation, a September 2020 classroom observation, a September 2020 hearing evaluation, a September 2020 OT evaluation, a September 2020 reading evaluation, and a September 2020 speech-language evaluation (Parent Ex. E12 at pp. 1-17).

An August 13, 2020 psychological evaluation yielded a full-scale IQ of 92, which placed the student in the average range with the student functioning in the average range in the areas of visual spatial and fluid reasoning and in the low average range in the areas of verbal comprehension, working memory, and processing speed (Parent Ex. E12 at pp. 8-9).

The August 14, 2020 social history indicated that the parent reported the student had a "visual processing disorder," struggled with reading comprehension, memorizing math facts, spelling, writing, staying on task and working independently, and he took a long time to complete tasks and had been in special reading groups at school (Parent Ex. E12 at pp. 2-3).

Results of academic achievement testing completed on August 14, 2020, found the student performing in the low average range in basic reading skills and reading fluency and in the average range in reading comprehension (Parent Ex. E12 at pp. 4-5). The student performed in the average range for math applied problems and writing samples, in the low average range for spelling and sentence writing fluency, the low range for math calculation, and the very low range for math facts fluency (id. at pp. 4-6).

The November 2020 multidisciplinary report reflected that, due to difficulties related to reopening after COVID-19 closures, the September 11, 2020 observation of the student on the second day of school may not have been truly representative of the student's natural classroom behavior and therefore referred the reader to the student's fourth grade report card comments,

which were included earlier in the report and summarized above (Parent Ex. E12 at p. 4; see id. at pp. 1-2).

A summary of a September 16, 2020 hearing evaluation indicated that the student's teacher "checked" the following areas of concern with respect to the student's listening behaviors; said 'huh?' or 'what?' at least five times a day, had a short attention span, daydreamed, was easily distracted by background noises, had difficulty with phonics, forgot what was said in a few minutes, did not remember simple routines, had difficulty following auditory directions, could not always relate what was heard with what is seen, and was performing below average in one or more subject areas (Parent Ex. E12 at p. 13). Based on observations and ratings from the student's teacher, the student was considered at risk of having a central auditory processing disorder in the area of multiple inputs (id.). Reportedly the student's scores on assessments of his auditory processing abilities ranged from the average range to the mild and moderate deficit ranges and it was noted that on a subtest that allowed for repetition of information or a longer time to generate a response the student scored within the average range of abilities (id.). The summary of the hearing evaluation indicated that it was apparent that the student was struggling with the information he received and needed to retain throughout his school day (id.).

A September 18, 2020 OT evaluation summary included parent concerns that, when writing, the student demonstrated some reversals/letter directionality and that the student needed additional time and several reminders to complete a multi-step task, and noted that the parent also expressed that she did not have concerns in the areas of tactile, movement, or visual processing (Parent Ex. E12 at p. 15). It was noted that the student did not have his glasses with him during testing (id.). Administration of assessments in the areas of fine motor precision and integration, bilateral coordination, and motor coordination found the student performing in the average range (id. at pp. 15-16). On assessments of visual perceptual skills and abilities that did not require a motor response the student's scores fell within the average range (id.).

Assessments conducted as part of a September 23, 2020 reading evaluation found the student performing in the low average range for word identification, word comprehension, passage comprehension, and the reading comprehension cluster and in the low range for word attack, the basic skills cluster, and the total reading cluster (Parent Ex. E12 at pp. 6-8).

Administration of a September 28, 2020 speech-language evaluation revealed the student functioning within the average range on assessments of his current understanding of age-level vocabulary words and language concepts, expressive vocabulary, picture vocabulary, and word ordering and multiple meanings, and below the average range in the areas of sentence combining and relational vocabulary (Parent Ex. E12 at pp. 10-11). Reportedly the student struggled with understanding how words were put together correctly to form sentences and with understanding how to identify mistakes in grammatical structures, and demonstrated scattered skills ranging from poor to average, indicating inconsistencies in the areas of receptive and expressive language (id. at p. 12). In addition, the student demonstrated difficulty with the auditory memory task of recalling sentences of varied length and complexity and also had more difficulty assembling words and phrases to create valid sentences; the student's scores in these areas were reflective of difficulties with verbal organization (id.).

The October 2020 CSE found the student eligible to receive special education and related services as a student with a learning disability (Parent Ex. B1 at p. 1). The October 2020 CSE recommended a 10-month program consisting of ICT services for 75 minutes each per day in math, science, and social studies, a 15:1 ELA special class for 75 minutes per day, one 30-minute session of small group OT per week, one 30-minute session of small group speech-language therapy per week pushed into the 15:1 special class, one 30-minute session of small group speech-language therapy per week in a separate location, and one 30-minute session of small group hearing services per week (Parent Exs. B1 at pp. 1, 11; D10 at p. 2). The October 2020 CSE further recommended supplemental supports of checks for understanding, increased verbal response time, preferential seating, general education supports (e.g., reminding the student to wear his glasses, providing for use of a sloped writing surface, and encouraging him to self-advocate), note taking supports, and modified assignments (Parent Ex. B1 at pp. 11-12). The October 2020 IEP reflected that the student had significant delays in reading decoding, reading fluency, spelling, math calculation, math fluency, and language skills, which interfered with his participation in age-appropriate activities (*id.* at p. 9). The October 2020 IEP included seven annual goals in reading, writing, mathematics, speech-language, motor skills, and hearing (*id.* at pp. 9-10).

In her due process complaint, the parent alleged that the district denied the student a FAPE by failing to recommend and provide appropriate specially designed reading instruction. State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstituting programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

As noted above, the IHO focused on the CSE's failure to reference AIS on the IEP. State regulations define AIS—which are available to both disabled and nondisabled students—as "additional instruction which supplements the instruction provided in the general curriculum" (8 NYCRR 100.1[g]; see 8 NYCRR 100.2[ee]). State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with the student's IEP (8 NYCRR 100.1[g]). To be clear, certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), and according to the State Education Department, such general services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/docs/AISQAweb.pdf>). But if a component of the AIS is provided to a student with a disability and that aspect of the service meets the definition of

"specially designed instruction" under IDEA, the United States Department of Education's Office of Special Education Programs has clarified that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]; see Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P., 2019 WL 4315975, at *12 (E.D.N.Y. Aug. 23, 2019), adopted at, 2019 WL 4933576 [E.D.N.Y. Oct. 7, 2019]; Urbandale Community Sch. Dist., 70 IDELR 243 [SEA Iowa 2017] [noting that "[i]nstruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance"]).

As noted above, the IHO did not consider whether the reading instruction provided to the student in the 15:1 ELA special class was sufficient to address the student's needs but instead focused on the CSE's failure to reference AIS on the IEP.

The district's coordinator testified that the student was appropriately classified as he entered fifth grade because the student had been receiving AIS instruction but continued to exhibit deficits in reading and was not performing "where he needed to," which indicated that he required specialized instruction to address his needs (Tr. p. 108). The coordinator further testified that the October 2020 CSE agreed that the student would receive daily ELA instruction in a 15:1 special class where the student would receive highly specialized instruction in reading and writing from a certified special education teacher within a 75-minute block, in addition to any AIS supports that the student was accessing through the general education program (Tr. pp. 114-15, 117-18, 240-41, 248). The coordinator further explained that the October 2020 CSE determined that the student required more highly specialized individualized instruction than what could be offered in an ICT class and that he needed more explicit instruction in particular areas that would require a more restrictive setting (Tr. p. 120).

The special education teacher testified that the student began attending her 15:1 ELA special class the first week of November 2020, shortly after the student was found eligible for special education (Tr. pp. 339, 344). The special education teacher testified that she provided AIS instruction from 8:55 am to 9:20 am, and instructional support from 2:09 pm to 2:52 pm or 3:35 pm, depending on the day, in addition to the special education instruction the student was receiving (Tr. pp. 347-48, 349). The special education teacher further testified that the student received reading instruction according to his IEP daily from 9:20 am to 10:30 am (Tr. p. 351).

The special education teacher testified that the district utilized the READ 180 program and Phonics First program (Tr. pp. 340-42). Phonics First was described as similar to Orton-Gillingham and as a decoding program that "worked with just . . . one skill" in isolation and "worked on reading it, spelling it, writing them in sentences" and was more "phonics-based than comprehension-based" (Tr. p. 342). The special education teacher testified that she used Phonics First during the AIS portion of instruction where "we do just phonics reading, identifying, finding them, and reading and spelling those words (Tr. p. 349; see Tr. pp. 355-57).

READ 180 was described as "a program to help students that are struggling as a reader to get to grade level" (Tr. p. 341). The special education teacher testified that from 9:20 am to "about" 9:30 am, the 15:1 ELA special class students worked on "starting words which always [wa]s a written response" (Tr. p. 349). The special education teacher further explained that students would have a specific writing prompt where they were required to complete a "restate sentence and an answer sentence," and work on capitalizing the beginning of a sentence, and punctuation along with answering the question (Tr. p. 357). The special education teacher further testified that from 9:30 am to 10:00 am, "we do our rBook, which is a READ 180 book that's a consumable so they can . . . get the text right from the book and they also do their writing, their vocabulary" (Tr. pp. 349-50). During that time, the students discuss decoding words and how to write words apart in a whole group setting (*id.*). The special education teacher described this portion of instruction using rBook as containing "the passages, we work on the academic vocabulary, vocabulary that's in the passage, segmenting the word, the definition using the word. Then we'll read a text and, again, work on our decoding skills, and the students always bring in what we've done in the first part, the phonics" (Tr. pp. 358-59).

The special education teacher further testified that from 10:00 am to 10:30 am, the 15:1 ELA special class students worked individually; they completed a READ 180 "individualized computer component" that assessed the students, and "it place[d] them in the correct spot and they work[ed] on the computer while adults in the classroom help[ed] and walk[ed] around and monitor[ed] them" (Tr. pp. 350, 361-62; *see* Tr. p. 353). The special education teacher further explained that the students completed a reading inventory to "level them" so that the computer component generates a passage and questions commensurate with the student's level (*see* Tr. p. 360). The special education teacher described the computer component as beginning with "an anchor video to help them get that background knowledge of what they're going to be reading about" and continuing with an "explore zone," where the students learn six new words that will appear in the passage (*id.*). The students work on synonyms and antonyms using the words, "what it might look like, sound like, the definition" (Tr. pp. 360-61). Next, the special education teacher explained that students participated in a "reading zone," where a passage was read to them and the students answered a series of questions (Tr. p. 361). The students then participated in a "language zone," which had a "word zone" that focused on the students' word attack skills, and ability to segment words, and break apart words along with a "spelling zone" that advanced in difficulty with the students' reading level (*id.*). The rBook instruction also incorporated a writing section that required the students to practice a writing skill that involved an argumentative essay for the students to agree or disagree with the content, and a "success zone" to compare and contrast a passage and a fill-in-the-blank section to focus on the vocabulary utilized in the rBook unit (*id.*).

During cross-examination, the special education teacher agreed that decoding was the primary focus of the reading instruction and then comprehension "right after" and that the READ 180 component was where they worked individually on decoding skills (Tr. p. 366). The special education teacher indicated that as the student's "Lexile" or measure of reading comprehension ability continued to grow, the work would become more challenging (Tr. pp. 360, 362).

Based on the foregoing, the evidence in the hearing record shows that the October 2020 CSE recommended specialized reading instruction via the 15:1 special class. While the AIS delivered to the student, including the use of the Phonics First program and the provision of instructional support, could be described as specially designed instruction, a review of the evidence

in the hearing record shows that the 15:1 special class along with other supports included on the IEP, on their own, were sufficient to address the student's reading needs taking the AIS out of the calculus.

In addition to focusing on the district's provision of AIS, the IHO also found that the district failed to offer the student a FAPE because the October 2020 IEP included only one reading goal and should have included a reading comprehension goal.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The October 2020 IEP contained seven annual goals including one reading annual goal addressing identifying unknown words and using decoding strategies, one writing annual goal involving editing for spelling errors, one math annual goal involving the use of manipulatives/drawings/equations to "break down" word problems, one speech-language annual goal targeting answering "WH" questions in a timely manner, a motor skills annual goal targeting visual tracking/convergence/visual memory skills, and two hearing annual goals involving following and completing a series of at least three verbal instructions and identifying and summarizing key ideas and details based on an orally presented passage (Parent Ex. B1 at pp. 9-10). In addition, the IEP included a number of supports and accommodations for the student such as checks for understanding, increased verbal response time, preferential seating, reminders to wear his glasses, encourage use of a sloped writing surface, encouragement to self-advocate when he does not understand or needs assistance, a copy of class notes and supports for taking notes from the board, and modified length and complexity of homework assignments (*id.* at pp. 11-12).

The special education teacher testified that she worked directly with the student on his reading and writing goals in the 15:1 ELA special class (Tr. pp. 364-65). The special education teacher testified that the student's reading goal addressed his decoding needs and the writing goal included all of the needs incorporated in written work, such as capitalization and spelling (Tr. p. 365). As indicated above, the special education teacher identified the student's decoding skills as the need area addressed by the annual goal and described the impact on the student's learning as "without decoding, you can't read a passage, you can't be fluent, and you can't comprehend" (*id.*). The special education teacher further testified that she worked on decoding throughout the 75 minutes of daily ELA instruction, stating, "[w]e work on decoding strategies that whole time . . . doing [p]honics where we're pulling certain sounds out and putting them in . . . reading in the rBook, "especially when someone struggle[d] with the word, we work[ed] on segmenting and pulling it apart" and during the READ 180 computer component of instruction, as students worked individually on decoding skills (Tr. p. 366).

Moreover, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M., 2017 WL 607579, at *20-*21).

Based upon the foregoing, the October 2020 IEP, which recommended among other things, a 10-month program consisting of a 15:1 ELA special class, one reading annual goal, and the supports and accommodations described above offered the student a FAPE. The hearing record does not support the IHO's findings that the student required regular education supports, including AIS, to receive educational benefit or that those supports should have been included on the October 2020 IEP. Additionally, the hearing record does not indicate that the student needed 12-month services. The program recommended by the October 2020 CSE was appropriate and the special education teacher's description of the specialized reading instruction she provided to the student in accordance with the October 2020 IEP offered the student a FAPE.

D. Relief

Having found that the district offered the student a FAPE, the IHO's award of 12-month services of one hour per day of 1:1 reading instruction by a certified reading specialist trained in Orton-Gillingham must be reversed. Lastly, the IHO's determination that the parent is entitled to vision therapy provided by her private evaluator must also be reversed. The IHO found that the district "did not present any law that indicated that it had a right to choose a provider for a service it did not offer in the IEP" (IHO Decision at p. 25). However, the district agreed to provide vision therapy at the outset of the hearing and appears to have had a provider available. This is not an instance where the parent obtained private services because the district failed to do so, and the district was later found to have denied the student a FAPE. Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (Slama v. Independent Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-31; Application of a Child with a Disability, Appeal No. 97-87; Application of a Child with a Disability, Appeal No. 95-50; Application of a Child with a Disability, Appeal No. 91-19; Marple Newtown Sch. Dist., 46 IDELR 295 [SEA PA 2006]). Thus, the IHO erred by directing the district to utilize the parent's private evaluator to deliver the student's vision therapy.

VII. Conclusion

Based on the foregoing, the IHO erred in her determination that the district failed to offer the student a FAPE for the 2020-21 school year, and all of the relief awarded by the IHO to which the parties did not agree must be reversed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 2, 2021, is modified by reversing those portions that concluded the district failed to offer the student a FAPE for the 2020-21 school year; and

IT IS FURTHER ORDERED that the IHO's awards of 30 hours of compensatory 1:1 reading instruction, 30 hours of compensatory 1:1 academic instruction, one hour per day of 1:1 reading instruction by a certified reading specialist trained in Orton-Gillingham for a 12-month school year, and use of the parent's private evaluator to deliver agreed-upon vision therapy are vacated.

Dated: **Albany, New York**
 November 12, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER