The University of the State of New York

The State Education Department
State Review Officer
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No. 21-221

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Mitchell L. Pashkin, Esq.

The Law Office of Elisa Hyman PC, attorneys for respondents, by Erin O'Connor, 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 the decision of an impartial hearing officer (IHO) which ordered the district to convene a Committee on Special Education (CSE) meeting to develop a new individualized education program (IEP) that recommends a specific special education program and placement for respondents' (the parents') son. 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 IEP, which is delegated to a local 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

Given the limited nature of the appeal, the parties' familiarity with the detailed facts and procedural history of the case is presumed and will not be recited in detail. Briefly, the student has a history of speech-language and motor delays, attention and behavior regulation deficits, and learning difficulties (see Parent Exs. N; P; W) and has been the subject of prior administrative proceedings. As part of a prior impartial hearing, an IHO issued a decision dated March 6, 2019, finding that the district failed to provide the student with a free appropriate public education (FAPE) for the 2016-17, 2017-18, and 2018-19 school years and awarding the parents tuition reimbursement for the costs of the student's attendance at the Aaron School (Aaron) for the 2018-19 school year, as well as placement at the Aaron school with related services and after-school services and compensatory related services and tutoring for the denial of a FAPE for the 2016-17, 2017-18, and 2018-19 school years (Parent Ex. B at pp. 7-14).

The student continued to attend Aaron during the 2019-20 school year (see Dist. Exs. 5-8). According to the parents, they filed a due process complaint notice challenging the program

offered to the student for the 2019-20 school year (2019-20 proceeding) (Parent Ex. V at p. 10). On September 16, 2019 the IHO who presided over the 2019-20 proceeding, ordered the district to provide all of the services ordered in the unappealed March 6, 2019 IHO decision as the student's stay-put placement during the pendency of the 2019-20 proceeding, including: placement at Aaron; five 45-minute sessions per week of individual speech-language therapy, two sessions to be provided after school; two 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session of OT in a group of two; two 30-minute sessions per week of physical therapy (PT) in a group of two; 10 hours per week of after-school tutoring; assistive technology; a 12-month school year; and special transportation (Parent Ex. E at p. 2; see Tr. p. 10; Parent Ex. B at p. 13).

A CSE convened on May 18, 2020 and formulated an IEP for the student with an implementation date of June 19, 2020 (see generally Dist. Ex. 1). The May 2020 IEP included results of a private neuropsychological evaluation that had been initiated by the parents (District Ex. 1 at p. 1; see Parent Ex. N).[1] Finding the student eligible for special education and related services as a student with an other health-impairment, the CSE recommended that the student attend an 8:1+1 special class placement in a specialized school with related services consisting of one 30-minute session per week of group counseling services, two 30-minute sessions per week of individual OT and one 30-minute session of group OT, two 30-minute sessions per week of group PT, and two 30-minute sessions of individual speech-language therapy and one 30-minute session of group speech-language therapy (District Ex. 1 at pp. 10-11, 15). The May 2020 CSE also recommended 12-month services for the student (id. at p. 11).

According to the parents, at the May 2020 CSE meeting, they disagreed with the recommendations contained in the May 2020 IEP, "emphasiz[ing] that although 8:1+1 might be an appropriate number of kids, the [specialized school] profile was not appropriate to meet [the student's] needs" and the district advised them to "seek 'due process' if they did not agree with the placement but did not offer a different [district] placement option" (Parent Ex. V. at p. 11).

The student's mother testified that for the 2020-21 school year, Aaron did not offer the student a placement because the class was going to be bigger and the student needed more support and individual attention (Tr. pp. 144-46; see Parent Ex. G).

A prior written notice (notice of recommendation) and a school location letter each dated July 29, 2020 were generated as a result of the May 2020 CSE meeting (Dist. Ex. 2 at pp. 1-5).[2]

[1] The private neuropsychological evaluation was completed in June 2017 (Parent Ex. N). A re-evaluation was conducted in June 2018 (Parent Ex. P). An updated neuropsychological evaluation was conducted in March 2021 (Parent Ex. W).

[2] The student's mother testified that she did not receive a copy of the IEP until it was disclosed as part of the impartial hearing and that she did not receive a school location letter until August 2020 (Tr. pp. 146-51). According to the student's mother, the parents contacted the school but were informed that it was closed and all information about the school could be found on the website; however, the student's mother believed that the information on the website was too general for her to make a decision about whether it was appropriate for the student (Tr. pp. 151-52).

A. Due Process Complaint Notices

The parents filed a due process complaint notice on June 30, 2020, which included a request for an immediate pendency hearing (Parent Ex. A at p. 13). By amended due process complaint notice, dated December 23, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year (see Parent Ex. V).[3] The parents contended that the district failed to adequately evaluate the student; failed to create an appropriate IEP; failed to offer the student a timely and appropriate school placement; and failed to follow the procedural requirements of the IDEA (id. at p. 2). The parents asserted that the district violated section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), and the IDEA by "adopting and implementing systemic and blanket policies and practices, which have affected the special education services that have been offered" to the student and by discriminating against the student based upon his disability (id.).

More specifically, the parents contended that the district had not offered the student a timely and appropriate school placement and that the student was without a school placement at the start of the 12-month school year (Parent Ex. V at pp. 2, 13, 14). The parents alleged that the May 2020 CSE committed procedural and substantive errors which denied the student a FAPE for the 2020-21 school year, denied the student educational benefits and excluded the parents from the special education process, including that the district: failed to offer the student a placement that reflected the recommendations set forth in the neuropsychological evaluation relied on at the May 2020 CSE meeting; failed to address that the student was bilingual; failed to provide the student's parents with translation and bilingual translation services; did not have a properly constituted CSE meeting; failed to recommend sufficient related services; did not properly conduct or consider an FBA and BIP; predetermined the student's program and placement; and did not adequately address the student's speech and comprehension issues (id. at pp. 11-13).

As relief, the parents requested findings that the district failed to offer the student a FAPE and relief in the form of: a pendency order including a substantially similar placement to Aaron; an immediate interim order directing the district to provide full day 1:1 in-home or remote SETSS and continuation of all of the student's related services; an immediate interim order for an independent neuropsychological evaluation; a final order including placement at a private school that would be able to meet the student's needs and all related services; compensatory educational services; market rate for, and transportation to and from, all after-school services; and, going forward, an interpreter and translation of all educational records and documents (Parent Ex. V at pp. 15-16).

B. Impartial Hearing Officer Decision

On July 8, 2020, the IHO initially assigned to preside over this matter (IHO I) issued an order denying consolidation of this proceeding with the then-pending 2019-20 proceeding (IHO Order on Consol.). The parties convened for a hearing date to address the student's pendency placement, which was presided over by IHO I, on July 31, 2020 (Tr. pp. 1-22). IHO I continued

[3] In addition to the original due process complaint notice dated June 30, 2020 and an amended due process complaint notice dated December 23, 2020 (see Parent Ex. A; First Amended Due Process Compl. Notice), a "Corrected" amended due process complaint notice dated December 23, 2020 was entered into evidence as Parent Ex. V (Tr. pp. 71-72).

to preside over the matter for two additional hearing dates (September 24, 2020 and November 12, 2020), during which the parties discussed the status of the matter, including the possibility of settlement (Tr. pp. 23-37).

In an interim decision dated September 30, 2020, citing a motion for "emergency interim relief" filed by the parents on September 9, 2020, IHO I granted the parents' request for an order that the student be provided 10 hours per week of 1:1 tutoring services in addition to pendency services set forth in the September 2019 pendency decision issued as part of the 2019-20 proceedings, noting that the parents' request was made because the student was no longer permitted to attend Aaron during the 2020-21 school year, "which is a private school and the student's pendency placement" (IHO Interim Decision; Parent Ex. U; District Ex. 4). The IHO also noted that there was no dispute that the student was not attending Aaron for the 2020-21 school year and found that the parents' application was for "'emergency interim relief,' not pendency," and as a result "the pendency analysis [wa]s not applicable" and the interim decision "[wa]s not a decision on the issue of pendency" (id. at p. 2).

The impartial hearing on the merits proceeded under a different IHO (IHO II) on December 15, 2020 and concluded on June 10, 2021, after six days of proceedings under IHO II (Tr. pp. 38-240).[4] In a decision dated October 1, 2021, IHO II determined that the district had "conceded" that it failed to provide the student with a FAPE for the 2020-21, 12-month school year and, as such, the only issues that needed to be addressed were "the extent to which the [p]arent [wa]s entitled to the various forms of relief requested" (IHO Decision at p. 4).

IHO II addressed the district's arguments regarding credibility of the parents' witnesses by finding that: (1) contrary to the district's assertion, the neuropsychologist's testimony did not conflict with her evaluation simply because the evaluation did not recommend or mention compensatory services, as there was no need for the neuropsychological evaluation to address compensatory education; (2) nothing in the hearing record or the district's post-hearing brief supported the contention that testimony from the student's tutor should carry "significantly more weight" than the testimony of the neuropsychologist, also noting that the director of the tutoring agency testified at the impartial hearing rather than the student's tutor; and (3) it would be "highly inappropriate" for the IHO to "take judicial notice of all the cases [the IHO] has handled regularly during the 20/21 school year where the parent has not made any payments to a unilateral placement" in order to reject a parent's testimony, instead finding that the testimony of the student's mother was "credible and convincing" (IHO Decision at p. 5).

[4] The district, instead of sequentially numbering its exhibits for the entire hearing, submitted District Exhibits 1 and 2 on the July 31, 2021 hearing date (Tr. p. 5), and then started from District Exhibit 1 again on the December 15, 2021 hearing date (Tr. p. 43). In a letter dated December 2, 2021, the Office of State Review requested copies of District Exhibits 1 and 2 submitted on the July 31, 2021 hearing date, as these were not included with the hearing record filed by the district. By response dated December 8, 2021, the district submitted the missing district exhibits and an amended certification. Upon review, District Exhibits 1 and 2 submitted on the July 31, 2021 hearing date and District Exhibits 1 and 2 submitted at the December 15, 2021 are substantively the same, except that District Exhibit 1 submitted on the July 31, 2021 hearing date included a completed attendance page. It is also noted that District Exhibits 1 and 2 are dated May 18, 2020 and July 29, 2020 respectively, and date references to these exhibits in the transcript of the July 31, 2021 hearing date are not accurate (compare Tr. p. 2, with Tr. p. 41).

With respect to the parents' specific requests for relief, the IHO found that "the CSE need[ed] to develop a new IEP" that would "incorporate[] the recommendations made in the [s]tudent's neuropsychological evaluation," including after-school speech-language therapy and placement in a State-approved nonpublic school program, stating that the district "must promptly place the [s]tudent in an appropriate [nonpublic school] program" (IHO Decision at pp. 5-6). IHO II reasoned that a parent may request, and an IHO may order, a new program and placement based on a school district's failure to provide an appropriate program and placement and that such an order would not constitute inappropriate prospective relief (id.). Here, IHO II found that the district acknowledged that it failed to provide the student with a FAPE and provided no testimony regarding what an appropriate program and placement would be, while the parent presented detailed and convincing testimony regarding the program and placement the student required in order to make meaningful progress (id.).

With respect to the parents' request that the district continue to provide the student with services until the student could be placed in an appropriate school setting, the IHO directed the district to provide the following services on a weekly basis: 25 hours of 1:1 tutoring, five 45-minute sessions of 1:1 speech-language therapy, two 30-minute sessions of 1:1 OT, and one social skills group session (IHO Decision at pp. 6, 9). IHO II found that it was "imperative" for the student to continue to receive services until he could be appropriately placed and noted that the district did not oppose the request (id. at p. 6).

IHO II denied the parents' request that, in the event that an appropriate nonpublic school could not be located within 30 days of the issuance of the IHO decision, the district be ordered to fund a 12-month private school program able to meet the student's needs, finding that, since the record did not include sufficient information about any particular private school program, she would not give the parents "carte blanche" authority to pick a private school and require the district to fund it (IHO Decision at p. 6).

Finally, IHO II awarded the parents' request for compensatory education in the amount of: 25 hours per week of 1:1 tutoring for the 46 week period between July 1, 2020 and June 30, 2021, minus any hours funded under IHO I's interim decision; 46 hours of 1:1 OT and 23 hours of 2:1 OT (to be provided on a 1:1 basis if a 2:1 service could not be located within 30 days of the issuance of the IHO's decision); and five 45-minute sessions per week of 1:1 speech-language therapy for the 46 week period between July 1, 2020 and June 30, 2021, minus any hours funded under IHO I's interim decision (IHO Decision at pp. 7-10). In making the compensatory award, IHO II noted that the parents sought compensatory services only for those services that were mandated by IHO I's interim decision but were not provided to the student during the 2020-21 school year, which was "reasonable and appropriate" (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals. The sole issue on appeal is whether IHO II erred in ordering the district to reconvene and recommend a specific special education program and placement. In particular, the district argues that IHO II erred in ordering the district to develop a new IEP to specifically incorporate the recommendations made in the neuropsychological evaluation, including that the student receive after-school speech-language therapy and attend a placement in a State-approved nonpublic school program. The district further argues that ordering that the student be placed in a particular type of school or program in a future school year would be "an

inappropriate prospective placement" and that such a determination "runs afoul" of the purposes of the IDEA and "bypasses" the annual CSE review process. With respect to relief, the district contends that IHO II should have more appropriately awarded compensatory educational services only or ordered the CSE to reconvene to consider the results of the evaluations, rather than "force the CSE to wholesale adopt those recommendations."

In an answer, the parents initially contend that prospective relief is permissible under the IDEA and that, while a prospective award is generally disfavored where it circumvents the IDEA process, the unique circumstances of this matter justified IHO II's award of prospective relief. In particular, the parents refer to delays in the impartial hearing system, which resulted in an IHO not being assigned to hear the full case until five months after the due process complaint notice was filed with the outcome that no IHO decision was issued within the 2020-21 school year; the student was without a placement for the entirety of the 2020-21 school year and remains without an appropriate placement while the district is contesting pendency; and the district has repeatedly denied the student a FAPE. In support of their last argument, the parents indicate that the due process complaint notice for the 2020-21 school year was the third time they had filed for due process and they have filed for due process for a fourth time for the 2021-22 school year, alleging denial of a FAPE for similar reasons.[5] Accordingly, the parents contend that they are entitled to "prospective relief in the form of an IEP for the 2021-2022 school year with the requested services."

Notwithstanding their view that IHO II could permissibly order prospective IEP amendments, the parents further argue that the district is unable to implement IHO II's order for an IEP with the specific program, since IHO II's order was for the district to place the student "in an appropriate New York State approved non-public school" program and "upon information and belief," there are no approved nonpublic school programs in the State that are appropriate for the student and would accept him. Accordingly, the parents argue "[i]n light of the impossibility of implementation," IHO II's order to create an IEP with a specific program and to place the student in a nonpublic school "is futile and should be vacated." Furthermore, the parents argue that "a reconvene with a specific program" for the 2021-22 school year is unnecessary, given that it is almost midway through the 2021-22 school year which is the subject of a new due process complaint notice.

Finally, the parents agree that IHO II erred in ordering the district to create an IEP for the 2021-22 school year with specific services, contending that, as IHO II awarded the parents compensatory banks of services to remedy the district's denial of FAPE for the 2020-21 school year, IHO II's award of a prospective IEP with specific services for a future school year is "duplicative" of the compensatory award. Therefore, the parents agree with the district that IHO II erred in ordering the district "to reconvene and create an IEP with specific program recommendations." In conclusion, however, the parents note that, "the IHO was warranted in ordering the [district] to reconvene to create an IEP with specific mandates" concluding that "the

[5] The parents in their answer indicate that they have filed a new due process complaint notice alleging a denial of a FAPE for the 2021-22 school year and attach a copy of the due process complaint notice as additional evidence (Answer ¶ 24 n.1; Answer Ex. B).

IHO had authority to order the [district] to convene to create an IEP for [the student] for the 2021-22 school year in light of the unique circumstances of this case."

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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--CSE Reconvene & Prospective Program and Placement

This issue raised by the district on appeal is narrow and relates only to the IHO's order requiring the CSE to reconvene and recommend a specific program. Moreover, although somewhat unclear, the parents appear to ultimately agree that the IHO's order should be vacated.[7]

Awarding prospective IEP amendments, including prospective placement in a nonpublic school, under certain circumstances, has the effect of circumventing the statutory process, pursuant

[6] 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).

[7] The parents simultaneously argue that they agree with the district that the IHO erred in ordering the district "to reconvene and create an IEP with specific program recommendations," while also stating that "the IHO was warranted in ordering the [district] to reconvene to create an IEP with specific mandates." The parents' position appears to be that, while the IHO had the authority to order such relief, under the circumstances of the present matter, the relief is not desirable for this student.

to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

While prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is sought by the parents, such relief could be treated as an election of remedies by the parents, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 20-123; Application of a Student with a Disability, Appeal No. 19-018).

Here, in their answer, the parents acknowledge that an award of prospective relief is no longer fitting for the student (Answer ¶¶ 26, 27). Accordingly, it does not appear from the parents' answer that they would elect such a remedy, and, therefore, an award of prospective placement of the student as ordered by IHO II is not an appropriate award at this juncture.

Additionally, the 2020-21 school year is over, during which time the student received and was awarded educational and compensatory services, and, according to the due process complaint notice filed by the parents challenging the student's programming for the 2021-22 school year, a CSE convened in May 2021 to develop an IEP for the student for the 2021-22 school year (see IHO Decision; Answer Ex. B). As such, if the parents remain displeased with the CSE's recommendation for the student's program for the 2021-22 school year, they may obtain appropriate relief in the proceeding that, according to the parents, they have already initiated (see Eley, 2012 WL 3656471, at *11 [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

VII. Conclusion

Having considered the evidence in the hearing record and determined that the parties are in agreement that an order requiring the CSE to reconvene and include specific program and placement recommendation in the student's IEP program and placement is not desirable, the IHO's decision will be modified accordingly.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 1, 2021, is modified by reversing that portion which directed the CSE to convene a meeting to develop a new IEP that incorporates

recommendations made in the student's neuropsychological evaluation and placement in an appropriate State-approved nonpublic school program.

Dated: **Albany, New York**
December 23, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER