The University of the State of New York

The State Education Department
State Review Officer
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No. 21-228

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

Appearances:
The Cuddy Law Firm, PLLC, attorneys for petitioner, by Simone James, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her requests for relief consisting of a prospective placement and services, a specific assistive technology device, compensatory educational services, and specific hourly rates for the compensatory educational services. Respondent (the district) cross-appeals from the IHO's order directing the district to fund a music therapy evaluation as an independent educational evaluation (IEE). The appeal must be sustained in part. The cross-appeal must be dismissed.

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[a]). 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 this appeal, a full recitation of the student's educational history is not necessary. Procedurally, the evidence in the hearing record indicates that the student was the subject of a prior due process proceeding, which the parent initiated by due process complaint notice dated April 2020 (see Parent Ex. A at p. 3; Dist. Ex. 1 at p. 1). In the April 2020 due process complaint notice, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, 2019-20, and 2020-21 school years, and asserted that the district failed to provide the student with an "appropriate placement and program"

and failed to "adequately evaluate" the student (Parent Ex. A at p. 3; see Dist. Ex. 1 at p. 2). As relief for the district's alleged violations, the parent sought IEEs, compensatory educational services, and for the district to defer the student's case to the Central Based Support Team (CBST) "for [a] new placement" (Dist. Ex. 1 at p. 2).[1]

Prior to, and concurrent with, the appointment of an IHO for the impartial hearing related to the April 2020 due process complaint notice, the parent obtained a neuropsychological evaluation of the student over three separate days in August and September 2020, which culminated in an evaluation report dated September 29, 2020 (see Parent Ex. S at p. 1). An IHO (IHO 1) was appointed to the parent's case on September 9, 2020; the impartial hearing was completed in one day on October 7, 2020; and IHO 1 issued a decision, dated October 16, 2020 (see Dist. Ex. 1 at pp. 1, 7). In the decision, IHO 1 found that the district conceded that it failed to offer the student a FAPE for the 2017-18, 2018-19, 2019-20, and 2020-21 school years, and while given the opportunity to present documentary and testimonial evidence and to cross-examine the parent's witness, IHO 1 noted that the district declined to do so (id. at pp. 3-4). Finding that the district failed to offer the student a FAPE for the four school years at issue, IHO 1 turned to the relief sought by the parent (id. at p. 4). IHO 1 determined that the parent requested IEEs at public expense in a letter dated February 2020, and the district did not "present evidence that it responded appropriately" to the parent's request by either providing the requested IEEs or by filing a due process complaint notice to defend the "contested evaluation" performed by the district (id.; see 34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][vi]). In addition, IHO 1 noted that the parent "submitted rate affidavits and resumes from [her] chosen providers for the IEEs," and upon review of those documents, IHO 1 found the providers were "qualified to conduct the IEEs" and "their rates [were] reasonable and within market standards" (Dist. Ex. 1 at p. 4).[2]

In light of the foregoing, IHO 1 ordered the district to fund the following assessments: a neuropsychological evaluation by a specific provider (at a rate not to exceed $5,500.00), a functional behavioral assessment (FBA) (at a rate not to exceed $3,375.00) and behavioral intervention plan (BIP) if indicated (at a rate not to exceed $1,125.00), a bilingual speech-language evaluation (at a rate not to exceed $2,400.00), an assistive technology evaluation (at a rate not to exceed $2,500.00), an occupational therapy (OT) evaluation (at a rate not to exceed $2,000.00), a physical therapy (PT) evaluation (at a rate not to exceed $2,000.00), and an applied behavior analysis (ABA) skills assessment (at a rate not to exceed $3,375.00) (see Dist. Ex. 1 at pp. 6-7). IHO 1 also ordered all of the IEEs to be conducted by qualified providers of the parent's choosing (id.).

[1] The parent's April 2020 due process complaint notice was not entered into the hearing record as evidence; any facts or information concerning the contents of the April 2020 due process complaint notice have been drawn from the IHO decision issued in that proceeding, dated October 16, 2020, as well as from the parent's January 29, 2021 due process complaint notice (see Dist. Ex. 1 at pp. 1-7; see also Parent Ex. A at pp. 3).

[2] As part of the legal standard relied on by IHO 1 in determining whether the parent was entitled to the requested IEEs, IHO 1 indicated that if an IEE met the "agency criteria, [the IEE] must be considered by the [CSE] in any decision made with respect to the provision of FAPE to a student" (Dist. Ex. 1 at p. 4, citing 34 CFR 300.503[c][1] and 8 NYCRR 200.5[g][vi]). IHO 1 further indicated, however, that the CSE's "obligation to consider the IEE d[id] not include a corresponding obligation to accept the IEE or its recommendations" (Dist. Ex. 1 at p. 4 [emphasis in original], citing S.S. v. Bd. of Educ. Town of Ridgefield, 10 F. 3d 87 [2d Cir. 1993]).

With respect to the parent's request for compensatory educational services, IHO 1 concluded that the hearing record did not "reflect a current accurate profile" of the student's needs "in the areas that [the p]arent ha[d] requested compensatory education" (Dist. Ex. 1 at p. 5). IHO 1 further noted that, "[i]n an effort to complete the [hearing] record," she questioned the parent's witness—"the psychologist who evaluated [the s]tudent"—to "ascertain a reasonable remedy of service" to meet the student's needs; however, the psychologist could not "conclusively quantify a recommendation for compensatory education services" to meet the student's needs (id.). Consequently, IHO 1 indicated that her decision "w[ould] be in no way interpreted to impede [the p]arent's right to refile a case for compensatory education relief upon completion of the [IEEs] ordered" therein (id.).

Finally, IHO 1 turned to the parent's request for a "change in placement" for the student (Dist. Ex. 1 at p. 5). Noting first that the district failed to "prove [it] had provided an appropriate placement" for the student for the "school years at issue," IHO 1 pointed to testimonial evidence by the parent's witness—the psychologist who evaluated the student—"regarding her recommendation for a change in placement" (id.). According to IHO 1, the psychologist "opined that [the s]tudent require[d] a full time ABA program in order to learn," and in addition, the psychologist described the student's "substantial delays in all developmental areas and his need to be supervised full time due to his . . . diagnosis (presenting a danger to himself)" (id.). Finding the psychologist to be a credible and qualified witness, IHO 1 concluded that a change in placement was an appropriate remedy "[g]iven the duration" of the district's failure to offer the student a FAPE (id. at pp. 5-6). As a result, IHO 1 ordered the district to "defer the [s]tudent to the CBST for placement in a 12-month program that provide[d] full time ABA instruction in a 6:1:1 class with related services and a 1:1 full time health paraprofessional" within 15 days of the date of the decision, and furthermore, that "such placement should incorporate the recommendations made in the neuropsychological evaluation" report entered into the hearing record as evidence (id. at p. 6). In addition, IHO 1 ordered that the placement "shall include transportation to and from the placement" (id.).

The evidence in the hearing record reflects that, shortly after IHO 1 issued the October 2020 decision, a CSE convened on November 4, 2020 (see Parent Ex. D at p. 17).[3] Thereafter, on November 10, 2020, the FBA/BIP IEE of the student was conducted, and the testing results were reduced to an evaluation report, dated January 13, 2021 (see Parent Ex. R at p. 1). On January 5, 2021, the ABA skills assessment IEE of the student was completed (see Parent Ex. Q at p. 1 [reflecting January 10, 2021 as the date of the ABA skills assessment IEE evaluation report]). Within the midst of completing the IEEs ordered by IHO 1, the parent, in a letter to the district dated January 11, 2021, indicated that, in "August and September of 2020," a neuropsychological

[3] A notation in the November 2020 IEP indicated that the parent "mentioned that she would be sending an evaluation in for review" and that the "information w[ould] be shared with the school psychologist" (Parent Ex. D at p. 18). Based on a review of the November 2020 IEP—as well as the November 2019 IEP in the hearing record, which reflected a projected annual review date of November 15, 2020—it appears that the CSE met to conduct the student's annual review on November 4, 2020 and developed his IEP, which seemed to reflect a backdated "projected implementation" date of October 30, 2020 and a projected annual review date of November 4, 2021—but the terms were not in accord with the October 16, 2020 directives in IHO 1's decision or with the recommendations from the neuropsychological IEE that the parent mentioned she would be forwarding to the district (compare Parent Ex. D at p. 1, with Parent Ex. C at p. 1, and Dist. Ex. 1). It is somewhat baffling that the parties did not seem to acknowledge IHO 1's decision at that juncture.

IEE of the student had been completed, and as a result of that IEE, the evaluator recommended a "music therapy evaluation in order to help him make progress" (Parent Ex. J at p. 1).[4] According to the letter, the neuropsychological IEE had been provided to the district in "October 2020 and on November 4, 2020" (id.). In the January 2021 letter, the parent requested a "bilingual music therapy evaluation" of the student as a publicly funded IEE, and the parent identified the specific evaluator and rate for the requested IEE (id.).

On January 12, 2021, a CSE convened again, this time to incorporate the directives from IHO 1's decision into the student's IEP, including a deferral to the CBST and to change the student's placement—i.e., a State-approved nonpublic school—as well as recommendations from the neuropsychological IEE into the IEP (management needs) (compare Dist. Ex. 1 at p. 6, with Parent Ex. E at pp. 6, 15, 18-19, 21). The January 2021 IEP specifically included the following recommendations: a 6:1+1 special class placement in a State-approved nonpublic school; a 12-month school year program; a 1:1 health paraprofessional; and special transportation consisting of limited travel time, air conditioning, a minibus, and transportation "from the closest safe curb location to school" (Parent Ex. E at pp. 15-16, 18). The January 2021 IEP included one annual goal with corresponding short-term objectives to address the student's ability to "maintain a toilet schedule," as well as annual goals and corresponding short-term objectives targeting the student's needs in the areas of English language arts (ELA), mathematics, communication, writing, speech-language, sensory regulation, fine motor and eye coordination, and pre-writing skills (id. at pp. 7-14). Within the management needs section of the January 2021 IEP, the CSE incorporated the following recommendations from the neuropsychological evaluation—as ordered by IHO 1—and, more specifically, with respect to the recommendation that the student receive "instruction with the following features": evidence-based ABA techniques, multimodal/multisensory presentation of material, an opportunity for hands-on activities using preferred materials to maintain engagement, positive behavior supports throughout the school day, opportunities for sensory activities through the school day, frequent breaks, individual picture schedule and techniques for supporting regular use of picture symbols throughout the school day, consistent use of reinforcers to improve on-task behavior (such as musical activities, visual stimulation, squeeze toys, and any other reinforcer determined by the FBA/ABA evaluation), positive attention and reinforcement, modeling and repetition, behavioral interventions determined by the ABA evaluation, preferential seating, reduced distractions, small reasonable goals for academic work, verbal and visual and gestural prompting, and an opportunity for individualized instruction (id. at p. 6).[5]

Following the January 2021 CSE meeting, the remaining IEEs of the student, as ordered by IHO 1, were completed: speech-language (January 14, 2021), OT and PT (January 22, 2021), and assistive technology (January 29, 2021) (see Parent Exs. O at p. 1; P at p. 1; T at p. 1; U at p. 1).

[4] The parent appeared to mistakenly date the letter as "January 11, 2020," rather than January 11, 2021 (see Parent Ex. J at pp. 1-2).

[5] Despite the fact that the January 2021 CSE meeting took place the day after the parent's letter requesting a music therapy evaluation as an IEE, there is no indication in the January 2021 IEP that the parent alerted the CSE to her IEE request or otherwise requested a music therapy evaluation at the CSE meeting (see generally Parent Ex. E).

A. Due Process Complaint Notice

By due process complaint notice dated January 29, 2021, the parent alleged once again that the district failed to offer the student a FAPE for the 2018-19 school year ("from January 29, 2021 on [sic]") and the 2019-20 and 2020-21 school years (Parent Ex. A at pp. 1, 4, 7). Relevant to this appeal, the parent initially requested the following as relief: an order finding that the district failed to offer the student a FAPE for the 2018-19 ("from January 29, 2021 on [sic]"), 2019-20, and 2020-21 school years; and an order directing the district to fund a bilingual music therapy evaluation as an IEE by a specific provider at a rate not to exceed $1,500.00 (id. at p. 7).[6] Next, the parent requested an order directing a CSE to convene to review the IEE results within 15 days of the completion of said IEEs, and to "develop an appropriate IEP based on the IEEs" that included, but was not limited to, the following, as recommended by the psychologist who conducted the neuropsychological IEE of the student: a 6:1+1 special class placement; a 12-month school year program; a 1:1 health paraprofessional; socialization instruction and supports incorporated into the curriculum; special transportation consisting of limited travel time, air conditioning, and a minibus; and appropriate and measurable annual goals, including annual goals for toileting (id. at p. 8). In addition, the parent requested that the newly developed IEP include an "accurate and comprehensive statement of the [s]tudent's current levels of performance"; "[a]ppropriate related services as recommended by the [IEEs]"; an appropriate assistive technology device, if necessary; and to "[i]ntegrate goals from the [s]tudent's [IEEs]" (id.).

Next, the parent requested compensatory educational services as relief, consisting of, but not limited to, the following: 1380 hours of ABA therapy, 276 hours of parent counseling and training, speech-language therapy, OT, PT, counseling, and assistive technology training (see Parent Ex. A at p. 8). The parent further requested that the district fund the compensatory educational services "to be provided outside of school hours" and "by independent providers of the [s]tudent's choosing at their normal and customary rates" (id.). Relatedly, the parent requested that the district fund transportation costs to access the compensatory educational services by issuing MetroCards to the parent within 14 days of the decision (id.).

In addition, the parent requested an order directing the district to provide the student with 10 hours per week of home-based ABA services and two hours per week of parent counseling and training, as recommended in an IEE (see Parent Ex. A at p. 8).

Next, the parent requested an order directing the district to defer the student's case to the CBST, and while attempting to locate an appropriate program, direct the district to fund and provide the student with "push-in ABA services, 30 hours each week, by a provider of the [p]arent's choosing" (Parent Ex. A at p. 9). The parent noted that, should the district fail to locate a State-approved nonpublic school for the student "within 30 day of the order," then the district should be ordered to "fund a private school of the [p]arent's choosing" (id.). Finally, the parent requested an order directing the district to: "put the [s]tudent's tuition into a special needs trust to ensure timely payments be made to the school," "fund the door to door transportation to and from [the student's]

[6] In the January 2021 due process complaint notice, the parent asserted her entitlement to a music therapy IEE based on the district's alleged failure to respond to her request for the IEE within the time frames set forth in the district's Standard Operating Procedures Manual (SOPM), that is, within "ten calendar days" (Parent Ex. A at p. 7).

new placement," "authorize service providers and the [s]tudent's placement within 14 days of the order's date," and "put the funds for any compensatory services in a special needs trust so that the providers c[ould] be paid timely and that services c[ould] continue without delay" (id.).

B. Facts Post-Dating the Due Process Complaint Notice

In a letter dated March 8, 2021, the parent filed a state administrative complaint with the New York State Education Department (NYSED) Office of Special Education (60-day complaint), alleging that the district failed to timely appoint an IHO with respect to the January 2021 due process complaint notice (see Parent Ex. V at pp. 1-3). In a letter to the parent dated March 30, 2021, the regional associate assigned to investigate the allegation in the parent's 60-day complaint acknowledged receipt of the parent's letter, and in a letter of the same date to the district, the regional associate requested several documents from the district, including a copy of the parent's "request for the [IEE]," dated January 11, 2021 (Parent Exs. W at pp. 1, 4-5; X at p. 5).

On or about April 19, 2021, an IHO (IHO 2) was assigned to this proceeding (see IHO Decision at p. 3).

Thereafter, in a letter sent to all parties involved in the parent's 60-day complaint, dated May 6, 2021, the Office of Special Education advised the parties of its findings and issued the following compliance assurance plan: the required corrective action noted that, by "July 2, 2021, the [district] will submit to the NYSED documentation that the [IEE] was provided at public expense" (Parent Ex. X at pp. 1, 3-6).[7]

C. Impartial Hearing Officer Decision

On May 28, 2021, the parties proceeded to, and completed, the evidentiary phase of the impartial hearing in this matter (see Tr. pp. 1-50). After the conclusion of the evidentiary phase, the parent submitted a closing brief (undated) for consideration (see generally Parent Closing Br.). In the closing brief, the parent slightly modified the relief originally sought in the due process complaint notice with respect to the IEP to be developed with specific program recommendations upon review of the IEEs: to wit, placement in an ABA program as recommended by two IEE evaluators; placement in a "small, supportive, very specialized program class, with a 1:1 health paraprofessional," as recommended in the neuropsychological IEE; "[s]pecific, meaningful and measurable goals tailored to [the student's] individual needs, including integrating the goals developed from the independent [speech-language], PT, and OT evaluations"; four 60-minute sessions per week of individual speech-language therapy, one session of speech-language therapy per week in a small group (all with a bilingual provider on a 12-month school year basis); four 45-minute sessions per week of individual OT (on a 12-month school year basis); an "iPad Mini5 with

[7] Despite the fact that the parent's 60-day complaint had been resolved prior to the date scheduled for the impartial hearing to take place, neither party informed IHO 2 of these events either at the impartial hearing or afterwards, in the parent's closing brief to IHO 2; similarly, neither party brought these facts to the attention of the SRO as part of this appeal or more particularly, how, if at all, the disposition of the parent's 60-day complaint may influence the current appeal—especially with respect to the district's cross-appeal of that portion of IHO 2's decision awarding a music therapy evaluation as an IEE, which was the same corrective action issued by the Office of Special Education (see generally Tr. pp. 1-50; Parent Exs. A-Z; AA-JJ; Dist. Ex. 1; IHO Decision; Req. for Rev.; Parent Mem. of Law; Answer & Cr. App.).

128 GB and Snap + Core First application"; 10 hours per week of ongoing home-based ABA services; and two hours per week of ongoing parent counseling and training services (id. at pp. 18-19; compare Parent Ex. A at p. 8, with Parent Closing Br. at pp. 18-19, 23-24, 29-30).

The parent also modified the relief she requested in the due process complaint notice to include an order directing the district to "fund the tuition" for the student's placement in a nonpublic school of the parent's choosing for the "remainder of the 2021-2022 school year as a form of compensatory education" if the district was unable to locate a State-approved nonpublic school through the CBST within 30 days of the date of the decision (Parent Closing Br. At p. 19; compare Parent Ex. A at p. 9, with Parent Closing Br. at p. 19). The parent also noted that while the district attempted to locate a State-approved nonpublic school, the district should be ordered to fund 25 hours per week of push-in ABA services—as opposed to the original request for 30 hours per week—and by a provider of the parent's choosing (compare Parent Ex. A at p. 9, with Parent Closing Br. at p. 19). With respect to compensatory educational services, the parent requested the following: 368 hours of speech-language therapy, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 276 hours of OT, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 92 hours of PT, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 1380 hours of ABA therapy, with a qualified provider of the parent's choosing, and at a rate not to exceed $300.00 per hour; and 70 hours of assistive technology training, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour (compare Parent Ex. A at p. 8, with Parent Closing Br. at pp. 19-20, 25-29).

In addition to the foregoing and with respect to the related services recommended in the IEEs, the parent sought two 30-minute sessions per week of PT; as support services recommended in the IEEs, the parent requested 10 hours per week of home-based ABA services provided by, or closely supervised by a Board Certified Behavior Analyst (BCBA) "as part of an appropriate program"; and two hours per week of parent counseling and training services to be delivered by the home-based ABA provider (compare Parent Ex. A at pp. 8-9, with Parent Closing Br. at pp. 22-23).

In a decision dated October 1, 2021, IHO 2 determined that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years, noting the district's failure to present any witnesses or testimonial evidence aside from entering a copy of IHO 1's decision into the hearing record as evidence (see IHO Decision at pp. 8, 12). Next, IHO 2 found that the student was entitled to a music therapy evaluation as an IEE (id. at p. 9). IHO 2 indicated that the parent requested the IEE and the district did not provide a response, to date (id.). IHO 2 noted that, although the district asserted at the impartial hearing that a music therapy evaluation was not "deemed necessary for educational benefits," this conclusory assertion was not supported by any evidence in the hearing record (id.). As a result, IHO 2 ordered the district to fund a music therapy evaluation as an IEE, with a specific provider, and at a rate not to exceed $1,500.00 (id. at pp. 10-11).

Next, IHO 2 found that the student was entitled to receive "related services and support services as recommended and specified by the [IEEs]" (IHO Decision at p. 9). IHO 2 also found that the hearing record contained recommendations by the IEE evaluators, which "established in conclusive fashion the compensatory education services to meet the [s]tudent's needs" (id.). IHO

2 further found that these recommendations "were warranted as an appropriate remedy for the [d]istrict's violation of IDEA requirements" (id.). As a final point, IHO 2 noted that the district failed to offer "evidence to refute that the related services and support services as detailed by the IEEs were not appropriate for the student's educational needs" (id.). As a result, IHO 2 ordered the district to fund the following compensatory educational services: 368 hours of speech-language therapy, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 276 hours of OT, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 92 hours of PT, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; 1380 hours of ABA therapy, with a qualified provider of the parent's choosing, and at a rate not to exceed $250.00 per hour; and 70 hours of assistive technology training, with a qualified provider of the parent's choosing, and at a rate not to exceed $100.00 per hour (id. at p. 11).

Notwithstanding the foregoing, IHO 2 determined that the evidence in the hearing record did not support the parent's request for an award of 276 hours of parent counseling and training services as compensatory educational services (see IHO Decision at p. 10). Here, IHO 2 concluded that the parent "did not provide any testimony regarding" either the amount of the compensatory educational services recommended in the IEE or with respect to the rate of $300.00 per hour; as a result, IHO 2 denied this relief (id.).

Finally, IHO 2 denied the parent's request for a "prospective placement or funding in a non-approved private school of the [p]arent's choosing for the 2021-22 school year as an award for compensatory education and funding door to door transportation" (IHO Decision at p. 10). IHO 2 found that the hearing record failed to contain sufficient evidence "relating to a prospective non-public school placement or reimbursement" (id.). However, IHO 2 further noted that, "[n]otwithstanding [these] findings, this [d]ecision should not impede the [p]arent from placement of the [s]tudent at a non-public school or seeking relief for tuition reimbursement, transportation costs or other relief under the IDEA" (id.). Additionally, IHO 2 noted that the "school years at issue [were] essentially over and the more appropriate course [was] to limit review to remediation of past harms that have been explored through the development of the underlying hearing record" (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that IHO 2 erred by reducing the hourly rates for the ABA therapy ($250.00 per hour rather than the requested $300.00 per hour) and assistive technology ($100.00 per hour rather than the requested $250.00 per hour) awarded as compensatory educational services; by denying the parent's request for a specific assistive technology device (iPad Mini5 with 128 GB and Snap + Core First application); by denying her requests for parent counseling and training as compensatory educational services (276 hours at a rate not to exceed $300.00 per hour) and ongoing home-based ABA services (10 hours per week) and parent counseling and training services (two hours per week); by denying her request for an ABA based placement as a form of compensatory educational services; and by denying her request to reconvene a CSE meeting to develop an IEP for the student that included the "recommendations of the [IEEs]."

As relief, the parent seeks an order directing the district to convene a CSE meeting to review the IEE results and to "create an appropriate IEP" that included, but was not limited to, the following as recommended in the IEEs: placement in an ABA program, placement in a "small classroom, with a 1:1 health paraprofessional"; socialization instruction; five sessions per week of speech-language therapy; four sessions per week of OT; and two sessions per week of PT. In addition, the parent requests an order directing the district to provide the student with 10 hours per week of home-based ABA services and two hours per week of parent counseling and training. The parent further requests an order directing the district to defer the student's case to the CBST to locate an appropriate ABA placement, and if the district cannot locate such program within 30 days of the date of the decision, then allow the parent to place the student in a nonpublic school for the 2021-22 school year as a form of compensatory educational services. Also, the parent requests that, while the district attempts to locate an appropriate full time ABA program, the district should be ordered to fund and provide the student with 25 hours per week of push-in ABA services.

Next, the parent requests an order directing the district to provide the student with an iPad Mini5 with 128 GB and Snap + Core First application, and the following compensatory educational services: 1380 hours of ABA therapy by a specific agency provider and at a rate not to exceed $300.00 per hour; 276 hours of parent counseling and training by a specific agency provider and at a rate not to exceed $300.00 per hour; and 70 hours of assistive technology training by a provider of the parent's choosing and at a rate not to exceed $250.00 per hour.

In an answer, the district responds to the parent's allegations and generally argues to uphold those portions of IHO 2's decision that reduced the hourly rate for the ABA therapy awarded as compensatory educational services to $250.00 per hour; and denied the parent's requests for the student's prospective placement in a nonpublic school at district expense, to develop an IEP with specific recommendations set forth in the IEEs, and to prospectively provide and fund home-based services. The district affirmatively argues, however, that the parent may be entitled to an award of parent counseling and training services as compensatory educational services, but that any such award should be limited to no more than 120 hours. The district similarly asserts that the parent may be entitled to an assistive technology device, but that the district should be allowed to provide a device that serves the same function as recommended in the assistive technology IEE. With respect to IHO 2's decision to reduce the hourly rate for the assistive technology training awarded as compensatory educational services to $100.00 per hour, the district agrees with the parent that IHO 2 erred and should have awarded an hourly rate of $250.00 for these services.[8]

As a cross-appeal, the district argues that IHO 2 erred in awarding a music therapy evaluation as an IEE and seeks to reverse this award.[9] The district contends that res judicata or collateral estoppel precluded this relief.

[8] To the extent that the district affirmatively agrees with the parent's position that IHO 2 improperly reduced the hourly rate for the assistive technology training services awarded as compensatory educational services, that is, from $250.00 per hour to $100.00 per hour, this issue will be deemed to be resolved and no longer in dispute in this appeal; as such, the hourly rate for the assistive technology training services will not be further discussed.

[9] Although permitted by regulation, the parent did not submit an answer to the district's cross-appeal (see 8

V. Applicable Standards—Compensatory Educational Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

VI. Discussion

A. Preliminary Matters

At the outset, I would be remiss in failing to explain that the administrative proceedings underlying this appeal are the product of an unsound impartial hearing process involving the decisions rendered in not one but two separate impartial hearings before different IHOs. It is unquestionable that both parties were aggrieved by IHO 1's decision, because IHO 1 determined that the district denied the student a FAPE and ordered some remedial relief in the form of granting new assessments at public expense and ordering that the district place the student in a in a state approved non-public school. The parents were aggrieved in part by the same decision, because

NYCRR 279.5[b]).

IHO 1 denied the parents' request for compensatory education because of her findings that the parent provided inadequate evidentiary support to award such relief and determining that parents' expert was unable to quantify the student's need for compensatory education. IHO 1's determination to grant partial relief and then dismiss the case while the parties obtained more evidence for a second due process proceeding on the same issues at some later point in time.[10] Neither party saw fit to appeal from IHO 1's determination. Instead, both sides seemed complacent, satisfied to start the case over in front of a new IHO with the additional IEEs in hand. Indeed, the parents then filed a second due process complaint notice, briefly mentioning IHO 1's decision without mentioning the school years involved and then focusing once again on the district's alleged failures to offer a FAPE during the 2018-19 through 2020-21 school years. The matter came to a head in their opening statements before IHO 2, when both parties accused one another of failing to comply with IHO 1's decision, with the district on the one hand seeking to compel the parents' compliance with the placement process and the parents on the other hand seeking to modify the relief ordered by IHO 1 because the student had not yet been placed in state-approved nonpublic school (Tr. pp. 8-9; 11-12). The parents further argued noncompliance with IHO 1's unappealed order in their closing brief and contended that the student should be placed in an unapproved school of the parents choosing if the noncompliance with IHO 1's order continued (Parent post-hr'g brief at pp. 6, 9, 19). Thus, parents continued to ask IHO 2 (and now ask the undersigned) to revisit the FAPE determination on grounds already covered by IHO 1 regarding the "18/19 (from January 29, 2021 on), 19/20, and 20/21 school years" and then put provisions in place that would effectively enforce IHO 1's determination if the district failed to comply within 30 days (id. at p. 18). The district in contrast is equally perplexing insofar as it once again took

[10] Although IHO 1's attempt to gather evidence at the impartial hearing from the sole witness who appeared to testify was laudable, her decision to deny the parent's request for compensatory educational services at that time due to insufficient evidence and then to inform the parent of her ability to refile a case for such relief when the IEEs were completed was improper—albeit there is nothing to be done about it now. In essence, IHO 1 followed the same course of other IHOs who did the same thing while labeling the compensatory educational services "unripe" for review—a result that has routinely been reversed on appeal and remanded, at times, back to IHOs (see Application of a Student with a Disability, Appeal No. 21-120; Application of a Student with a Disability, Appeal No. 21-104; Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 18-135). As has been noted in prior State level review decisions, an IHO's reticence in calculating a compensatory education award without IEEs is understandable, as they may offer insight into what position the student would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services the student should have received (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]; see Newington, 546 F.3d at 123). Remand in that proceeding is no longer possible. There was a better course, even though it presents its own challenges with timeline compliance. Rather than taking the approach she did, IHO 1 could have either required the parties to submit additional evidence to support the request for compensatory education or ordered interim IEEs and that the parties were free to request that the case remain open until the IEEs were completed, allowing her to reach a conclusion on compensatory education services on the merits (see Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 [D.D.C. 2017] ["A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination"]). In this instance, IHO 1 appears to have forced herself into an untenable position—namely, a hearing record that did not contain sufficient evidence upon which to reach a conclusion about the compensatory educational services, which points to either ignorance or willful disregard of the burdens of proof by both parties in this case. The result is that that there was just a delay and a state administrative complaint filed because no IHO was appointed to the case on the second time around.

virtually no initiative to defending itself during the impartial hearing process, and appears to agree with the parent on numerous points regarding the provision of compensatory education to the student; however; at the same time, the district selectively tries to use a res judicata defense for the first time on appeal to the parents' music therapy evaluation request, all while failing to defend against the fact that the Office of Special Education stepped in while this matter was pending and ordered the district to provide the very IEE relief the parents that parents were seeking in the due process proceeding.

It is well settled that an IHO does not have the authority to enforce or stand in review of another IHO's decision (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A..R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]). Here, IHO 1 appeared to thrust that responsibility of enforcement or continuing the proceeding on their prior claims onto IHO 2 by allowing the parties to return to due process on the same issues to develop a remedy. It is also axiomatic that an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514 [a]; 8 NYCRR200.5[j][5][v]), and the parties do not challenge IHO 1's decision. I find myself faced with resolving a procedural conundrum that was created by the parties and IHO 1 when she issued a final order that failed to resolve the disputed issues in the case, and instead allowed the parties to return to due process a second time. On the one hand, I have strongly considered vacating IHO 2's decision in its entirety, and as of the date of this decision, I am not entirely convinced that it would not be the better course. However, I also cannot endorse efforts to enforce or modify the terms of IHO 1's decision in any way as I am without authority to reopen the terms of that unappealed order. The parties' options at this juncture are to seek enforcement of IHO 1's decision in the appropriate forum if they are unhappy about how matters worked out, or to agree that the decision was ill-advised and move on.

As for IHO 2's decision, I also note that the parties have nevertheless found a great deal of common ground insofar as the much of the compensatory education relief ordered by IHO 2 was not challenged. I also am acutely aware that I come to this administrative hearing process after the IHOs and attorneys have already wrought too much damage to correct it. Vacating IHO 2's decision is likely at this juncture to consign the parties to far more litigation going forward with no benefit whatsoever to the student and repeated findings that the district largely failed to defend itself and instead agrees that the parents should prevail to a greater degree in some respects. Thus, I am left to work out a fair result the best I am able, even if I believe it may premised upon a foundation of the parties that is legally unsound.

B. Compensatory Educational Services

1. ABA Therapy Services

Here, the parent argues that IHO 2 improperly relied on extrinsic evidence and arbitrarily reduced the hourly rate to be paid for the 1380 hours of ABA therapy awarded as compensatory educational services from the requested $300.00 per hour to $250.00 per hour. The parent contends that the evidence she submitted into in hearing record reflected that the agency she selected to provide these services charged $300.00 per hour, and the hearing record was otherwise devoid of evidence that the rates were unreasonable. Conversely, the district asserts that IHO 2 justifiably

reduced the hourly rate awarded for the ABA therapy services, as evidence in the hearing record reflects that the agency selected by the parent (or its affiliate) charged $250.00 per hour for "one type of special education instruction that incorporate[d] ABA therapy."

Initially, neither party contends that IHO 2 erred in awarding 1380 hours of ABA therapy as compensatory educational services. Based on the evidence in the hearing record, IHO 2's award of the 1380 hours of ABA therapy was consistent with the recommendation made by the evaluator who conducted the ABA skills assessment IEE of the student, as well as the FBA/BIP IEE of the student, and who attested that 1380 hours of ABA therapy was required a compensatory educational services because the student had not "received appropriate behavioral supports to date" and thereafter, calculated the recommendation as "10 hours per week for 46 weeks for the past 3 years" (Parent Ex. AA at pp. ¶¶ 4, 31). Thus, the dispute between the parties now focuses solely on the hourly rate awarded for the parent to obtain those services, which at this point has been reduced to a difference of $50.00 per hour.

Nevertheless, while the district now argues on appeal that the parent's evidence—that is, a rate sheet submitted that listed rates for specific services by a specific agency and its affiliated agency—justified a rate of $250.00 per hour for what may be a similar service (special education itinerant teacher [SEIT] or special education teacher support services [SETSS] by an ABA-trained teacher), the district did not contest the proposed rates at the impartial hearing for any compensatory educational services to be awarded by IHO 2 and the district has not now provided any evidence, other than pointing to the parent's own rate sheet, to uphold IHO 2's decision to award $250.00 per hour for the ABA therapy services (see Answer & Cr. App. at ¶ 22, citing Parent Ex. GG). Indeed, if the district wished to argue that a particular rate should apply to the compensatory award, it was incumbent on the district to develop the hearing record by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). If the district disagreed with the rates proposed by the parent's preferred providers, it was incumbent on the district to come forward with evidence demonstrating that the rates were not reasonable.

Ironically, however, the parents have the same problem insofar as the rate sheet included in the hearing record listed 1:1 ABA therapy compensatory services at a rate of $300.00 per hour but also listed SEIT/SETSS by an ABA-trained teacher compensatory services at a rate of $250.00 per hour, but does not otherwise make a distinction between the two services actually delivered at the disparate rates or why disparate rates had been assigned to these two services (see Parent Ex. GG at p. 1). In addition, the evaluator who recommended the 1380 hours of ABA therapy as compensatory educational services did not specify how the ABA therapy compensatory services must be provided to the student, or more specifically, in what type of setting (see generally Parent Ex. AA at ¶ 31). Therefore, in light of the fact that the parent's evidence, while unrebutted by the district, supports the finding reached by IHO 2 that the ABA therapy compensatory services could be delivered by an ABA-trained teacher at a rate of $250.00 per hour. I decline to disturb IHO 2's decision.

2. Parent Counseling and Training Services

The parent argues that IHO 2 erred by arbitrarily denying her request for 276 hours of parent counseling and training services at a rate not to exceed $300.00 per hour as compensatory educational services. More specifically, the parent contends that, pursuant to State regulations pertaining to students with autism, parents must be provided with parent counseling and training services '"for the purpose of enabling parents to perform appropriate follow up intervention activities at home'" (Req. for Rev. at ¶ 33, citing 8 NYCRR 200.13[d]). The parent also contends that the evidence in the hearing record reflects that the district failed to provide her with any parent counseling and training services, while the student's IEPs recommended that she receive four 30-minute sessions per year (see Req. for Rev. at ¶ 34, citing Parent Exs. C at p. 18; D at p. 12; E at p. 15; FF at ¶ 11). In addition, the parent asserts that the evaluator who conducted the ABA skills assessment IEE, as well as the FBA/BIP IEE, attested that the parent required parent counseling and training services to "learn how to promote [the student's] skills development, functional communication, and implement ABA-based strategies that [were] known to change behavior in positive, meaningful, and long-lasting ways" (Req. for Rev. at ¶ 35, citing Parent Ex. AA at p. 8).

The district asserts that, contrary to the parent's arguments, IHO 2 reasonably concluded that the parent was not entitled to 276 hours of parent counseling and training services as compensatory services. The district further asserts that the evidence in the hearing record reflects that the district's failure to provide the parent with parent counseling and training services was limited to the "period of school closure due to Covid-19" (Answer & Cr. App. at ¶ 19, citing Parent Ex. FF at ¶ 11). Consequently, the district affirmatively agrees that, based on the evidence in the hearing record, the parent may be entitled to, at most, 120 hours of parent counseling and training as compensatory services (calculated as two hours per week for 60 weeks during the 2019-20 and 2020-21 school years) (Answer & Cr. App. at ¶ 19, citing Parent Exs. AA at ¶ 32; FF at ¶ 11).

Turning to the evidence in the hearing record, the parent's attestation concerning the provision of parent counseling and training services is less than clear and is confined to essentially one sentence within a paragraph that references both the time frame of the school closures as well as the 2020-21 school year: "The school did not contact me to schedule any parent counseling and training (PCAT) services" (Parent Ex. FF at ¶ 11). Within the same paragraph, the parent commented on the fact that, during the 2020-21 school year, the student had been assigned the same OT provider who had failed to contact her "during the school closure" to schedule OT sessions until June 2020 (id.). This evidence is not consistent with the parent's contention on appeal, to wit, that the district failed to provide her with the recommended four 30-minute sessions per year of parent counseling and training recommended in the student's IEPs. In addition, the evaluator who recommended 276 hours of parent counseling and training as compensatory educational services calculated the requested award based on "2 hours per week for 46 weeks for 3 years" because the parent had "not received appropriate parent training to date" (Parent Ex. AA at ¶ 32).

Based on the foregoing, there is no reason to disturb IHO 2's determination that the hearing record failed to contain sufficient evidence to support the parent's request for 276 hours of parent counseling and training services as compensatory educational services (see IHO Decision at p. 10). In essence, the parent's arguments on appeal suggest that, absent any evidence from the district, IHO 2 was somehow required to award the full amount of parent counseling and training as

compensatory services based solely on the recommendation within an IEE and the scant amount of evidence that the parent may not have received such services. However, while the district failed to present evidence or its view of an appropriate compensatory education award with respect to parent counseling and training at the impartial hearing, IHO 2 was not required to award all of the relief that the parent sought. Such an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] [noting that "[c]ommon sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]).

There may be some merit to awarding a limited amount of parent counseling and training as a compensatory award; however, such an award should be judged based on the purposes behind a compensatory award and parent counseling and training, which are not necessarily in agreement. Parent counseling and training is a service provided to parents in order to assist them in providing students with support in implementing a student's IEP in the home. More specifically, State regulations provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). Whereas, the purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451 [2d Cir. 2014]) "[T]he ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (Reid, 401 F.3d at 524 [D.C. Cir. 2005]). In determining the impact of a failure to deliver parent counseling and training in the first instance, the inquiry should focus on the impact to the student, rather than the impact to the parent (see Clear Creek Indep. Sch. Dist. v. J.K., 400 F. Supp. 2d 991, 995 [S.D. Tex. 2005] [assessing whether implementation of parent counseling and training denied student a FAPE based on impact that the failure to deliver services had on the student]). Accordingly, without a specific argument as to how compensatory parent counseling and training would help to place the student in the position he would have been in if not for the denial of FAPE, a more appropriate award would have been additional services to the student. However, in reviewing the IHO's award of 1380 hours of compensatory ABA therapy, it does not appear that additional services are necessary and that they may in fact become burdensome (see M.M., 2017 WL 1194685, at *8). Therefore, the parent's argument must be dismissed.

3. Assistive Technology

The parent argues that IHO 2 erred by denying her request for an assistive technology device, and points to evidence in the hearing record that the assistive technology IEE included a recommendation for a specific device—namely, an iPad Mini5 and Snap + Core First application.

In response, the district acknowledges that such an award may well be warranted, but that the district should be permitted to provide a device that serves the same function, rather than the specific device requested by the parent.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

In this case, the parent did not allege in her due process complaint notice that the district failed to consider the provision of assistive technology devices or services as a basis upon which to conclude that the district failed to offer the student a FAPE for the school years at issue (see Parent Ex. A at pp. 1-7). As relief, the parent did request, however, with respect to the development of a new IEP based on a review of the completed IEEs, that the district should include a recommendation for an appropriate assistive technology device in the IEP (id. at p. 8). IHO 2 did not specifically address the parent's request for an assistive technology device, but instead ordered the district to provide the student with 70 hours of assistive technology training as compensatory educational services (see generally IHO Decision).

To support her request for an iPad Mini5 and Snap + Core First application, the parent points to the assistive technology IEE of the student, which included a recommendation for this specific device in order to provide the student with an "effective portable means of communication" (Parent Ex. T at pp. 4-5). According to the evaluator, the student demonstrated the "necessary cognitive skills to use a dynamic screen [speech generating device (SGD)] to augment his communication" (id. at p. 4). Prior to recommending this specific device for the student, the evaluator delineated the following features that an assistive technology device should include: voice output; the ability to be accessed by direct selection; allow access to external devices; utilize picture symbols as well as objects; allow for messages to be stored and reused at later times; allow for language and vocabulary growth; allow for communication across language environments; and be durable, portable, and lightweight (id. at p. 5). During the evaluation process, the student was presented with, and trialed, a "variety of communicators," including the iPad Mini "loaded with various speech applications" (id.). According to the evaluator, of the different applications trialed with the student, the Snap + Core First "held [the student's] attention for the longest" time (id.). The parent reported that the student did not "attend to technology for an extended period of time," noting further that he will "watch preferred videos for 5 [to] 10 minutes" (id. at p. 6). As a result of the evaluation, the evaluator recommended the iPad Mini5

and Snap + Core First application for the student in order to communicate and to "supplement communication" (id. at p. 6).[11]

In light of the foregoing evidence, together with the district's acknowledgement that IHO 2 should not have wholly denied the parent's request for an assistive technology device, the question becomes whether the district is required to provide the student with the specific device recommended in the assistive technology IEE. Other than pointing to the recommendation in the assistive technology IEE, the parent does not otherwise explain why the student needs this particular device to make progress or to receive educational benefits. Moreover, given that the evaluator delineated certain features that should be included in any assistive technology device for the student, it is reasonable to allow the district to provide the student with an assistive technology device, other than the iPad Mini5 and Snap + Core First application, so long as the selected device contains those specific features delineated in the IEE (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at * 16 [S.D.N.Y. May 24, 2012], aff'd, H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x. 64, 67 [2d Cir. 2013]). In H.C., the district court found noted that the "IDEA d[id] not require 'a school district to provide a specific program or employ a specific methodology in providing for the education of children with disabilities'" (H.C., 2012 WL 2708394, at * 16, citing Straube, 801 F.Supp.2d at 1176]; see also A.H. v. Dep't of Educ. of N.Y.C ., 394 F. App'x 718, 721 [2d Cir. 2010], quoting Rowley, 458 U.S. at 199 [finding that the "IDEA does not require that an IEP furnish 'every special service necessary to maximize each handicapped child's potential'"]). Consequently, the parent's request for an iPad Mini5 and Snap + Core First application is denied.

C. Prospective Placement

On this point, the parent argues on appeal that IHO 2 arbitrarily denied her request for an "ABA placement" and erred by failing to order the district to convene a CSE meeting to "create an appropriate IEP that includes the recommendations of the [IEEs]" (Req. for Rev. at p. 2). More specifically, the parent contends that the hearing record contained "ample evidence" that the district was required to "locate an appropriate ABA placement" for the student, noting further that the district acknowledged IHO 1's decision, which ordered the district to locate such placement for the student. The parent also argues that she cooperated with the CBST process and that two schools did not accept the student, one school did not offer ABA, and one other school could not provide the student with the supports he needed. In light of the foregoing, the parent asserts that IHO 2 erred by arbitrarily denying her request to receive funding for a "private placement" for the student. The parent also argues that IHO 2 erred by denying her requests for "ongoing home-based services" of ABA therapy and parent counseling and training services.

In response, the district argues that IHO 2 justifiably declined to order the district to prospectively fund home-based services, order the student's placement in an ABA program, and make changes to the student's IEP to include all the recommendations made in the IEEs. The district also argues that the parent did not allege any violations with regard to the 2021-22 school year. Moreover, the district asserts that, as held repeatedly by SROs, orders directing specific

[11] The evaluator also noted that a "'no-tech' backup system should be created and maintained in the event of a device malfunction such as static picture boards with core vocabulary" (Parent Ex. T at p. 8).

changes to a student's IEP or program and placement circumvent the statutory process of the CSE, which must periodically assess the student's needs. According to the district, IHO 2 acted within his equitable authority in denying the parent's request, properly limited relief to past violations of FAPE, and found that the hearing record failed to contain sufficient evidence with regard to a nonpublic school placement.

Initially, a review of the evidence in the hearing record reflects that the parent's requests for prospective relief—here, a deferral to the CBST, ordering the student's placement in an ABA placement, and ordering a CSE to convene to make specific recommendations about the student's special education program and related services from the neuropsychological IEE—were either, in whole or in part, already ordered as relief in IHO 1's decision (see Dist. Ex. 1 at pp. 5-6). For example, as noted above, the parent initially challenged whether the district offered the student a FAPE for the 2017-18, 2018-19, 2019-20, and 2020-21 school years in a due process complaint notice dated April 2020 (Parent Ex. A at p. 3; see Dist. Ex. 1 at p. 2). Based on what can be gleaned from the evidence in the hearing record, it appears that, in the April 2020 due process complaint notice, the parent sought prospective relief—consisting of specific recommendations to be included in the student's IEP based on the then-completed neuropsychological IEE of the student, as well as a deferral to the CBST for placement in a State-approved nonpublic school—several IEEs of the student, and compensatory educational services of an unidentified nature (see Dist. Ex. 1 at p. 2).

After completing the impartial hearing related to the parent's April 2020 due process complaint notice, IHO 1 ordered the following prospective relief: a deferral of the student's case to the CBST "for placement in a 12-month program that provide[d] full time ABA instruction in a 6:1:1 class with related service and a 1:1 fulltime health paraprofessional" within 15 days of the date of the decision, and furthermore, that such "placement should incorporate the recommendations made in the neuropsychological evaluation" entered into the hearing record as evidence (id. at p. 6). In addition, IHO 1 ordered that the placement "shall include transportation to and from the placement" (id.).

Evidence in the hearing record also reveals that, consistent with IHO 1's decision, a CSE convened on January 12, 2021 to comply with the directives in that decision. Notably, the January 2021 CSE deferred the student's case to the CBST for placement in a State-approved nonpublic school and recommended the following, consistent with IHO 1's decision: a 6:1+1 special class placement in a State-approved nonpublic school; a 12-month school year program; a 1:1 health paraprofessional; and special transportation consisting of limited travel time, air conditioning, a minibus, and transportation "from the closest safe curb location to school" (Parent Ex. E at pp. 15-16, 18). In addition, the January 2021 CSE incorporated numerous recommendations from the neuropsychological IEE of the student into the management needs section of the IEP, including that the student receive instruction with the following features: evidence-based ABA techniques, multimodal/multisensory presentation of material, an opportunity for hands-on activities using preferred materials to maintain engagement, positive behavior supports throughout the school day, opportunities for sensory activities through the school day, frequent breaks, individual picture schedule and techniques for supporting regular use of picture symbols throughout the school day, consistent use of reinforcers to improve on-task behavior (such as musical activities, visual stimulation, squeeze toys, and any other reinforcer determined by the FBA/ABA evaluation), positive attention and reinforcement, modeling and repetition, behavioral interventions determined

by the ABA evaluation, preferential seating, reduced distractions, small reasonable goals for academic work, verbal and visual and gestural prompting, and an opportunity for individualized instruction (id. at p. 6).

In the parent's affidavit submitted in lieu of her direct testimony, she admitted that, as a result of the prior impartial hearing, the district was ordered to find a full-time ABA program for the student (see Parent Ex. FF at ¶ 21). According to the parent, she was contacted by, and visited, approximately four State-approved nonpublic schools in March and April "2020," and, based upon information she either observed or was provided in response to her questions, the parent rejected all of them as not appropriate for the student (id.; see Tr. pp. 39-43).[12]

In light of the foregoing evidence, it appears that the district complied with the order in IHO 1's decision with respect to the prospective relief requested by the parent and what was then known as recommendations from the neuropsychological IEE, but, based on the parent's testimony, the district has been unable to locate and secure the student's placement at a State-approved nonpublic school following the January 2021 CSE meeting held to make the changes to the student's IEP as ordered by IHO 1. Therefore, to the extent that the parent's dispute surrounding IHO 2's decision denying the same prospective relief could be deemed an allegation directed at the implementation of, or the enforcement of, IHO 1's decision from the prior administrative proceeding, it is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

Turning to the parent's subsequent due process complaint notice, dated January 2021 and related to the instant appeal, the parent challenged whether the district offered the student a FAPE for the 2018-19 ("from January 29, 2021 on [sic]"), 2019-20, and 2020-21 school years (Parent Ex. A at pp. 1, 4, 7).[13] As relief, the parent sought the following prospective relief: a CSE to

[12] It appears that the parent mistakenly indicated that she visited the State-approved nonpublic schools in 2020, as opposed to 2021 (see Parent Ex. FF at ¶ 3).

[13] Based on the evidence in the hearing record submitted for this appeal, the last CSE to convene prior to the parent's April 2020 due process complaint notice was the CSE meeting held on November 15, 2019 for the student's annual review, which developed an IEP to be implemented from November 2019 through November 2020—overlapping portions of the 2019-20 and 2020-21 school years (see Parent Ex. C at pp. 1, 23). As a result, IHO 1's finding that the district failed to offer the student a FAPE for the 2020-21 school year was necessarily limited to that portion of the 2020-21 school year covered by the November 2019 IEP, or, more specifically, for those special education programs and services to be delivered to the student during summer 2020 (July and August), and thereafter, from September through November 2020 (id.). IHO 1 did not, however, specifically limit her finding to that time frame for the 2020-21 school year, nor does it appear that the district—in conceding it failed to offer the student a FAPE for all four school years at issue in the April 2020 due process complaint notice—limited its concession of FAPE to that time frame for the 2020-21 school year (see generally Dist. Ex. 1). Given that the parent's January 2021 due process complaint notice challenged three of the same school years as in the prior proceeding—that is, the 2018-19, 2019-20, and 2020-21 school years—it would seem prudent for

convene to review the IEE results within 15 days of the completion of said IEEs, and to "develop an appropriate IEP based on the IEEs" that included, but was not limited to, the following, as recommended by the psychologist who conducted the neuropsychological IEE of the student: a 6:1+1 special class placement; a 12-month school year program; a 1:1 health paraprofessional; socialization instruction and supports incorporated into the curriculum; special transportation consisting of limited travel time, air conditioning, and a minibus; and appropriate and measurable annual goals, including annual goals for toileting (Parent Ex. A at pp. 1, 8). In addition, the parent requested that the newly developed IEP include an "accurate and comprehensive statement of the [s]tudent's current levels of performance"; "[a]ppropriate related services as recommended by the [IEEs]"; an appropriate assistive technology device, if necessary; and to "[i]ntegrate goals from the [s]tudent's [IEEs]" (id.).

IHO 2 denied the parent's request for prospective relief on the basis that the hearing record failed to contain sufficient evidence for awarding either a "prospective placement or funding in a non-approved private school of the [p]arent's choosing for the 2021-22 school year as an award for compensatory education and funding door to door transportation" (IHO Decision at p. 10). IHO 2 also noted that he declined to award the parent's requested relief because the school years at issue were over and it was more appropriate to remedy past harms based on the evidence in the hearing record (id.).

Thus, to the extent that the parent appeals IHO 2's decision denying her requests to allow her to place the student in a nonpublic school of her choosing for the 2021-22 school year and to direct the CSE to make changes to the student's IEP to include specific recommendations for related services not already made by the CSE, generally, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Additionally, at this point, since two IHOs have already adjudicated the parent's claims related to the 2018-19, 2019-20, and 2020-21 school years, and the parent has not challenged the 2020-21 school year beyond what the January 2021 IEP may provide to the student through the projected annual review date of January 12, 2022 (see Parent Ex. E at p. 1; see generally Dist. Ex. 1; IHO Decision). In addition, the parent has been awarded substantial amounts of compensatory educational services to remedy the district's past failures to offer the student a FAPE for these same

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either the parties or IHO 2 to have recognized and discussed what, if any, preclusive effects the prior impartial hearing and IHO 1's decision had on the present case. Nevertheless, and perhaps somewhat fortuitously, the district did not defend any allegations presented in the parent's January 2021 due process complaint notice related to whether it offered the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years (see Tr. pp. 1-50; Parent Exs. A-Z; AA-JJ; Dist. Ex. 1).

school years. In addition, given that a CSE has an obligation to review a student's IEP at least annually, the CSE should have the opportunity to convene to produce an IEP for the remainder of the 2021-22 school year and to review the IEEs to consider the recommendations therein in formulating the student's IEP (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).[14] Consequently, there is no reason to disturb IHO 2's decision denying the parent's request for prospective relief.

D. Music Therapy IEE

Finally, turning to the district's cross-appeal of IHO 2's decision directing the district to provide the parent with a music therapy evaluation as an IEE, which the district argues should have been barred by principles of res judicata and collateral estoppel, the district's arguments, as explained herein, must be dismissed.

First, as described above, the Office of Special Education already addressed this matter of its own accord while the impartial hearing was pending and while the better course would likely to have been to set aside the matter that was the subject of a pending due process proceeding, to the extent that the district was previously directed to provide the parent with a music therapy IEE as the corrective action plan resulting from the parent's 60-day complaint—and which, based on the same resolution, the district was required to present documentation as to the completion of the IEE by July 2, 2021—any decision overturning IHO 2's order to conduct the same IEE has no effect on the district's obligation to conduct the IEE pursuant to the State's corrective action plan. Notably, there is no evidence that the district has objected to the corrective action plan.

VII. Conclusion

As described above, I find myself deeply troubled by the manner in which this proceeding arrived at the Office of State Review after two IHO decisions rendered on the same school years, one unappealed, as well as a dispute over a music therapy IEE that was covered by an unchallenged State administrative complaint determination that addressed the same issue while it was the subject of a pending due process proceeding. Setting those problems aside, however, and finding insufficient evidence in the hearing record to overturn IHO 2's factual findings with respect to the compensatory educational services and rates awarded, other than the rate agreed to by the district for the assistive technology training services, as well as the award of the music therapy IEE, and

[14] To be clear, a CSE must consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (see 34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

IHO 2's decision denying the parent's requests for a specific assistive technology device and prospective relief, the necessary inquiry is at an end.

I caution both the parties and the IHOs that if they persist in duplicative impartial hearings and the practice of deferring the issue of equitable relief into future due process proceedings, I am unlikely to follow this course of action in a future decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that IHO 2's decision dated October 1, 2021, must be modified by reversing that portion which directed the district to fund the assistive technology training services awarded as compensatory educational services at a rate of $100.00 per hour, and instead, as agreed to by the district, the district shall fund these compensatory educational services at a rate not to exceed $250.00 per hour.

Dated: **Albany, New York**
December 15, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER