The University of the State of New York

The State Education Department
State Review Officer
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No. 22-015

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:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Justin M. Coretti, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2020-21 school year was appropriate. As explained below, the appeal must be sustained in part and the matter must be remanded for further administrative proceedings.

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

As relevant to this appeal, the student began attending a charter school within the district for ninth grade during the 2019-20 school year (see Tr. pp. 56-59; see generally Dist. Ex. 5). For the 2019-20 school year, the student's special education programing—as recommended in his October 2019 IEP—consisted of integrated co-teaching (ICT) services for instruction in English language arts (ELA), mathematics, social studies, and science; three 40-minute sessions per month of counseling services in a group; one 40-minute session per month of individual counseling

services; testing accommodations; and special transportation (see Parent Ex. B at pp. 1, 11-12, 14).[1]

During the 2019-20 school year, the student's charter school transitioned to full-time, remote instruction beginning in or around mid-March 2020 due to the Covid-19 pandemic and the statewide closure of school buildings (see Tr. pp. 58-59, 74). At the impartial hearing, the special education department head from the charter school testified that remote instruction consisted of "half an hour of live instruction per day per class," from 10:00 a.m. to 10:30 a.m., and for the remainder of the school day, the students participated in "asynchronous work time" to check in with teachers and to receive counseling or other services (see Tr. pp. 56-59, 69-71).

On September 15, 2020, a CSE convened to conduct the student's annual review and to develop an IEP for the 2020-21 school year (see Dist. Ex. 1 at pp. 1, 29). Finding that the student remained eligible for special education as a student with autism, the September 2020 CSE recommended the following: ICT services for instruction in ELA, mathematics, social studies, and science; one 40-minute session per week of counseling services in a group of three; and one 40-minute session per week of individual counseling services (id. at pp. 1, 24).[2] As supplementary aids and services, program modifications, and accommodations, the September 2020 CSE recommended an academic support group (id. at p. 24). The September 2020 CSE also created annual goals, measurable postsecondary goals, and a coordinated set of transition activities, and recommended testing accommodations and special transportation (id. at pp. 13-23, 26-29).

For the 2020-21 school year, the student continued to attend the charter school, and due to the ongoing public health and safety concerns related to the Covid-19 pandemic, he participated via full-time, remote instruction in the same format as implemented beginning in March 2020 (see Tr. pp. 58-59, 80).[3]

A. Due Process Complaint Notice

By due process complaint notice dated March 9, 2021, and as relevant to this appeal, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years (see Parent Ex. A at p. 1). More specifically, the parent asserted that the district failed to appropriately evaluate the student in the areas of adaptive living skills and assistive technology (id. at p. 3). The parent also asserted that the district failed to recommend an appropriate program, noting that despite the student's "ongoing poor academic performance," the district "continually placed" the student in an ICT setting (id. at p. 4). In addition, the parent alleged that the district failed to recommend the mandated services for students with autism pursuant to State regulation, and the district failed to recommend a program that

[1] According to the October 2019 IEP, a vocational assessment interview had been administered to the student (see Parent Ex. B at p. 2).

[2] The student's eligibility for special education and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] At the impartial hearing, the special education department head from the charter school testified that the student resumed in-person instruction on September 9, 2021 (see Tr. p. 80).

enabled the student to make progress (id.). Next, the parent alleged that the district failed to develop an appropriate transition plan or postsecondary goals, and the student's September 2020 IEP failed to include appropriate transition goals (id. a tp. 5). The parent also noted that he could not determine whether the annual goals in the September 2020 IEP were appropriate for the student because, to date, he had not received a copy of the IEP (id.). Next, the parent asserted that the district failed to fully implement the student's counseling services and failed to provide the parent with copies of the student's progress reports (id. at pp. 5-6).

As relief for the alleged violations, the parent requested an order directing the district to: provide the parent with copies of the student's progress reports; conduct evaluations in the areas of adaptive living skills and assistive technology, as well as a vocational assessment; provide home-based, "make-up counseling services" for those services not provided to the student; provide compensatory educational services for the failure to offer the student a FAPE; and defer the student's case to the Central Based Support Team (CBST) for placement in nonpublic school (Parent Ex. A at p. 6). Additionally, the parent requested an award of "any different and/or additional relief" that was appropriate to ensure that the student continued to receive a FAPE for the remainder of the 2020-21 school year (id. at p. 7).

B. Impartial Hearing Officer Decision

On July 6, 2021, an IHO was appointed to the case (see IHO Decision at p. 1). Thereafter, the IHO conducted "status conference[s]" over the course of four impartial hearing dates in July, August, and September 2021, to allow the parties an opportunity to settle the matter (see Tr. pp. 1-40). Unable to resolve the matter, on October 14, 2021 the parties proceeded to an impartial hearing on the merits of the case, which concluded on November 2, 2021 after two days of hearings (see Tr. pp. 41-281). In a decision dated January 13, 2022, the IHO found that the district failed to offer the student a FAPE for approximately five months during the 2019-20 school year, and ordered the district to provide the student with 300 hours of compensatory educational services (provided by Huntington Learning Center [HLC] at a rate of $97.00 per hour) and to conduct a functional behavioral assessment (FBA) by a Board Certified Behavior Analyst (BCBA) that included an adaptive living skills assessment, and if necessary, to develop a behavioral intervention plan (BIP) for the student (see IHO Decision at pp. 4-6, 7-8).

With respect to the 2020-21 school year, the IHO found that, consistent with the "makings of a sufficient IEP," the September 2020 IEP included a statement describing the student's present levels of performance, established annual goals designed to meet the student's needs and enabled him to make progress, and provided for the use of special education services (IHO Decision at p. 6). In addition, the IHO noted that he found no "issues with procedure of implementation" related to the 2020-21 school year that "warrant[ed] a finding of a denial of [a] FAPE" (id.). Next, the IHO determined that the parent had not "indicate[d] his concerns with the quality of education the student was receiving during the period of remote learning" (id.). However, as a concern to "all parents and educators during the public health crisis," the IHO noted that the "limited law that ha[d] trickled in ha[d] stated that remote education plans in their relationship to an offer of FAPE d[id] suffice" (id., citing J.T. v. DeBlasio, 2020 WL 6748484 [S.D.N.Y. Nov. 13, 2020] and Hernandez v. Grisham, 2020 WL 7481741 [D.N.M. Dec. 19, 2020]). As a result, the IHO

concluded that the district appeared to "make ample efforts to comport with the requirements of the IEP" (IHO Decision at pp. 6-7).

Next, the IHO found that the evidence reflected that the student began showing a "marked improvement towards the beginning of February 2020 which followed into the beginning of the following year" (IHO Decision at p. 7). In addition, the IHO pointed to improvements reflected in the student's testing results obtained in 2021, which were "well above average," and that testimonial evidence "indicat[ed] other areas of improvement" (id.). In light of the evidence, the IHO concluded that the "limited data offered," together with the "legally sufficient IEP," demonstrated that the student was "actually making progress" and that the district offered the student a FAPE for the 2020-21 school year (id.). Consequently, the IHO denied the parent's requests to order the district to defer the student's case to the CBST and to provide the student with make-up counseling services (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals from an adverse portion of the IHO's decision, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2020-21 school year. The parent contends that the hearing record contains evidence demonstrating that, contrary to the IHO's determination, the student did not make progress during the 2020-21 school year. The parent also argues that the IHO erred by denying, in part, his request for compensatory educational services, which was predicated on the IHO's erroneous finding that the district offered the student a FAPE for the 2020-21 school year. Next, the parent asserts that the IHO erred by denying his request to defer the student's case to the CBST and failing to award 80 40-minute sessions of counseling services as make-up services, which were also predicated on the IHO's erroneous finding that the district offered the student a FAPE for the 2020-21 school year. As relief, the parent seeks to reverse the IHO's finding that the district offered the student a FAPE for the 2020-21 school year, and to order the district to provide the student with an additional 105 hours of compensatory educational services (provided by HLC), to provide the student with make-up counseling services (80 40-minute sessions), and to defer the student's case to the CBST.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety.[4] Initially, the district notes that the September 2020 IEP satisfied both the procedural and substantive aspects of the IDEA, and further notes that the CSE incorporated the "findings and some of the recommendations" from the student's March 2020 neuropsychological evaluation into the IEP, but that the CSE was not otherwise required to adopt all of the findings and recommendations from the privately obtained evaluation report. The district indicates that the September 2020 CSE relied on additional evaluative information about the student's "day-to-day performance at school that did not always align very closely with the snapshot impression [of the

[4] The district does not appeal the IHO's finding that the district failed to offer the student a FAPE for the 2019-20 school year, or the IHO's order directing the district to provide the student with 300 hours of compensatory educational services (provided by HLC at a rate of $97.00 per hour) and to conduct an FBA, with an adaptive skills component, by a BCBA (see generally Answer). Consequently, the IHO's determination regarding the 2019-20 school year, and the relief awarded thereto, have become final and binding on the parties and, as such, will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

student] obtained" through the March 2020 neuropsychological evaluation. The district also indicates that the September 2020 CSE added services to the student's IEP as a result of its review of the evaluative information presented, and recommended ICT services because the student was making progress. Next, the district points to evidence demonstrating that the September 2020 IEP included a coordinated set of transition activities, measurable and appropriate annual goals, and documented the parent's concerns. With respect to parent counseling and training, the district admits that the September 2020 IEP did not include a recommendation for this service, but notes that the failure to recommend parent counseling and training, standing alone, does not rise to the level of a denial of a FAPE. As a final point, the district contends that the "only argument the [parent] reasserts in the [request for review] with respect to whether the [district] offered [the student] a FAPE for the [20]20-21 [school year wa]s that [the student] purportedly failed to make meaningful academic progress," which, the district argues, is not supported by the evidence in the hearing record. Relatedly, the district notes that any additional grounds or arguments in the parent's memorandum of law submitted in support of the request for review are not properly raised and must not be considered. Finally, the district asserts that the IHO properly denied the parent's requests for relief, consisting of additional compensatory education, a deferral to the CBST, and make-up counseling services, because the IHO properly concluded that the district offered the student a FAPE for the 2020-21 school year.

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]).[5]

[5] 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

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

Upon review, the IHO's FAPE analysis for the 2020-21 school year, which was based on an application of an erroneous legal standard, constitutes reversible error and must be vacated.

In the decision, the IHO initially identified two issues to be resolved through the impartial hearing (see IHO Decision at p. 2). Notably, however, the IHO identified the same issue for both the 2019-20 and 2020-21 school years, namely, whether the district denied the student a FAPE "because the [p]ublic [s]chool c[ould not] generate or implement an appropriate IEP or provide the therapeutic environment he require[d] to access the curriculum" (id.). While the parent sought a determination regarding whether the district offered the student a FAPE for both school years, the parent pointed to discrete issues within the March 2021 due process complaint notice upon which to draw the ultimate conclusion regarding whether the district offered the student a FAPE (see generally Parent Ex. A). For example, and as relevant herein to whether the district offered the student a FAPE for the 2020-21 school year, the parent alleged that the district failed to appropriately evaluate the student in the areas of adaptive living skills and assistive technology (id. at p. 3). The parent also asserted that the district failed to recommend an appropriate program, noting that despite the student's "ongoing poor academic performance," the district "continually placed" the student in an ICT setting (id. at p. 4). In addition, the parent alleged that the district failed to recommend the mandated services for students with autism pursuant to State regulation, and the district failed to recommend a program that enabled the student to make progress (id.). Next, the parent alleged that the district failed to develop an appropriate transition plan or postsecondary goals, and the student's September 2020 IEP failed to include appropriate transition goals (id. a tp. 5). The parent also noted that he could not determine whether the annual goals in the September 2020 IEP were appropriate for the student because, to date, he had not received a copy of the IEP (id.). Next, the parent asserted that the district failed to fully implement the student's counseling services and failed to provide the parent with copies of the student's progress reports (id. at pp. 5-6).

An IHO is required to issue detailed findings on the discrete issues identified in a party's due process complaint notice, a process that entails a detailed factual and legal analysis (34 CFR 300.511[c][1][iv] [indicating that an IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice"]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). The IHO's analysis of the parties' claims in this case departed dramatically from this standard. Here, rather than addressing each issue the parent raised in the due process complaint notice to determine whether the September 2020 IEP was appropriate and offered the student a FAPE for the 2020-21 school year, the IHO found that evidence of the

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).

student's subsequent progress during that school year led to the conclusion that the district offered the student a FAPE (see IHO Decision at pp. 6-7).

It is well settled that the determination of whether an IEP offers a FAPE must be made by evaluating the IEP "prospectively as of the time of its drafting" (R.E. 694 F.3d at 186). The IHO's approach, which focused solely on whether the student made progress after the development of the September 2020 IEP, appears to be results oriented—an approach rejected by the Second Circuit (R.E., 694 F.3d at 184-88 [explaining that, with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]).[6] Moreover, the Second Circuit's holding in L.O. v. New York City Department of Education, 822 F.3d 95 (2d Cir. 2016), reaffirmed R.E.'s rule that the "'IEP must be evaluated prospectively as of the time of its drafting,'" and found that, based on the facts presented in L.O., the same rule applied even when the student "was actually educated at the IEP placement,'" as opposed to being unilaterally placed by the parent (L.O., 822 F.3d at 114-15). Accordingly, the analysis of whether an IEP offers a FAPE focuses on the information available to the CSE at the time the IEP was developed.[7]

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10 [c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]). Accordingly, the parent's claims relating to the September 2020 CSE and IEP, as set forth in the March 2021 due process complaint notice, must be remanded to the IHO to render a determination regarding whether the district offered the student a FAPE for the 2020-21 school year. Upon remand, the IHO may consider whether additional evidence is necessary to fully develop the hearing record on each of the discrete issues above that must be ruled upon. In addition, should the IHO find that the district failed to offer the student a FAPE for the 2020-21 school year and consider additional relief in the form of compensatory educational

[6] However, the Second Circuit has rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 186-87; J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *18 n.23 [S.D.N.Y. Nov. 17, 2015] [noting that "[i]t is appropriate to rely on evidence explaining how specific IEP requirements would operate in practice to achieve the IEP's required academic needs, even if it is not appropriate to rely on evidence claiming that a student would receive services above and beyond what the IEP requires on its face"] [emphasis in original]).

[7] If, after conducting a prospective analysis, it is determined that a school district has denied a student a FAPE, the student's subsequent progress or lack thereof under the challenged IEP(s) may be taken into consideration when developing equitable relief. The objective of remedial relief under IDEA is to provide appropriate relief when warranted under the circumstances, not simply to penalize alleged misfeasance of the public agency in any and all situations.

services at HLC, the IHO must consider what effect, if any, the student's previous award of tutoring services at HLC may have on any further relief ordered.[8]

As a final point, to the extent that the parent continues to seek relief in the form of a prospective placement in a nonpublic school through a deferral to the CBST, such relief is generally disfavored because it 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"]). Moreover, the two school years at issue—2019-20 and 2020-21—have ended, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2021-22 school year (see also 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 year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. Accordingly, there is no reason to grant the parent's request for a prospective placement or, more specifically, to order the district to defer the student's case to the CBST.

VII. Conclusion

Having determined that the IHO failed to apply the appropriate legal standard to determine whether the district offered the student a FAPE for the 2020-21 school year, the IHO's decision therein must be vacated and remanded for further administrative proceedings consistent with this decision.

[8] At the impartial hearing, the director of educational services (director) from HLC testified that, when the student was last evaluated at HLC within the past two to three months, the student had already been receiving services at HLC (see Tr. pp. 252, 257-58; see generally Parent Ex. F). According to the director, the student initially "started at around a 4th grade level with his curriculum," and was then-currently "between a 6th and 7th grade level" (Tr. p. 258). When asked to review the "program map" reflected in parent exhibit F, the director explained that it outlined how HLC planned to "utilize the hours recommended" for the student, which had been derived "a little bit different[ly] because [the student] ha[d] the previous set of hours that he [was] currently receiving tutoring for" (Tr. p. 259). The director further explained that the student's previous program map "t[ook] him through the 8th grade level for curriculum," so she "added on the additional hours that [she] felt like he needed to go from where that program map left off to where" the student was currently, in 10th grade (Tr. p. 259). According to the director, it was anticipated that the student would reach the "8th grade level" working under the "previous program map," although there was "no guarantees that that would work" (Tr. pp. 259-60). The director was confident that, given the student's progress to date, the previous program map hours would "cover him through the 8th grade level" and the hours set forth in the newly developed program map in parent exhibit F "would pick up where those left off" (Tr. p. 260).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 13, 2022, is modified by vacating that portion of the decision which found that the district offered the student a FAPE for the 2020-21 school year; and,

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a determination regarding whether the district offered the student a FAPE for the 2020-21 school year based on the issues raised in the parent's March 2021 due process complaint notice.

Dated: **Albany, New York**
March 25, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER