The University of the State of New York

The State Education Department
State Review Officer
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No. 22-114

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian Reimels, Esq.

Cuddy Law Firm, PLLC, attorneys for respondents, by Benjamin M. Kopp, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the part of a decision of an impartial hearing officer (IHO) which ordered the district to convene a Committee on Special Education (CSE) meeting to amend the individualized education program (IEP) for respondent's (the parent's) son. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of multiple administrative hearings challenging the student's education programming during the 2016-17 through 2018-19 school years, as well as a prior State-level administrative review involving the student's educational programming for the 2019-20 and 2020-21 school years (see Application of the New York City Dep't of Educ., Appeal No. 21-178; Parent Ex. C at p. 3). Accordingly, the parties' familiarity with the facts and procedural history preceding this matter, as well as the student's educational history, is presumed and will only be included as relevant to this appeal.

A. Due Process Complaint Notice

By amended due process complaint notice dated November 8, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. C at p. 1).[1] The parent asserted several procedural and substantive inadequacies with an IEP developed for the student in June 2021 and specifically claimed that the district failed to appoint an IHO, failed to comprehensively evaluate the student in all areas of suspected disability, failed to appropriately respond to the parent's request for an independent educational evaluation (IEE), failed to provide the parent with evaluative data prior to the June 2021 CSE meeting, failed to mandate a research-based methodology appropriate for the student, failed to mandate an appropriate program and placement for the student, failed to mandate and provide appropriate parent counseling and training individualized to the student's needs, failed to offer meaningful, measurable annual goals in all areas of the student's needs, predetermined various parts of the student's program, and retaliated against the student for reports of his mistreatment relating to his disabilities in the district's special education program (id. at pp. 8-12).

With regard to pendency, the amended due process complaint notice reflected that the parent had appealed the decision of the SRO in Application of the New York City Dep't of Educ., Appeal No. 21-178, to the United States District Court, Southern District of New York (Parent Ex. C at p. 1; IHO Ex. X at p. 13). The amended due process complaint notice further stated that the parent had obtained, on August 2, 2021, a stipulation and order from the District Court indicating that the student's pendency program would be consistent with a February 4, 2019 unappealed IHO decision (Parent Ex. C at pp. 1-2; see Parent Ex. E).

As relief, in this proceeding, the parent sought (1) a pendency order directing that the student's pendency program was the program set forth in the August 2, 2021 stipulation and order of the District Court; (2) a determination that the district failed to offer the student a FAPE for the 2021-22 school year; (3) funding for an independent physical therapy (PT) evaluation in the amount of $2,500, and funding for transportation costs to and from the evaluation; (4) funding for an IEE conducted by the parent's chosen evaluator in the amount of $5,500, and funding for transportation costs to and from the evaluation; (5) an order directing the CSE to reconvene to develop an appropriate IEP that included 27 listed requirements; (6) an order directing the district's Central Based Support Team (CBST) to identify, locate, and secure a State-approved, nonpublic school capable of providing appropriate instruction and classroom services, within thirty (30) days of the matter being referred to the CBST; (7) compensatory tutoring services in an unspecified amount at an enhanced rate of $126 per hour to remedy the denial of a FAPE for the 2021-22 school year; (8) an order directing the district to provide compensatory related services in an unspecified amount, and if the district could not identify and secure the services of a provider at its rate within ten days of being so ordered, the parent requested funding for such services at a rate not to exceed $250 per hour; and (9) extended eligibility for special education services due to

[1] The parent filed an initial due process complaint notice on July 16, 2021, which was not marked as an exhibit but was included as part of the certified hearing record submitted to the Office of State Review (Jul. 16, 2021 Due Process Compl. Not. at p. 1). In the July 16, 2021 due process complaint notice, the parent asserted that the district had denied the student a FAPE for the 2021-22 school year, and alleged procedural and substantive deficiencies in a June 2021 IEP (id. at pp. 1, 7-10).

ongoing denials of FAPE resulting from the district's failure to appoint an IHO and other unreasonable delays on the part of the district (Parent Ex. C at pp. 13-15).

On November 22, 2021, the parent filed another due process complaint notice and requested consolidation with the November 8, 2021 amended due process complaint notice (Parent Ex. B at p. 1). The parent reasserted pendency—as outlined above—reasserted the claims set forth in the November 8, 2021 amended due process complaint notice as related to the June 2021 IEP, further alleged that the same procedural and substantive deficiencies applied to an IEP developed in November 2021, and claimed that the district had failed to offer the student a FAPE for the 2022-23 school year (id. at pp. 1, 10-15). As an additional new claim, the parent contended that the district failed to comply with a corrective action plan that had resulted from a State complaint (id. at p. 12). The November 22, 2021 due process complaint notice requested the same relief as indicated in the November 8, 2021 amended due process complaint notice, with the addition of a 28th proposed requirement that a new IEP include the recommendations from the requested IEE, and a finding that the student was denied a FAPE for the 2022-23 school year (id. at pp. 15, 16).

B. Additional Due Process Complaint, Impartial Hearing and Impartial Hearing Officer Decision

The IHO was appointed to hear both matters in December 2021, and, on December 21, 2021, ordered that the matters be consolidated (Dec. 21, 2021 IHO Order on Consolidation at p. 2). The parties convened for a preliminary conference on February 2, 2022, at which time, the parent's attorney reported that the independent neuropsychological evaluation was not completed (Tr. pp. 1-9; see Tr. pp. 3-4).[2] A status conference was held on February 24, 2022 (Tr. pp. 10-16).

A CSE convened on March 15, 2022 to review the student's programming and develop an IEP with an implementation date of March 16, 2022 (Parent Ex. G at pp. 1, 44-46, 50).

On March 18, 2022, the parent filed another due process complaint notice (Parent Ex. A). In the March 2022 due process complaint notice, the parent requested consolidation with the prior November 2021 due process complaint notices and incorporated them by reference (id. at p. 1 n.1). The parent reasserted pendency in accordance with the August 2, 2021 stipulation and order of the District Court, reasserted the claims set forth in the November 22, 2021 due process complaint notices as related to the June 2021 and November 2021 IEPs, realleged a denial of a FAPE for the 2021-22 and 2022-23 school years, and further alleged that the same procedural and substantive deficiencies as alleged regarding the June 2021 and November 2021 IEPs, applied to the March 2022 IEP (id. at pp. 15-21).

As relief, the parent sought (1) a pendency order directing that the student's pendency program was the program set forth in the August 2, 2021 stipulation and order of the district court; (2) a determination that the district denied the student a FAPE for the 2021-22 and 2022-23 school

[2] Correspondence between the parties and the IHO indicates that the district agreed to fund the parent's requested independent neuropsychological evaluation at some point in November 2021 (IHO Ex. V at p. 4). At a status conference on February 24, 2022, the parent's attorney indicated that funding was the result of a partial resolution agreement (Tr. p. 11). The parent's March 18, 2022 due process complaint notice indicates that the parties entered into a partial resolution agreement to fund the neuropsychological evaluation at the conclusion of the November 17, 2021 CSE meeting (Parent Ex. A at p. 9).

years; (3) a finding that the district retaliated against the parent in violation of the Americans with Disabilities Act (ADA); (4) an order for the district to conduct an assistive technology evaluation; (5) funding for an independent PT evaluation in the amount of $2,500, and funding for transportation costs to and from the evaluation; (6) funding for an independent neuropsychological evaluation conducted by the parent's chosen evaluator in the amount of $5,500, and funding for transportation costs to and from the evaluation; (7) an order directing the CSE to reconvene to develop an appropriate IEP for the remainder of the 2021-22 school year and for the 2022-23 school year that included all of the following recommendations: an educational setting in a State-approved nonpublic school that specializes in the education of students with Autism Spectrum Disorder (ASD), together with staff trained by and under the supervision of a NYS Licensed Behavioral Analyst/Board Certified Behavior Analyst (BCBA), and with coordination between teachers, therapists/aides, evaluators, and the parent; a homogenous grouping consisting of bright children with severe ASD symptomatology and a small student-to-teacher ratio, no greater than 6:1 with direct and individualized instruction; a structured, multisensory program with staff that has expertise in the early grade remediation of learning disorders in reading, math, and writing; total wrap-around services including behavior specialists, special educators, speech and language specialists, occupational therapists, physical therapists, and counselors; a 12-month program due to the threat of regression; 1:1 intensive instruction implementing a research-based, structured program of applied behavior analysis (ABA) with 25 hours of in-school ABA and 15 hours of at-home ABA weekly; milieu treatment, specifying structured teaching strategies that are part of the repertoire of the student's educational program and consistent across situations such as Treatment and Education of Autistic and related Communication-Handicapped Children (TEACCH) incorporated with ABA in a specialty program; visual schedules and work systems; a 1:1 instructional aide trained in ABA principles who will implement a behavioral intervention plan (BIP); a 1:1 paraprofessional on the bus; the FBA and BIP developed by the student's BCBA, with periodic updates thereof; assistive technology, as determined by an updated assistive technology assessment; social skills training; three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of group (2:1) speech-language therapy; two 30-minute sessions per week of individual OT with sensory integration training; two 30-minute sessions per week of individual counseling using the DIR/Floortime model; PT, as determined by the requested independent PT evaluation; one 60-minute session per month of parent counseling and training for consistency of approach in following the BIP at home and in school; and meaningful, measurable annual goals in all areas of need, with concrete baselines, targets, measuring criteria, and plans for moving the student toward functional independence; (8) an order directing the district's CBST to provide the parent with an exact copy of the packet that it plans to send with the student's application(s) to State-approved nonpublic schools at least seven days prior to beginning to apply; (9) an order directing the district's CBST to provide the parent with the list of schools to which the CBST will apply at least seven days prior to beginning to apply; (10) an order directing the district to have placed the student in a school capable of providing the program delineated in (7) within thirty days of the IHO's order; (11) 800 hours of compensatory tutoring services at a rate of $140 per hour, to address the student's deficits in the area of reading; (12) 400 hours of compensatory tutoring services at a rate of $140 per hour, to address the student's deficits in the area of writing; and (13) 200 hours of compensatory tutoring services at a rate of $140 per hour, to address the student's deficits in the area of mathematics (Parent Ex. A at pp. 21-23).

At a status conference held on March 23, 2022 (Tr. pp. 17-30), the IHO indicated that she was inclined to grant the request for consolidation of the parent's due process complaint notices

(Tr. p. 25).[3] By order dated March 23, 2022, the IHO consolidated the matters (Mar. 23, 2022 IHO Order on Consolidation at p. 2).

The parties convened for an impartial hearing on April 26, 2022, which concluded on June 1, 2022, after two days of proceedings (Tr. pp. 53-220). During the April 26, 2022 hearing date, the IHO denied the district's motion to dismiss the 2022-23 school year from the proceedings, stating that the student's March 2022 IEP would be in effect during the 2022-23 school year (Tr. pp. 59-60). Following the parent's opening statement on April 26, 2022 (Tr. pp. 81-89), the IHO requested that the district identify any requested relief to which the district was in agreement (Tr. p. 89). The district's attorney stated that the district intended to defend its offer of a FAPE for the 2021-22 school year and did not disagree with the parent's request for an independent PT evaluation (Tr. pp. 91, 92-93). The district's attorney did not agree with the parent's request for an assistive technology evaluation (Tr. p. 92). The district's attorney stated that a prior assistive technology evaluation was still current, that the student had an assistive technology device, and was receiving assistive technology services (id.). At the conclusion of the impartial hearing, the parent submitted a closing brief, which reiterated the requested relief as set forth in the March 18, 2022 due process complaint notice and described in detail above (IHO Ex. X at pp. 19-27; see Parent Ex. A at pp. 21-23).[4] The district did not submit a closing brief.

By decision dated August 3, 2022, the IHO found that the district failed to offer the student a FAPE for the 2021-22 school year (IHO Decision at pp. 6-7). In addressing the district's argument that the parent's claims related to the 2022-23 school year were not ripe for adjudication, the IHO agreed that it was premature for the parent to assert that the district had failed to timely place the student for the 2022-23 school year; however, the IHO did not agree that it was premature to address the March 2022 IEP (id. at p. 6). The IHO specifically noted that the March 2022 IEP had an implementation date of March 16, 2022, which was within the 2021-22 school year (id.). The IHO next determined that the district did not present any witnesses to defend the June 2021 or November 2021 IEPs, and therefore found that both IEPs were not appropriate (id.). The IHO further determined that the district did not implement the recommendation for placement in a State-approved nonpublic school following the March 2022 CSE meeting and, therefore, the district failed to offer the student a FAPE for the 2021-22 school year (id. at pp. 6-7).

The IHO then addressed the parent's request for compensatory educational services (IHO Decision at pp. 7-14). The IHO reviewed the entirety of the services that the student received during the 12-month 2021-22 school year, including pendency (id. at pp. 7-10).[5] The IHO found

[3] An additional status conference was held on March 30, 2022 (Tr. pp. 31-52), wherein the district indicated it would move to dismiss the 2022-23 school year from the parent's due process complaint notices, which the IHO declined to consider at that time (Tr. pp. 35, 38).

[4] The parent withdrew her requests for compensatory counseling and speech-language therapy services, as well as for extended eligibility (IHO Ex. X at p. 27).

[5] The IHO cited to the parties' uncontested pendency form dated November 18, 2021 (Parent Ex. F). To be clear, the agreement between the parties as set forth on the form relates only to this matter. The uncontested pendency form and the decision of an SRO will have no effect on the student's right to pendency flowing from the August 2, 2021 stipulation and order of the District Court, so long as the parent's federal civil action is pending in that forum.

that the student was not provided with an appropriately qualified teacher during July and August 2021, which "may have impacted the ability of the [s]tudent to receive a FAPE" (id. at p. 9). The IHO further found that the student did not receive appropriate services during September and October 2021 (id. at pp. 10-11, 13). Next, the IHO found that the neuropsychologist's recommendations for compensatory educational services were based on a formula that 200 hours of remediation would equal an improvement of one grade level, rather than based on what the student's amount of progress and functioning level should have been if he had received appropriate services (id. at pp. 13-14). On that basis, the IHO found that the neuropsychologist's recommendations were not helpful for determining an appropriate award (id. at p. 14). After reviewing the totality of services the student received including the pendency program, the IHO found that the student was entitled to compensatory educational services for the period of July 2021 through October 2021 (id.).

Turning to relief, the IHO ordered the district to fund 350 hours of compensatory tutoring at a reasonable market rate, a district assistive technology evaluation, an independent PT evaluation at a cost of up to $2,500, and funding in the amount of $5,500 for a privately obtained neuropsychological evaluation dated March 3, 2022 (id. at pp. 15, 17, 18).

In considering the parent's request for the IHO to order changes to the student's IEP consistent with the March 3, 2022 neuropsychological evaluation and subject to the recommendations from a new assistive technology assessment, and to order placement in a nonpublic school capable of providing the ordered program, the IHO noted that the district had referred the student to the CBST on or before April 6, 2022, had stated on the record on April 26, 2022 that no placement had been found, and as of the last hearing date on June 1, 2022 had provided no further information regarding the status of the student's placement in a nonpublic school (IHO Decision at pp. 15-16). The IHO further noted that as of the date of the parent's closing statement on July 13, 2022—after the start of the 12-month 2022-23 school year—there was no indication whether a placement had been located (id. at p. 16). The IHO noted the lack of any statements by the district on the record as to the status of the student's placement and the district's failure to submit a closing statement (id.). Although, the IHO found that it was premature to determine that the district would not locate a placement for the 2022-23 school year, the IHO mused "whether a placement will be timely located for the 2022-23 school year" (id.). The IHO then addressed the parent's request for an exact copy of the application packet and a list of schools to which the district planned to apply (id.). The IHO determined that the parent's request was not unreasonable and found that the parent was entitled to this information.

The IHO reiterated that as of April 6, 2022, the district had not received responses from eight prospective nonpublic schools, five schools had rejected the student, and stated that it was not clear whether the remaining schools had responded in any way since that time (IHO Decision at pp. 16-17). The IHO then decided she would order the district to locate a nonpublic school program for the student that specializes in the education of children with autism identifying specific parameters that the program would have to meet (id. at p. 17).

As relief, the IHO directed the district to fund the neuropsychological evaluation dated March 3, 2022, at a cost of $5,500, if it had not already done so; fund an independent PT evaluation at a cost of up to $2,500; and conduct a new assistive technology evaluation within 30 days of the date of her decision (IHO Decision at p. 17).

Next, the IHO ordered that the student's IEP shall be amended to provide for a non-public school program which specializes in the education of children with autism. The program shall provide a homogeneous grouping of bright children with severe ASD symptomatology and a small student to teacher ratio of no greater than 6:1. It shall include a structured, multisensory program with staff that has expertise in the early grade remediation of reading, math and writing learning disorder. It shall include total wrap around services including behavior specialists, special educators, speech and language specialists, OTs, PTs and counselors and a twelve month program. It shall include milieu treatment in order to remove barriers preventing the Student from focusing on classroom instruction and activities. It shall include 1:1 intensive instruction implementing a research-based structured program of ABA for 25 hours per week in school and 15 hours per week of ABA at home (IHO Decision at pp. 17-18).

The IHO further ordered the district to provide the parent with an exact copy of the packet that it plans to send with the student's applications and the list of schools to which the CBST will apply (IHO Decision at p. 18). The IHO next ordered the district to locate a placement that could provide "the IEP program ordered above" within 30 days of the date of her decision (id.). Lastly, the IHO ordered the district to fund 350 hours of compensatory tutoring at a reasonable market rate for the failure to provide appropriate services from July 2021 through October 2021(id.).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO exceeded her jurisdiction by awarding the parent a specific program and placement recommendation. The district also argues that the IHO erred in requiring the CSE to amend the student's IEP to include specific recommendations and in further ordering that the district implement that IEP. The district contends that the IHO also erred in directing the district to locate a program, rather than to refer the student for a program. The district alleges that the IHO should have ordered the CSE to reconvene to consider adding additional recommendations and/or required to the CSE to develop an appropriate IEP, including finding an appropriate placement in which to implement the new IEP.

The district appeals from the IHO's decision directing that the district provide the parent with exact copies of the application packet sent to nonpublic schools and a list of the nonpublic schools to which the district plans to send packets. The district argues that this improperly allows the parent access into the school selection process. The district argues that such application packets may contain sensitive information that the parent is not entitled to view, such as financial terms, and internal email communications. The district asserts that such information is outside the bounds of the IDEA, and that the IHO's order should be annulled.

As relief, the district requests that the IHO's order directing the CSE to reconvene to add specific program recommendations from the parent's neuropsychological evaluation to the student's IEP, and to locate a placement capable of implementing the new IEP within 30 days of the order be vacated. The district requests that, instead, the CSE be directed to reconvene to consider adding further recommendations to the student's IEP. In addition, the district requests that the IHO's order directing the district to provide the parent with exact copies of the application packet sent to prospective nonpublic school placements be vacated.

In an answer the parent asserts that the IHO did not err and acted within her discretion in ordering a specific program and placement for the student. The parent argues that the IHO had

ample evidence of the student's needs to mandate that the student's IEP be amended to include the recommendations of the neuropsychological evaluation. With regard to the meaning of some of the recommendations of the parent's neuropsychologist, the parent argues that upon reconvening, the CSE can figure out what "bright, structured, expertise, total wrap around services" means by collaborating or inviting the neuropsychologist to the meeting. In response to the district's appeal relating to the provision of application packets, the parent argues that the IHO was within her discretion and further that the district never objected to the parent's request during the impartial hearing. Regarding the IHO's order to provide the parent with a list of prospective nonpublic schools, the parent contends that she wants to know what the district's efforts are in locating a placement so that she can determine if the placement is appropriate. Additionally, the parent asserts that she needs the information so that she does not apply to the same schools as the CBST. In response to the district's argument that the application packets contain sensitive information, the parent asserts that the district should already know the contents of an application packet as it has already sent some. With regard to the district's request to reconvene the CSE, the parent alleges that it would be an exercise in futility as the CSE recommends the same program year after year and have been ordered to reconvene every year, yet make no changes to the student's IEP. Lastly, the parent asserts that it would be absurd to believe that the parties could reconvene and agree to a district IEP rather than the program and placement ordered by the IHO.

V. Applicable Standards

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

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

Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion - Relief

A. Scope of Review

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

In this instance, neither party has appealed the IHO's award of 350 hours of compensatory tutoring. In addition, the district has not appealed from the IHO's order to fund the March 3, 2022 neuropsychological evaluation, to fund an independent PT evaluation, or to conduct a new assistive technology evaluation. As such, those determinations have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The remaining claims before me are whether the IHO correctly ordered that the student's IEP be amended to include specific recommendations from a March 3, 2022 neuropsychological evaluation; that the district locate a nonpublic school capable of implementing the ordered IEP within 30 days of the IHO's decision; and that the district provide the parent with an exact copy of the application packet and a list of schools to which the district will apply.

B. Prospective Placement

The district appeals from the IHO's decision which ordered that it amend the student's IEP to include specific recommendations from a March 3, 2022 neuropsychological evaluation and to locate a nonpublic school to implement the IEP within 30 days of her decision. The parent argues that the IHO was within her discretion to order IEP amendments and placement in a nonpublic school and asserts that the IHO's decision should be affirmed.

An award of prospective relief in the form of IEP amendments, including prospective placement in a nonpublic school, 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"]).

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

The hearing record indicates that the CSE convened on March 15, 2022 to review the results of the March 3, 2022 neuropsychological evaluation and the November 26, 2021 functional behavioral assessment (FBA)/behavioral intervention plan (BIP) (Parent Ex. EE at pp. 2, 3). According to a March 28, 2022 prior written notice, the CSE discussed "the implications of the results of the neuropsychological evaluation, most salient being that [the student's] cognitive functioning [wa]s within or approaching the average range in many areas" (id. at pp. 1, 3). As a result, the prior written notice reflected that the student would continue to be assessed through standardized assessment and required a class with students who were also assessed via standardized assessment (id. at p. 3). The prior written notice further reflected that the student required a smaller class ratio to best support his learning and since the district did not have a class with those specifications, the CSE recommended deferral to the CBST for placement in an appropriate nonpublic school (id.). The March 2022 CSE also reportedly addressed the parent's concern regarding the "impact on [the student]'s progress due to the school's failure to provide instruction during the Extended School Year (ESY) by a certified and qualified special education teacher" and discussed whether there was a need for additional services (id.). The March 2022 CSE presented data which indicated that the student did not regress over the summer and determined that there was no need for additional services (id.). Next, the certification of the student's then-current teacher for the 2021-22 school year was reviewed and indicated that the then-current teacher had a special education license to teach children with disabilities in grades 1 through 6 and was therefore qualified to teach the student (id.).

In the description of other options considered, the March 28, 2022 prior written notice reflected that continuation in a 6:1+1 special class in a district specialized school was considered but rejected because it was determined that although the student needed a small class setting, his cognitive and academic functioning was higher than students who were placed in small classes in specialized schools (Parent Ex. EE at p. 2). The prior written notice further reflected that the

student also needed to be given the opportunity to converse and play with peers at his level in a reciprocal manner and that the majority of his classmates were nonverbal and only engaged in solo or parallel play (id.). Reportedly, the CSE considered "a more rigorous academic program" such as a 12:1+1 special class in a specialized school, but rejected it because the staffing ratio was too low to support the student's needs (id.). The prior written notice also reflected that the March 2022 neuropsychological assessment indicated that the student's cognitive and academic functioning ranged from the low average to average range in most areas (id.). According to the prior written notice, the student required a nonpublic school setting that could support him cognitively and academically, while at the same time addressing his significant behavioral deficits associated with autism (id.). Additionally, the prior written notice indicated the March 2022 neuropsychological evaluation reported that the student had not progressed in areas of adaptive functioning, which meant "that the current school setting and likely the full-time ABA services ha[d] not helped him to develop in these areas" (id.). Therefore, a more restrictive setting, such as a State-approved residential nonpublic school, was not considered as it was believed to be too restrictive for the student at the time. The prior written notice also explained that "although the current class size recommendation is 6:1:1, the team defers to CBST to make an appropriate recommendation to a school that will meet [the student]'s needs and best support his academic, social, behavioral needs . . . [t]hus, the class size may be different in the non-public school" (id. at pp. 2-3).

The hearing record also reflects that the student's information was sent to the CBST no later than April 6, 2022 (Dist. Ex. 4 at pp. 1-2). Additionally, the district provided a spreadsheet showing that 13 application packets were sent to State-approved nonpublic schools on April 6, 2022, that three schools rejected the student for lack of an appropriate program, that one school rejected the student for lack of an appropriate available class grouping, and that another school rejected the student due to lack of an appropriate opening (Dist. Ex. 9 at p. 1).

The district provided no further evidence of its efforts to place the student for the 2021-22 school year or the 2022-23 school year. The student's documented behavioral challenges, as well as the application process beginning in April of the 2021-22 school year, likely contributed to the difficulty in locating a placement. However, as the district rested its case on April 26, 2022 and the hearing concluded on June 1, 2022, the IHO correctly found that it was premature to determine that the district would be unable to locate a placement for the student for the 2022-23 school year, beginning in July 2022.

Nevertheless, the IHO's directive that the IEP be amended to include specific recommendations from the March 2022 neuropsychological evaluation, such as a specific methodology and a home-based program may have the unintended consequence of making the student even more difficult to place.

As noted in State guidance, State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR §200.6[j][2] see "Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at https://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf). State regulation further requires that the length of a school day for a State-approved private school must include instructional and related services (8 NYCRR §200.7[b][4]). State guidance reflects that State-approved private schools have been directed by the New York State Education Department to hire

staff necessary to provide related services and to accept only those students for whom they can provide the special education program and services recommended in students' IEPs ("Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at https://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf). State guidance further indicates that NYSED has directed the New York City Department of Education to ensure that it refers students to schools that are approved to meet the needs of the student, without having to receive related services beyond the school day through the use of related services authorizations (RSAs) (id.). Here, the IHO's directive to include a specific methodology and a home-based program on the student's IEP has the chance of making placement of the student at an approved nonpublic school increasingly unlikely due to the need to follow the requirements set forth in State regulations and State issued guidance documentation.

This is especially problematic as the IHO's finding of a denial of FAPE for the March 2022 IEP was entirely based on the district's inability to secure a nonpublic school placement, rather than a consideration of the appropriateness of the district's recommended program or the specific program recommended in the March 2022 neuropsychological evaluation report.

The IHO awarded the parent her requested relief after finding a denial of a FAPE for the 2021-22 school year on the ground that the district did not present any witnesses to defend the June 2021 and November 2021 IEPs, and on the ground that the district failed to implement the March 2022 IEP by failing to locate a placement (IHO Decision at pp. 6-7). There have been no substantive findings regarding whether or not the program recommended in the March 2022 IEP would have offered the student a FAPE for the 2022-23 school year, and no substantive findings regarding whether the program recommendations set forth in the March 2022 neuropsychological evaluation were required for the student to receive a FAPE. As the parent has not cross-appealed from the IHO's failure to address her claims related to the appropriateness of the March 2022 IEP for the portion of the 2022-23 school year in which it was to be implemented, there is no argument asserted on appeal to review the appropriateness of the March 2022 IEP. It is not the responsibility of an SRO to research and construct the appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [holding that a generalized assertion of error on appeal is not sufficient]). Accordingly, I will not search the parties' briefs and the hearing record in order to reconstruct the parties' dispute as to the March 2022 IEP or, for that matter, the appropriateness of the program recommendations contained in the March 2022 neuropsychological evaluation.

As in the prior appeal (Application of the New York City Dep't of Educ., Appeal No.: 21-178), the IHO's order would tend to undermine the district's continuing obligations to the student and the procedural requirements of the IDEA. While the parent has expressed reasonable frustration with the prospect of another CSE meeting and asserts that a reconvene of the CSE would not be productive, the CSE must reconvene to consider the results of the independent PT evaluation and the district's new assistive technology evaluation when they are completed. In addition, it appears that the parties have achieved some common ground in that there is agreement that the student requires placement in a State-approved nonpublic school. Additionally, the March 2022 CSE was required to consider the March 2022 neuropsychological evaluation; however, in

so considering it, the CSE was not required to adopt the recommendations of the evaluator (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Nevertheless, the March 2022 IEP incorporated evaluative information and some recommendations from the March 2022 neuropsychological evaluation into the March 2022 IEP (Parent Ex. G at pp. 4-6, 9, 19-20). Accordingly, a reconvene of the CSE will allow the district and parent to review the most current evaluative information concerning the student and revisit issues such as appropriate methodologies, supports and services in order to cooperatively arrive at a program that is both appropriate to address the student's special education needs and capable of implementation in a State-approved nonpublic school.

In the event that the district cannot find an appropriate State-approved program within the State to meet the student's needs, State law expressly directs the district to notify the Commissioner of Education (Educ. Law § 4402[2][b][3]). While a district is not authorized to place a student in a school that has not been approved by the Commissioner of Education, in the event that no approved schools are available to address a student's needs, the Commissioner may approve an interim placement ("Placements of Students with Disabilities in Approved Out-of-State Residential Schools and Emergency Interim Placements," Office of Special Educ. Mem. [Mar. 2012], available at https://www.p12.nysed.gov/specialed/publications/outofstateplacementsEIP.htm ["School districts do not have authority in law to place students with disabilities in nonapproved schools"]; see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1180 [S.D.N.Y. 1992] [indicating that in the event there are no appropriate State-approved nonpublic schools, a court may direct the State to expand the list of approved schools or provide conditional approval for an appropriate placement]).

C. Educational Records

Lastly, the district contends that the IHO erred in directing that the district provide the parent with exact copies of the application packet and a list of the nonpublic schools to which the district plans to send packets. The parent argues that it was within the IHO's discretion to order the district to provide the parent this information and further that the district never objected to the parent's request during the impartial hearing.

The Family Educational Rights and Privacy Act (FERPA) and the IDEA grant parents the right to review and inspect their child's education records (34 CFR 99.10[a]; 300.613[a]). Educational records are defined as records that are directly related to a student that are collected, maintained, or used by the district (34 CFR 99.3; 300.613[a]). Districts must comply with a parental inspection request within 45 days (34 CFR 99.10[b]; 300.613[a]). When in-person review is not feasible, districts must provide the parents with a copy of the requested records or make other arrangements for review (34 CFR 99.10[d]; 300.613[b][2]). Parents are also entitled to have the educational records explained or interpreted upon request (34 CFR 300.613[b][1]). However, the right to inspect does not include records kept in the sole possession of the maker which are used only as a memory aid and are not shared with others (see Owasso

Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 435-36 [2002]; Bd. of Educ. v. Horen, 2010 WL 3522373, at *25-*27 [N.D. Ohio Sept. 8, 2010], aff'd 113 LRP 45713 [6th Cir. May 26, 2011]).

Initially, the district does not assert that the packets sent to nonpublic schools on behalf of the student as part of the application process are not educational records of the student. Rather, the district argues vaguely and unconvincingly that the application packets may contain sensitive information that the parent is not entitled to view, such as financial terms, and internal email communications. However, the district does not provide a definitive statement as to what is actually contained within the packets, and as asserted by the parent, the district should already know the contents of an application packet having already sent 13 packets out to potential State-approved nonpublic schools in April 2022. Further, the district has not asserted a separate argument with regard to the list of nonpublic schools beyond stating without citation to any authority, that it is outside the bounds of the IDEA.

While neither party has presented a sufficient argument regarding the parent's entitlement to the application packets, with neither party assessing this information as part of a student's educational records, there is insufficient basis on appeal to depart from the IHO's direction that the district provide this information to the parent. In particular, the district has not addressed whether the information is or is not a part of the student's educational record and instead has only made generalized assertions regarding information that the district is privy to and the parent is not. Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

VII. Conclusion

As set forth above, the IHO's order directing a change in the student's IEP and ordering the district to locate a nonpublic school program within 30 days of her decision to implement that change in programming must be vacated. However, the IHO's order directing the district to provide the parent with an exact copy of the application packets and a list of the nonpublic schools to which the district is sending applications will not be disturbed.

THE APPEAL IS SUSTAINED AS INDICATED.

IT IS ORDERED that the IHO's decision dated August 3, 2022, is modified by reversing those portions which directed the district to amend the student's IEP to include specific recommendations and to locate a nonpublic school that could implement the amended IEP within 30 days of the date of her decision.

Dated: **Albany, New York**
October 12, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER