The University of the State of New York

The State Education Department
State Review Officer
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No. 14-010

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Neha Dewan, Esq., of counsel

Cuddy Law Firm, P.C., attorneys for respondent, Jason H. Sterne, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2012-13 and 2013-14 school years were not appropriate. 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 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

By letter dated December 4, 2012, the parent referred the student to the CSE for "possible special education services" (Parent Ex. S).[1] On December 20, 2013, one of several documented

[1] The hearing record shows that during the 2011-12 school year, the student received special education and related services through the committee on pre-school special education (CPSE) (see Parent Exs. H at p. 1; YY at p. 1; GGG at pp. 1, 7). After the district received the parent's consent for evaluations, which she initially withheld, the CSE convened on April 3, 2012 to conduct the student's initial review and to develop the student's IEP for the 2012-13 school year (see Dist. Exs. 2; 3; Parent Ex. H at pp. 1, 14). Finding the student eligible for special education as a student with an other health-impairment (OHI), the April 2012 CSE recommended a 12:1+1 special class placement in a community school for English language arts (ELA), mathematics, social studies, and sciences, as well as related services (Parent Ex. H at pp. 9-10, 14). However, by letter dated May 30, 2012, the

incidents involving the student's behaviors occurred, in which, while in the midst of an outburst lasting approximately 10-12 minutes, the student punched, kicked, smacked, bit, head butted, and possibly spit on the paraprofessional assigned to work with him (Parent Ex. HH; see also Parent Exs. U-HH; QQQ-FFFF). In a letter dated December 21, 2012, the district noted the student's significant behavioral issues and requested a psychiatric evaluation for the student (Parent Ex. R).[2]

On January 10, 2013, the CSE convened to determine the student's initial eligibility for special education and to develop the student's IEP to be implemented commencing January 24, 2013 (Parent Ex. G at pp. 1, 12-13). The January 2013 CSE determined that the student was eligible for special education as a student with an emotional disturbance (id. at pp. 2, 13). The January 2013 CSE recommended a general education classroom placement, with a full-time 1:1 crisis management paraprofessional and related services of two OT and one speech-language therapy sessions per week in small group (2:1) in a separate location, as well as one 30-minute counseling session per week in a small group (3:1) in a separate location, and one 30-minute individual counseling session per week in the general education classroom (id. at p. 9).

In a final notice of recommendation (FNR) dated January 15, 2013, the district summarized its recommendation that the student receive services the general education classroom and related services as recommended in the January 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the remainder of the 2012-13 school year (Parent Ex. O). By handwritten notation and signature on the FNR, dated January 25, 2013, as well as by an undated handwritten letter, the parent informed the district that she did not agree with the CSE's recommendations for the student but indicated that, nonetheless, the recommended "related services [could] be provided in the meantime while a new agreement [was] written" (Parent Exs. O; P). Specifically, the parent indicated her disagreement with the January 2013 CSE's determination that the student be classified as a student with an emotional disturbance, recommendation for related services with insufficient frequency, and failure to develop or recommend a behavioral intervention plan (BIP) or recommend special education teacher support services (SETSS) or a 1:1 paraprofessional (Parent Ex. O; see also Parent Ex. P).

By letter dated January 18, 2013, the district notified the parents of the student's immediate five day in-school suspension for kicking, hitting, spitting on, and head-butting his assigned paraprofessional (Parent Ex. GG). On January 23, 2013, while in the midst of his in-school suspension, the student bit and kicked his paraprofessional and was subsequently assigned to suspension at a different school (see Parent Ex. FF at pp. 3, 5-6, 15, 18).[3] The student subsequently received at-home suspension before attending a third school, from which he also suspended for

parent withdrew consent to the district's provision of "all special education services specified" on the April 2012 IEP and the student began attending kindergarten at a district public elementary school in a general education setting (Dist. Ex. 15; Parent Ex. R).

[2] It is not clear from the hearing record to whom the district's letter was addressed (Parent Ex. R).

[3] The hearing record shows that the student was assigned "three or four" paraprofessionals prior to the paraprofessional working with the student during the December 2012 and January 2013 incidents (Tr. pp. 727-28).

hitting, kicking, scratching and biting his teacher (see Tr. pp. 822-23, 826, 1338-40; Parent Ex. V at pp. 1, 4; see generally Parent Exs. Y-BB).

On March 19, 2013, the CSE convened again to develop the student's IEP to be implemented commencing April 3, 2013 (Parent Ex. F at pp. 1, 14). The March 2013 CSE determined that the student remained eligible for special education as a student with an emotional disturbance and recommended integrated co-teaching (ICT) services in a general education classroom for ELA, mathematics, social studies, and sciences (id.at pp. 9-10). The March 2013 CSE also recommended a full-time 1:1 crisis management paraprofessional and related services to be provided in a separate location, consisting of two 30-minute individual OT and two 30-minute individual speech-language therapy sessions per week, as well as two 30-minute counseling sessions per week, one individual and one in a group of three (id. at p. 10).

A. Due Process Complaint Notice

In an amended due process complaint dated April 23, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (see generally Parent Ex. A). The parent asserted that the district assigned to the student to inappropriate "alternative suspension sites," provided the student with a 1:1 paraprofessional whose training the parent "question[ed]," and failed to implement the student's January 2013 IEP during the student's suspensions (id. at p. 3). The parent disputed the January 2013 and March 2013 CSEs' determinations as to the student's eligibility for special education as a student with an emotional disturbance (id. at pp. 3, 5). The parent also alleged that the January 2013 and March 2013 CSEs: (a) failed to recommend an appropriate placement; (b) failed to develop appropriate, measurable annual goals and short-term objectives; (c) failed to appropriately evaluate the student; and (d) failed to recommend parent counseling and training (id. at p. 5). The parent also alleged that the district violated the student's rights under Section 504 of the Rehabilitation Act of 1973 (section 504) because it "only permitted the student to attend school for partial days" (id. at p. 6).

As relief, the parent requested that the IHO order the district to conduct "updated independent comprehensive evaluations," including the following: neuropsychological, assistive technology, auditory processing, sensory integration, OT, as well as a functional behavioral assessment (FBA) (Parent Ex. A at p. 6). The parent also requested an order directing the district to provide "an appropriate IEP" that, among other things, designated the student's eligibility for special education as a student with an OHI (id.). The parent requested prospective placement of the student in "an appropriate non-public school placement" (id.). In addition, the parent sought additional services to compensate for the district's failure to provide appropriate academic instruction and related services since January 24, 2013 (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 13, 2013 and concluded on October 22, 2013, after eight days of proceedings (Tr. pp. 1-1348). By decision dated December 12, 2013, the IHO found that the district failed to offer the student a FAPE for both the 2012-13 and 2013-14 school years (IHO Decision at pp. 16-17). Initially, with respect to implementation of the student's IEPs during the 2012-13 and 2013-14 school years, the IHO found that the district was "deficient in the

delivery" of the 1:1 behavior management paraprofessional and adopted the parent's calculations as to the related services that the district failed to deliver for the 2012-13 school year (id. at p. 16). As for the 2013-14 school year, the IHO acknowledged that his order for additional services did not take into account "any missed services accumulated" since the commencement of the 2013-14 school year but determined that "[r]ather than overload [the student] with more sessions of services than are manageable" the additional services ordered relative to the 2012-13 school year were sufficient (id. at p. 18). Turning to the appropriateness of the January 2013 and March 2013 IEPs, the IHO found that the CSEs did not afford "proper weight" to the recommendations of the private physicians, service providers, and therapists and that the CSE's recommendation for a regular education classroom with ICT services and a 1:1 behavior management paraprofessional was "insufficient to assist the student to regulate and control his behavior and contributed to the student's behavior/social regression" (id. at pp. 13, 16-17).[4] The IHO also held that "the parent ha[d] from all appearances cooperated with the CSE . . . ." (id. at p. 13).

As relief, the IHO ordered that the district provide the following independent evaluations at public expense: (a) neuropsychological; (b) OT with a sensory component; (c) auditory processing; and (d) assistive technology (IHO Decision at p. 17). The IHO also ordered the district to re-convene a CSE and consider the results of the evaluations, reconsider the student's eligibility classification, and make a recommendation of deferral to the community based support team (CBST) for the purposes of the placement of the student in a nonpublic school program with related services (id.). Finally, the IHO ordered additional services to compensate for the district's failure to provide the student all of the related services mandated on his IEPs during the 2012-13 school year, including 37 sessions of speech-language therapy, 29 sessions of OT, and 32 sessions of counseling (id. at pp. 17-18). The IHO also directed the district to provide the parent with a schedule of, and access to, parent training sessions (id. at p. 18).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in ordering the district: (1) to provide the student with an assistive technology evaluation; (2) to provide the student with an auditory processing evaluation; and (3) to require the reconvened CSE to recommend a nonpublic school placement for the student. The district has not challenged that the parent prevailed on most of the issues ruled upon by the IHO. In particular, the district acknowledges that it does not appeal from the IHO's decision to the extent that it ordered the district to provide the student with a neuropsychological evaluation and an OT evaluation with a sensory component, reconvene a CSE meeting, provide the student with additional services, and facilitate the parent's access to parent training services.[5] Therefore, these determinations are final and binding and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[4] Although the IHO stated that the ICT services commenced on January 25, 2013, a review of the evidence in the hearing record shows that ICT services were not recommended on student's IEP in effect in January 2013 but, rather, were recommended by the March 2013 CSE (compare IHO Decision at pp. 16-17, with Parent Exs. F at 9-10; G at p. 9).

[5] In a footnote, the district also asserts that it does not appeal several of the IHO's statements found under the "Discussion" section and asserts that those statements were conclusory, amounted to dicta, and did not constitute "findings," since they were not written in the "Findings of Fact and Conclusions of Law" section of the IHO's Decision (Pet. ¶ 4, n.4). Reading the IHO's decision as a whole and contrary to the district's assertions, I find that

With respect to the IHO's order that the district pay for the costs of an independent assistive technology evaluation, the district asserts that such an evaluation is unnecessary and that the parent abandoned the claim during the impartial hearing. The district also asserts that the IHO did not set forth a basis for his decision to order the evaluation, other than that the student required a smaller placement. With respect to the IHO's order that the district pay for the costs of an independent auditory processing evaluation, the district asserts that the parent acknowledged at the impartial hearing that the evaluation had already been conducted and that the particular relief was no longer sought. Furthermore, the district asserts that the student does not require an auditory processing evaluation, as he does not present with significant hearing issues.

With respect to the IHO's order directing the reconvened CSE to recommend deferral to the district's CBST for the purposes of placement of the student in a nonpublic school, the district asserts that the IHO again failed to provide a legal basis for the award. The district asserts that the award violates the least restrictive environment (LRE) requirements of the IDEA and that the CSE should first be permitted to consider the results of all of the ordered evaluations and, if possible, recommend a public placement for the student.

In an answer, the parent responds to the district's petition by admitting or denying the allegations raised and asserting that the IHO ordered appropriate relief. In addition, the parent clarifies that the auditory processing evaluation she was seeking was a specific auditory processing evaluation; namely, the SCAN-3.[6]

V. Applicable Standards—Evaluative Data

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; 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]).

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the IHO's statements that (a) the student was "improperly programmed;" (b) the student was "ill placed" in an general education classroom with ICT services; (c) the student regressed in socialization skills and behavior; (d) the parents cooperated with the CSE, and (e) the CSE did not afford proper weight to the recommendations of the private physicians, service providers, and therapists (IHO Decision at pp. 13-14), constitute findings, by which the district was aggrieved, and, as such, are appealable (8 NYCRR 200.5[k]). As the district did not appeal these findings, they are, therefore, final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[6] The hearing record reveals that the SCAN-3 is a screening measure for auditory functioning, administrated by an audiologist, and "comprised of three subtests" (Tr. pp. 1191-92; Parents Ex. GGGG at p. 10).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors" (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

If the district refuses to conduct evaluations of a student in response to a parental request, the district must provide the parent with prior written notice—consistent with State and federal regulations—including a description of the determination it made and the reasons for its determination (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). In addition to the parent's ability to request a reevaluation by the district, "[i]f the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an independent educational evaluation [(IEE)] at public expense" (8 NYCRR 200.5[g][1]; see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502[b]; see also K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated the parent's claim for an IEE at public expense]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Once the parent has requested an IEE at public expense, the district must, "without unnecessary delay," either provide an IEE at public expense or file a due process complaint notice to defend its evaluation as appropriate at an impartial hearing (34 CFR 300.502[b][2]; 8 NYCRR 200.5[g][1]; see C.W. v. Capistrano Unified Sch. Dist., 2012 WL 3217696, at *6 [C.D. Cal. Aug. 3, 2012] [finding that a request for an impartial hearing made 41 days after the parental request for an IEE did not constitute an unnecessary delay]; see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]). If the school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE,

although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Furthermore, as part of a hearing, IHOs are vested with the authority to request that a student be evaluated at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2], [j][3][viii]). One Court, after quoting the regulation itself, noted that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process," without further elucidation (Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010]), while another Court has noted with approval an SRO's remand of a proceeding to the CSE in conjunction with direction to reevaluate a student to determine the student's educational needs, based both on the absence of sufficient evaluative data in the record and the length of time since the student had last been evaluated (B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601, 615 [W.D.N.Y. 2011]).

VI. Discussion

A. Assistive Technology and Auditory Processing Evaluations

In the instant case, the district asserts that the IHO erred in ordering the district to fund the costs of independent assistive technology and auditory process evaluations. The hearing record shows that the January and/or March 2013 CSEs reviewed: a February 2011 psychological evaluation, a February 2011 social history, and a March 2011 bilingual speech-language evaluation, all conducted by the student's preschool; a February 2012 OT evaluation; an April 2012 psychological evaluation; an October 2012 FBA; a December 2012 social history evaluation; a January 3, 2013 classroom observation and a January 8, 2013 supplementary classroom observation of the student; and a February 2013 speech-language evaluation (Tr. pp. 415-14, 451-52, 686-87, 867-68, 900, 965-67, 1250-51; see generally NN; QQ; RR; TT; WW; YY; CCC; DDD; EEE; FFF).

The evidence in the hearing record shows that, in an email dated February 20, 2013, the parents requested an update from the district as to their prior request for multiple evaluations, including a central auditory processing test, a psychoeducational evaluation, a sensory integrations and praxis test, and an "assistive technology testing accommodations" evaluation (Dist. Ex. 54 at p. 2). The hearing record further shows that the district responded to the parent's email on February 26, 2013 in order to "confirm" that, by conversation on February 15, 2013, the parent and the district had agreed that two of the requested evaluations (a psychoeducational evaluation and a central auditory processing test) would be provided at district expense (id. at p. 1). The hearing record does not indicate that the district provided the parent with prior written notice as a consequence of its refusal of the parent's request for the additional evaluations (see 34 CFR 300.503; 8 NYCRR 200.5[a]).

Initially, with respect to the IHO's order directing the district to fund the costs of an assistive technology evaluation of the student, the hearing record does not support the district's assertion that the parent abandoned this claim at the impartial hearing. On the contrary, the hearing record shows that the IHO made a determination on the record, without objection from the parties, that the parent's request for an assistive technology evaluation remained an issue in need of

resolution (Tr. pp. 91-92). Furthermore, as set forth above, the hearing record shows that the parent requested that the district conduct an assistive technology evaluation of the student (Dist. Ex. 54 at p. 2) and the district points to no evidence that it fully evaluated the student as to his needs in this area or otherwise determined that an assistive technology evaluation was unnecessary. As such, nothing in the hearing record warrants a reversal of the IHO's order that the district fund an assistive technology evaluation for the student.

The district also alleges that the IHO erred in ordering the district to fund the costs of an auditory processing evaluation of the student. First the district asserts that the parent privately obtained an auditory processing evaluation and withdrew her request for the same at the impartial hearing, and, second, the district alleges that the student did not present with significant auditory deficits and, therefore, did not require the ordered evaluation. The hearing record shows that the parent privately obtained a comprehensive audiological evaluation, conducted on May 14, 2012 and provided to the district on or about December 20, 2012, and an auditory-language processing evaluation, conducted on April 22, 2013 and provided to the district on June 13, 2013, during the impartial hearing (Tr. pp. 87, 1467-70, 1474-75; Dist. Ex. 22 at p. 1; Parent Ex. GGGG at p. 1). During the impartial hearing, the IHO inquired as to whether or not the parent continued to seek an auditory processing evaluation of the student and the parent did not refute the IHO's conclusion that the particular evaluation was no longer at issue (Tr. pp. 86-88, 91). Despite the IHO's narrowing of the issues during the impartial hearing, the parent argues on appeal that the IHO's order for an auditory processing evaluation was appropriate because the privately obtained auditory-language processing evaluation recommended that the student undergo further testing in the form of a SCAN-3 (see Parents Ex. GGGG at p. 10).

The results of the auditory-language processing evaluation showed that the student fell within age appropriate norms when tested on picture vocabulary, expressive vocabulary, auditory memory of numbers (forward and reverse), auditory memory of words, sentences, and in auditory reasoning (Parent Ex. GGGG at p. 3). However, the results also show that the student demonstrated deficits in word discrimination, phonological segmentation, phonological bleeding, and auditory comprehension (id.). The speech-language pathologist who conducted the evaluation noted that, in addition to the student's weaknesses in auditory functioning, he demonstrated sensory integration and attentional deficits (id. at p. 9). The speech-language pathologist opined that, at the time of the evaluation, the student was "too young to receive the full battery of testing for [c]entral [a]uditory [p]rocessing" and recommended that the student undergo the SCAN-3 test (id. at p. 10). The speech-language pathologist testified that the SCAN-3 would be administered by an audiologist and could be useful in differentiating the student's specific auditory skills and examining how well the student could hear noise (Tr. pp. 1191-92).

The evidence in the hearing record does not support the IHO's order that the district fund an independent auditory processing evaluation. The IHO erred in ordering such an evaluation to the extent that the parent already obtained the same (see generally Parent Ex. GGGG). Furthermore, even if the IHO had specifically ordered the SCAN-3 test, given the timing of the district's receipt of the privately obtained April 2013 auditory-language processing evaluation that recommended the SCAN-3, there is no indication that the district was aware of the parent's desire for such an additional evaluation until after the commencement of the impartial hearing and the parent failed to follow the prescribed procedures for obtaining the SCAN-3 at public expense. In the future, the parent may request that the district conduct a SCAN-3 test and the district, should

it conclude that further evaluative data is unnecessary to determine the student's educational needs, is reminded of its obligation to provide prior written notice consistent with State and federal regulations of that determination, the reasons for the determination, and the parent's right to request additional assessments (8 NYCRR 200.5[a]; see 34 CFR 300.305[d], 300.503).

B. Placement in a Nonpublic School

I turn next to the district's assertion that the IHO erred in ordering the district to refer the student to the CBST for purposes of a nonpublic school placement. The IHO ordered the district to provide for numerous evaluations of the student and then to reconvene to develop an appropriate IEP (IHO Decision at p. 17). When determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). The IHO's order that the CSE refer the student to the CBST for placement in a nonpublic school, particularly when read in conjunction with his order that the CSE reconvene to consider the results of the various ordered evaluations of the student, violates the CSE's duty to first determine if the student can be educated in a public school setting, and, as such, is premature (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA …and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]).

VII. Conclusion

Based on the above, the hearing record shows that the IHO properly ordered an independent assistive technology evaluation of the student at district expense but erred in ordering the district to fund the costs of an independent auditory processing evaluation. The evidence in the hearing record also supports the district's contention that the IHO erred in ordering the CSE to defer the student's placement to the CBST for placement in a nonpublic school.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's December 12, 2013 decision is modified by reversing those portions which ordered the district to fund the costs of an independent auditory processing evaluation and directed the CSE to place the student in a nonpublic school.

Dated: **Albany, New York**
February 18, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER