The University of the State of New York

The State Education Department
State Review Officer
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No. 15-064

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

Appearances:
Friedman & Moses LLP, attorneys for petitioner, Paula Rogowsky-Cohen, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which denied in part the relief she sought relating to the educational program that respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2012-13 and 2013-14 school year. The district cross-appeals certain findings made by the IHO in an amended decision. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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

With regard to the student's educational history, the evidence in the hearing record shows that, since approximately May 2009, the student attended a special class at a district public school and received, in various amounts, home-based services using ABA methodology pursuant to either an IEP or as relief granted through prior due process proceedings relative to previous school years

(see Apr. 3, 2014 Tr. p. 40; Aug. 15, 2014 Tr. p. 28-30; Oct. 8, 2014 Tr. pp. 207-08; Parent Ex. OO at pp. 1-2; see generally Parent Exs. B; C).[1]

On August 2, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. F at pp. 1, 20). Finding that the student remained eligible for special education as a student with autism, the August 2012 CSE recommended that the student receive 12-month school year services in a 6:1+1 special class in a specialized school for eight periods per day (id. at pp. 1, 14, 16, 19).[2] The CSE also recommended that the student receive the following related services on a weekly basis: three 30-minute individual speech-language therapy sessions; one 30-minute speech-language therapy session in a group of three; one 30-minute individual physical therapy (PT) session; one 30-minute PT session in a group of two; and three 30-minute individual occupational therapy (OT) sessions (id. at pp. 14-15). In addition, the CSE recommended the following weekly related services to be delivered at an "outside" location: two 60-minute individual speech-language therapy sessions and two 45-minute individual OT sessions (id. at p. 15).

On June 13, 2013, the district conducted an assistive technology evaluation of the student (Parent Ex. S at p. 1). On June 26, 2013, the CSE reconvened to discuss the June 2013 assistive technology evaluation report and to consider amending the August 2012 IEP (Parent Ex. E at pp. 1-10, 13, 27, 30; see Parent Ex. I).[3] By prior written notice dated June 27, 2013, the district informed the parent that the CSE recommended the integration of a "[d]ynamic display speech generating device" into the student's "existing school program" (Parent Ex. H at p. 1).

In a due process complaint notice dated July 1, 2013, the parent asserted that the district failed to offer the student a FAPE for the 2013-14 school year (Parent Ex. 1 at pp. 1-2). Subsequent to the parent's filing of the due process complaint notice, the CSE reconvened on July 5, 2013, to review the student's IEP (Parent Ex. D at pp. 1, 11). Finding that the student remained eligible for special education and related services as a student with autism, the July 2013 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school for 37 periods per week (id. at pp. 1, 8-9). The July 2013 CSE further recommended the following related services on a weekly basis: three 30-minute individual speech-language therapy sessions; one 30-minute speech-language therapy session in a group of three; one 30-minute individual PT session; one 30-minute PT session in a group of two; and three 30-minute individual OT sessions (id. at p. 8). The July 2013 CSE additionally recommended: three periods of adapted physical education per week;

[1] Due to a pagination error in the transcript, the pages are numbered consecutively until the proceedings conducted on August 15, 2014, at which point the pagination in the transcript begins anew. For purposes of clarity, all citations to testimony in this decision include the corresponding transcript date.

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

[3] In a letter dated June 18, 2013, the district invited the parent to attend the June 26, 2013 meeting (Parent Ex. I). A handwritten notation on this letter indicated that the purpose of the meeting was "strictly to add only the iPad to [the student's] IEP" (id.). The letter also informed the parent that annual goals would be added at a subsequent meeting on July 5, 2013 (id.).

one 30 to 60-minute session of parent counseling and training per month; and provision of a "[d]ynamic display speech generating device" (i.e., an iPad) (id. at pp. 8-9).

A. Due Process Complaint Notice

In an amended due process complaint notice dated December 18, 2013, the parent contended that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years (Parent Ex. O at pp. 1-10). The amended due process complaint notice contained approximately 70 numbered allegations; however, due to the limited issues presented on appeal, only those allegations both germane to the findings in the IHO's decision and presented on appeal are described below. Accordingly, the parties' familiarity with the remaining claims from the amended due process complaint is presumed.[4]

First, regarding the process by which the August 2012, June 2013, and July 2013 IEPs were developed, the parent contended that the CSEs failed to conduct sufficient evaluations of the student (Parent Ex. O at pp. 4, 7). The parent also argued that the CSEs failed to evaluate the student's assistive technology needs (id. at p. 4). The parent further asserted that the CSEs predetermined their recommendations for the student and repeatedly eliminated the student's 1:1 ABA services from his educational program without justification (id. at pp. 3, 5, 8). As for the August 2012, June 2013, and July 2013 IEPs, the parent alleged that these IEPs failed to include appropriate assistive technology services; were not based on the documents the CSE considered; did not include parent counseling and training "at home"; and did not include a sufficient "amount" of related services (id. at pp. 7, 8). Also, the parent asserted that the student made "slow and steady progress" due to his receipt of home-based ABA services, but failed to make "nearly the same" progress in school (id. at pp. 4-5).

The parent further asserted that the district, as a matter of policy, terminates the delivery of pendency services, notwithstanding the lack of a current IEP, until the parent initiates a new impartial hearing (Parent Ex. O at p. 9). The parent additionally alleged that the district violated Section 504 of the Rehabilitation Act of 1973 (Section 504) (id. at p. 8). For remedies, the parent requested: (1) at least 15 hours of home-based ABA services on a prospective basis; (2) additional related services; (3) provision of a "1:1 ABA teacher" to provide "direct services to [the student] in the classroom"; (4) consultation services to be provided by the aforementioned ABA teacher; (5) compensatory services; (6) an appropriate IEP; (7) declaratory relief; (8) payment for multiple evaluations; (9) provision of assistive technology as recommended in a private evaluation report; and (10) reimbursement and/or payment for the costs of the student's transportation (id. at pp. 9-10).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 7, 2013 (see Nov. 7, 2013 Tr. pp. 1-19). The IHO issued an interim decision dated November 15, 2013 indicating that the student's pendency placement "include[d]" 15 hours of home-based services per week (IHO Nov. 2013 Interim Decision at p. 2), which decision was amended on December 9, 2013 (IHO Dec. 9, 2015 Interim

[4] The majority of the parent's allegations did not specify to which IEP they related (see Parent Ex. O at pp. 1-9).

Decision at p. 2).[5] Following the November 7, 2013 proceedings, the parties continued with the impartial hearing, which concluded on March 17, 2015 after an additional 14 days of proceedings (Tr. pp. 1-433; 1-1182). In a decision dated May 5, 2015, the IHO found that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years (IHO Decision at pp. 1-23).

As a preliminary matter, the IHO stated that he would not entertain the parent's request for placement in a nonpublic school as it was not contained in the parent's amended due process complaint notice (IHO Decision at p. 8). The IHO also observed that evaluations requested by the parent were ordered and conducted during the impartial hearing (id. at pp. 5-6; see also Second Interim IHO Decision at p. 3).

Turning to the procedure by which the IEPs were developed, the IHO found that the district's failure to evaluate the student "for five years prior to the development of the IEP[s]" constituted a procedural violation of the IDEA (IHO Decision at pp. 19, 21-22). The IHO further found that the district's "blanket refusal" to include home-based ABA services in the student's IEP "substantially undermined" the CSE process (id. at pp. 19, 21). Moreover, the IHO found that the district reduced the student's weekly hours of home-based ABA services "without a discussion or evaluation to justify [such a] reduction" and that this was improper (id. at pp. 19, 20). The IHO further found that the student required "1:1 instruction" and a "home program" in order to achieve "educational progress" (id.).

Next, the IHO found that the IEPs did not "provide sufficient information about the IEP plan or placement"; were "not complete as to all services rendered"; and "faulty" as a result of the district's failure to conduct a timely evaluation of the student (IHO Decision at pp. 21, 22). However, the IHO found that the student did not require an increase in the amount or duration of the related services recommended by the August 2012, June 2013, and July 2013 CSEs (id. at pp. 22, 23). Consequently, the IHO denied the parent's request for compensatory related service sessions (id.). The IHO further found that the student made progress during the 2012-13 school year but that such progress was "trivial" (id. at pp. 13, 21).

As a remedy for the district's failure to offer a FAPE for the 2012-13 and 2013-14 school years, the IHO awarded compensatory individual home-based services (IHO Decision at pp. 20-22). While the IHO indicated that the parties did not develop a record as to the amount of home-based services the student required, the IHO identified a "consensus" that 15 hours per week would be appropriate to meet the student's needs (id. at p. 20). The IHO next found that, for the 2012-13 school year, the district unilaterally provided 13 hours of home-based services instead of 15 (id.). Thus, the IHO multiplied two hours per week by 45 weeks (a number that represented, according to the IHO, the number of weeks in a 12-month school year) and arrived at 90 hours (id.). The IHO then proceeded to reduce this award by 10 hours due to two equitable factors: the parent's

[5] These home-based services are described as "SETSS" services throughout the hearing record. State regulations do not define SETSS within the continuum of special education services (see generally 8 NYCRR 200.6) and the parties and the IHO failed to sufficiently define SETSS in the hearing record. Generally, however, the term SETSS has previously been used by this district to refer to services consistent with the regulatory version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also 8 NYCRR 200.6[f]). In light of past usage, it does not appear that SETSS would be an accurate description of the home-based services delivered to the student in this proceeding.

failure to provide certain documents to the CSE and the parent's periodic removal of the student from school prior to the end of the school day during the 2013-14 school year (id. at pp. 20-21). In addition to this compensatory award, the IHO ordered that the student receive: (1) 15 hours per week of home-based ABA; (2) one hour per week of services to be performed by the student's home-service provider for the purpose of coordinating the student's home and school programs; and (3) one hour per week of parent counseling and training "at home" by the student's home-service provider (id. at p. 23). The IHO further ordered the CSE to reconvene and alter the student's IEP "to conform" to his decision (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by failing to award the full extent of her sought relief. As a preliminary matter, the parent contends that the IHO failed to properly determine the student's pendency placement at the inception of the impartial hearing. With respect to the August 2012, June 2013, and July 2013 IEPs, the parent argues that the IHO erred by failing to address her claim that these IEPs did not address the student's need for assistive technology. Turning to the relief ordered by the IHO, the parent contends that the IHO's decision should be read to prescribe "after school" speech-language therapy and OT on a prospective basis. In support of this claim, the parent submits additional evidence together with her petition including an "amended" IHO decision dated June 8, 2015. The parent also contends that the IHO erred by failing to include his compensatory award of 80 hours in the decision's ordering clause. Moreover, the parent argues that the IHO should have awarded 90 hours of compensatory services and that the IHO's equitable reduction was not supported by the evidence in the hearing record.[6]

The parent seeks: "additional compensatory relief"; an additional 10 hours of compensatory home-based ABA services; modification of the student's current IEP to indicate that a portion of the student's speech-language therapy and OT services be delivered "after school"; and assistive technology and related training as recommended in a September 2014 evaluation report.

In an answer, the district denies the parent's material allegations with respect to the alleged errors committed by the IHO. With respect to the parent's request for assistive technology relief, the district argues that it met the student's needs by conducting an assistive technology evaluation in June 2013 and prescribing the use of an iPad equipped with communication software. The district further contends that the assistive technology relief sought by the parent is unwarranted because it exceeds the district's FAPE obligation or is "already accessible to the [s]tudent for free."

[6] The parent also appeals the IHO's failure to issue findings on her Section 504 claims to the limited extent that a court would deem such pleading necessary for purposes of administrative exhaustion. As the parent recognizes in her petition, these claims are outside the purview of an SRO's jurisdiction and, accordingly, cannot be considered (see Educ. Law § 4404[2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]).

The district also asserts that the IHO properly awarded a reduced amount of 80 hours of compensatory education services based upon equitable considerations.[7]

The district additionally cross-appeals a purported amendment to the IHO's decision. As a preliminary matter, the district argues that the IHO did not have jurisdiction to issue an amended decision. But even assuming for purposes of argument that the IHO had jurisdiction to do so, the district asserts that the parent's amended due process complaint does not contain any allegations pertaining to after-school related services. Finally, the district argues that after-school related services were not part of the student's pendency placement and, in any event, unnecessary to provide the student with a FAPE.

In an answer to the district's cross-appeal, the parent denies the district's material allegations and asserts that the IHO properly issued an amended decision. The parent further argues that the IHO correctly determined that the student is entitled to after-school speech-language therapy and OT on a prospective basis. The parent also contends that her amended due process complaint notice raised the issue of after-school delivery of related services and that the student requires these services in order to receive a FAPE.

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. v. Rowley, 458 U.S. 176, 180-83, 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]). "'[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. Florida 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]). 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., 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

[7] The district agrees with the parent that the IHO did not include this compensatory education award in the decision's ordering clause, but states that it would "not refuse implementation due to this oversight" (Ans. & Cross-Appeal at p. 16 n. 4).

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 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 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).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. After-School Related Services

Initially, the parent contends that the IHO failed to define the student's then-current educational placement in his pendency order. The parent asserts that the placement and related services contained in the August 2012 IEP constituted the "last agreed-upon" placement between the parties and further argues that these services included after-school speech-language therapy

and OT (Pet. ¶ 17).[8] In addition, the parent argues that the IHO's decision failed to set forth with clarity his intentions with respect to the student's after-school related services but that the IHO's decision should be interpreted to require the district to continue to deliver the student's after-school related services.[9] The district, in response, submits that the parties reached an agreement as to the student's pendency placement at the impartial hearing and that this agreement did not include after-school related services. The evidence in the hearing record supports the district's argument.

The parent appears to attempt to intermingle the separate and distinct question of the student's educational placement while the proceeding is pending with the question of the appropriate relief, if any, relating to after-school related services as a result of the district's denial of a FAPE to the student. However, a claim for public funding of a student's tuition or services pursuant to pendency must be evaluated separately from a claim for relief such as tuition reimbursement or compensatory education on the basis that the district failed to offer the student an appropriate IEP (see Mackey v. Bd. of Educ., 386 F.3d 158, 162 [2d Cir. 2004] [noting that "[a] claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP"]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [finding that "pendency placement and appropriate placement are separate and distinct concepts"]). Consequently, the two separate analyses are hereby addressed.

1. Pendency

First as to pendency, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; O'Shea, 353 F. Supp. 2d at 455-56). Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement

[8] The services identified in the parent's petition are identical to the services recommended in the August 2012 IEP with two exceptions. First, the August 2012 IEP prescribes one 30-minute session of individual PT per week and one 30-minute session of PT in a group of two while the parent's petition refers to two 30-minute sessions of individual PT (compare Parent Ex. F at p. 15, with Pet. ¶ 17). Second, the August 2012 IEP recommended one 30-minute session of speech-language therapy in a group of three per week to be delivered in the classroom which the parent did not identify in her petition (id.).

[9] The parent submits an amended version of the IHO's decision together with other documents in support of her interpretation of the IHO's decision with respect to the after-school speech-language therapy and OT services (see Pet. Exs. A-C). Specifically, the purported amended decision elaborated that, while the IHO did not find evidence to support an award of compensatory related services, "there shall be no decrease or change in the related services (i.e., [speech-language therapy] and OT) the [student] was receiving at the time of the parent's request(s) or at the time this decision was first issued in its un-amended form" (Pet. Ex. B at p. 23). Not only does the IHO lack authority to issue an amended decision that alters the substance of his original decision (see 20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-096; cf. J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]), but the amended decision did nothing to clarify the IHO's intent (Pet. Ex. B at p. 23). Accordingly, this amended decision is without effect and shall not be further considered.

(Mackey, 386 F.3d at 163, citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]). The United States Department of Education has opined that a student's then-current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then-current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, 1189 n.3 [S.D.N.Y. 1996]; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83, 90 [N.D.N.Y. 2001], aff'd, 290 F.3d 476 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

In the present case, the evidence in the hearing record shows that the parties reached an agreement at the impartial hearing as to the placement and services the student would receive during the pendency of the proceeding (see Nov. 7, 2013 Tr. pp. 4-6). When prompted by the IHO to identify the student's pendency placement and services, counsel for the parent identified a January 2011 pendency order issued in a prior impartial hearing, stating that she "would like pendency services from that [prior IHO] [o]rder . . . to continue" (Nov. 7, 2013 Tr. pp. 4, 9; see Parent Ex. B at p. 3). The parent's counsel then specified that the proposed pendency placement consisted of "a special class in a special school" as well as the following related services on a weekly basis: two 40-minute sessions of individual OT; three 30-minute sessions of individual OT; two 30-minute sessions of individual PT; four 45-minute sessions of speech-language therapy in a group of two; and four 30-minute sessions of individual speech-language therapy (Nov. 7, 2013 Tr. pp. 5-6). The parent also asserted that the student's pendency placement included 15 hours per week of home-based ABA services pursuant to a "[r]esolution [a]greement" entered into by the parties (Nov. 7, 2013 Tr. pp. 6-7; see Parent Ex. C at pp. 1-3). Following the parent's identification of these services, the IHO summarized the parent's sought services and asked the district if it "agree[d]" with the parent's position (Nov. 7, 2013 Tr. p. 14). The district representative responded by indicating that, in his view, the student should receive 13 instead of 15 hours per week of home-based ABA services (Nov. 7, 2013 Tr. pp. 16-17). The district representative did not otherwise object to the parent's sought services (see id.). Following this hearing date, the IHO issued a written interim decision on November 15, 2013 stating that the student's pendency placement "include[d]" 15 hours of home-based ABA services per week (IHO Nov. 2013 Interim Decision at p. 2; IHO Dec. 9, 2015 Interim Decision at p. 2).

While the IHO's written order neither specified the student's placement nor the type and duration of related services, a review of the discussion between the parties at the impartial hearing supports a finding that the parties stipulated as to the placement and the majority of the services the student would receive during the pendency of the proceeding and that the only disputed issue with regard to pendency was the amount of home-based ABA services, which the IHO resolved in the interim decision (see IHO Nov. 2013 Interim Decision at p. 2; IHO Dec. 9, 2015 Interim Decision at p. 2; Nov. 7, 2013 Tr. pp. 3-17). Moreover, as the district correctly argues, the parent did not indicate that she sought a different arrangement in her amended due process complaint notice or at any subsequent point during the impartial hearing. Thus, notwithstanding recommendations in the August 2012 IEP that the student receive some sessions of speech-

language therapy and OT "outside school" (see Parent Ex. F at p. 15), the parent chose to dispute this IEP in her due process complaint notice (see generally Parent Exs. A; O) and there is no evidence in the hearing record that the parties similarly intended any of the related services, agreed upon during the impartial hearing, to be delivered after school (see Nov. 7, 2013 Tr. pp. 3-17).[10] Therefore, the parent's request is dismissed.[11]

2. Prospective Relief

Next, the parent argues that the IHO's decision should be interpreted to require that the student receive after-school speech-language and OT going forward and seeks an order from the SRO directing the CSE to include after-school speech-language therapy and OT services on the student's "new IEP" (Pet. ¶ 70). Assuming without deciding that this claim for relief was contained in the parent's amended due process complaint notice and that the student required these services in order to receive a FAPE, prospective relief would be inappropriate under the circumstances of this case. In addition to the August 2012, June 2013, and July 2013 IEPs challenged in this proceeding, the hearing record contains a June 2014 IEP and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already developed a new IEP for the student for the 2015-16 school year (Dist. Ex. 21 at pp. 1, 25; see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). A CSE is tasked with assessing a student's needs from year to year, and it would be inappropriate to unnecessarily interfere with this process by ordering amendment of the student's IEP without any knowledge or evidence regarding the annual review of the student's current needs or services conducted subsequent to the matters under review in this proceeding (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Moreover, the evidence in the hearing record shows that, to the extent that the CSE may recommend a level of related services commensurate with years past, these services, in combination with the IHO's order for services and a prospective order directing the district to include after-school related services on the student's IEP, may not be feasible or in the student's interest (see Apr. 3, 2014 Tr. pp. 42-43; Oct. 8, 2014 Tr. p. 188; Oct. 17, 2014 Tr. p. 609; Parent Exs. D at p. 8; F at pp. 13-14; Q at p. 1).[12] The appropriate course is to require the parties to come into compliance with the statutory process envisioned under the IDEA and to effectuate equitable relief to remediate past harms that have been explored through

[10] Indeed, the pendency order from the prior impartial hearing, cited by counsel for the parent as evidence of the suggested placement and services (save the home-based ABA services), did not specify whether the services were to be delivered during or after school or otherwise identify a location for delivery of such services (see Parent Ex. B at p. 3).

[11] Even assuming for purposes of argument that the parties did not reach an agreement and relied instead upon a previous IEP that specified that certain related services be delivered after school, it would still remain unclear whether the student would be entitled to delivery of related services at the student's home (cf. T.M., 752 F.3d at 171 [pendency "guarantees only the same general level and type of services that the disabled child was receiving" and, further, "does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers"]).

[12] To the extent the parent's claim could be read as a request for compensatory speech-language therapy and OT sessions, this argument is foreclosed by the parent's election not to appeal the IHO's adverse determination on this aspect of the parent's requested relief (IHO Decision at p. 23; see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also 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 development of an appropriate evidentiary record. Therefore, the parent's request to direct the contents of new IEPs going forward is denied.

B. Compensatory Additional Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X., 2008 WL 4890440, at *23 [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. Mar. 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]).[13] Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in

[13] In addition, in the Second Circuit, compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see E. Lyme Bd. of Educ., 790 F.3d at 456 n.15; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at *3 [S.D.N.Y. Aug. 25, 2015]).

fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135).

1. Assistive Technology

The parent contends that the August 2012, June 2013, and July 2013 CSEs failed to consider and address the student's assistive technology needs and, further, that an award of compensatory services is warranted under the facts of this case. In response, the district argues that, although it failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, no compensatory relief is warranted. The evidence in the hearing record supports a conclusion that a limited compensatory award is appropriate to remediate the August 2012 CSE's failure to assess the student's assistive technology needs.

Because the IHO failed to address this claim in his decision, it is first necessary to review the extent to which the August 2012, June 2013, and July 2013 CSEs addressed the student's assistive technology needs. One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]).

With specific respect to the student's assistive technology needs, the evidence in the hearing record shows that the parent made multiple requests for an assistive technology evaluation prior to the August 2012 CSE meeting and that the district did not respond to these requests until June

2013 (see Parent Exs. MM-1 at p. 1; QQ at pp. 4-5; see also Jul. 16, 2014 Tr. pp. 294-95; Dist. Ex. 16 at p. 2; Parent Ex. S at p. 1). Moreover, the August 2012 CSE meeting minutes stated that the parent believed that an iPad was "an effective teaching tool" for the student (Dist. Ex. 16 at p. 2). The parent's views in this regard are further evidenced by the parent's statement in a June 2012 letter to the district that the student became "highly interested" in an iPad after being "exposed to communication-based programs" on an iPad during a speech-language therapy session (Parent Ex. QQ at p. 5). Nevertheless, the August 2012 CSE concluded that the student did not need any assistive technology devices or services (see Parent Ex. F at pp. 2-4). The district did not explain at the impartial hearing how the CSE reached this conclusion or the extent to which the August 2012 CSE attempted to ascertain the student's assistive technology needs. Therefore, the evidence in the hearing record supports a finding that the district failed to address the student's assistive technology needs for the 2012-13 school year.

On June 13, 2013, the district conducted an evaluation to assess the student's need for assistive technology (Parent Ex. S at p. 1). The evaluation team members consisted of the student's then-current speech-language provider, classroom teacher, and occupational therapist (id. at pp. 1-2). According to the resultant evaluation report, the student, prior to the evaluation, used an iPad and Proloquo2Go during "speech sessions, group activities[,] and English language arts" (id. at p. 1).[14] The evaluation report also indicated that, with the iPad's use, the student exhibited an "improved ability to respond to WH questions during speech and literacy activities" (id.). The evaluation report further recounted an observation by the student's then-current speech-language provider that the student "demonstrated an improved ability to sustain attention and focus" when using Proloquo2Go (id.).

The assistive technology evaluation team observed and took note of the student's behavior during a small group activity and an individualized instructional session and concluded that the student exhibited communicative intent, as well as the ability to "follow novel and familiar routines" (Parent Ex. S at pp. 1-2). According to the evaluation report, the student required a "voice output device to gain the attention of others and maintain social interactions" (id. at p. 1). In addition, the report stressed that a communication device would provide the student with "support for more enriched expressive vocabulary and serve as a model for language" (id. at p. 2). Finally, the report concluded that the student needed a "portable device that he c[ould] carry with him throughout the day and across various environments" and recommended that this device should be "integrated into the school by all staff and become part of the daily instruction" (id. at pp. 5-6). As noted previously, the June 2013 CSE considered the June 2013 assistive technology evaluation report and recommended the integration of a "dynamic display speech generating device" (i.e., the iPad) into the student's "existing school program" (Parent Exs. E at pp. 7, 13, 27; H at p. 1).

The July 2013 CSE continued the recommendation for a "dynamic display speech generating device" and indicated that it would be used at home and school (Parent Ex. D at pp. 2, 3, 9). Consistent with the June 2013 assistive technology evaluation report, the July 2013 IEP noted the student's need for an iPad to serve as an assistive technology device for communication

[14] Proloquo2Go is described in the hearing record as an "augmentative communication [program] which enables somebody who is a non-verbal speaker to communicate what [his or her] needs and wants are through a computer screen by selecting symbols or pictures" (Aug. 14, 2014 Tr. pp. 359-60).

(id. at p. 2; see Parent Ex. S at p. 5). In addition, the IEP included two speech-language annual goals that targeted the use of the iPad as a supportive tool for communication and peer interactions (Parent Ex. D at p. 7). One goal addressed the student's use of "assistive technology" to support interactive communication with peers (i.e., asking and answering questions) "during structured literacy and game activities" (id.). The second goal focused on employing the iPad to support the student's use of adjectives in his spoken and written language, as well as extending the length of his sentences (id.).

This evidence supports a finding that the June and July 2013 CSEs ascertained the student's assistive technology needs and prescribed appropriate services to address these needs. While the parent attempts to use the September 2014 private assistive technology evaluation report, completed during the course of the impartial hearing, as evidence that the June or July 2013 CSEs did not adequately address the student's needs, this report was not available to the June and July 2013 CSEs and cannot be used to assess their recommendations (see Parent Ex. RR at p. 1; see also C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]). Therefore, the parent's request for compensatory additional services arising from the 2013-14 school year is denied.

However, given the district's failure to explain how it assessed or met the student's assistive technology needs during the 2012-13 school year, it is next necessary to determine whether an award of compensatory additional services is warranted to "make up" for the district's denial of FAPE (Newington, 546 F.3d at 123). On appeal, the parent requests "compensatory [assistive technology] hours" as well as the services recommended in the September 2014 private evaluation report (Pet. ¶ 51). The district responds that the recommendations in the September 2014 assistive technology evaluation report are not necessary to provide the student with a FAPE or are available for free. Upon review, the evidence in the hearing record supports a finding that a limited compensatory award is appropriate to remedy the district's denial of FAPE.

At the impartial hearing, the parent offered the September 2014 private assistive technology evaluation report as evidence of services that would place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see generally Parent Ex. RR).[15] According to the evaluation report, the purpose of the evaluation was to determine if the student's "existing augmentative communication options" were adequate and to determine if additional assistive technology supports were required in order for the student to receive a FAPE (id. at p. 1). The specialist who completed the evaluation reviewed information about the student and observed the student in his classroom for "a couple of hours" and at home for two to two and one-half hours (Oct. 14, 2014 Tr. pp. 313-14; Parent Ex. RR at p. 1). While the specialist agreed with the recommendation in the June 2013 assistive technology evaluation report to provide the student with an iPad, she offered an alternative rationale for its need (Parent Ex. RR at p. 3). Specifically, the specialist opined that, since the student was a "verbal communicator," the iPad's purpose was to "provide visual verbal prompts to assist [the student] with his processing

[15] This evaluation report is being considered solely within the context of fashioning equitable relief and not to assess the recommendations made by the August 2012, June 2013, or July 2013 CSEs.

(word retrieval and initiation) challenges," rather than serve as a "[s]peech [g]enerating [d]evice" (id.). Despite this difference, the specialist indicated that the student continued to require the iPad recommended by the June and July 2013 CSEs for "core communication purposes" (id. at p. 8).

In addition, the consultant offered a host of recommendations for the student including additional technological equipment, various software products, ongoing training for staff, annual assistive technology assessments, and coordinated instructional efforts regarding the use of assistive technology devices (Parent Ex. RR at pp. 4-10). Additionally, the evaluator recommended that the student receive a second iPad, an "iPad 4 with Retina Display," for "additional communication and literacy-based functions" (id. at p. 8). The evaluator explained that this second iPad should be used for "language and literacy" as well as "academic training and functioning" (id.). The evaluator envisioned that this second iPad would "be transported back and forth between school and home" (id.). The evaluator also identified several downloadable educational applications that, in her view, were of "immediate importance" for the student (see id.).

An additional source of information regarding the student's assistive technology needs is a June 24, 2014 IEP introduced into evidence at the impartial hearing (Dist. Ex. 21 at pp. 1, 25).[16] Although the June 2014 IEP's present levels of performance do not reference the student's use of an iPad, the CSE recommended the use of a "device or service to address [the student's] communication needs" (id. at p. 6). Moreover, one of the IEP's annual goals indicated that the student would "develop the complexity of morphological/syntactic forms . . . with the support of assistive technology" and that this would take place "during structured activities, written work, and conversation" (id. at p. 17). The June 2014 IEP also reflected the parent's concern that the student required "an increased focus using assistive technology to enhance [his] communication skills" (id. at p. 3).

The foregoing information suggests that provision of a second iPad, as described in the September 2014 evaluation report, could appropriately remedy the August 2012 CSE's failure to address the student's assistive technology needs. Therefore, the district shall be ordered to provide the student with the additional iPad equipped with the applications and software identified in the September 2014 private assistive technology evaluation report (see Parent Ex. RR at p. 8).[17]

While the parent additionally seeks assistive technology training for the parent and the student's teachers as a compensatory service, this relief is not related to the August 2012 CSE's failure to assess the student's needs. Additionally, according to the evidence in the hearing record, this relief is not warranted because the district provided training to the parent and staff during the 2013-14 school year. The hearing record reflects that, at the district's invitation, the parent attended a staff training session for Proloquo2Go on October 8, 2013 (Dist. Ex. 20 at p. 1; see Tr. pp. 708-09; Dist. Exs. 10 at p. 9; 16 at p. 4). Among other attendees, the parent, the student's then-

[16] The July 2014 IEP, like the September 2014 evaluation report, is being considered solely for the purpose of fashioning equitable relief and not as evidence of what the August 2012 or July 2013 CSEs should or should not have recommended.

[17] The district shall not be responsible, however, for the non-educational accessories identified in the evaluation report; namely, a case and adjustable stand for the iPad (Parent Ex. RR at p. 8).

current classroom teacher and speech-language provider, and the assistant principal of the public school attended this training (Dist. Ex. 20 at p. 1; see Mar. 17, 2015 Tr. p. 1088; Dist. Ex. 21 at p. 28).[18] Notes from this training taken by the assistant principal demonstrate that the participants considered and discussed the parent's concerns during the training session (Dist. Ex. 20 at pp. 3, 4; see Mar. 17, 2015 Tr. pp. 1019-20).[19] Additionally, meeting minutes from the July 2013 CSE meeting indicate that the district provided the parent with a "getting started guide" for Proloquo2Go and reflect the district's intention to provide the parent with a "full manual" (Dist. Ex. 16 at p. 5; see also Aug. 14, 2014 Tr. p. 414). Also, the student's teacher for the 2012-13 school year (as well as for summer 2013) testified that she familiarized herself with the instructional manual for Proloquo2Go and received training on the use of the program from the student's speech-language provider (Jun. 17, 2014 Tr. pp. 125-26).

Therefore, to the extent the parent contends that she requires additional assistive technology training, this would be a useful topic to be discussed at one or more of the parent counseling and training sessions ordered by the IHO or the parent counseling and training recommended by the June 2014 CSE (see IHO Decision at p. 23; Dist. Ex. 21 at p. 21). And to the extent the parent claims that the student's teachers and providers require training, the parent has not explained how this remedy would make up for the August 2012 CSE's failure to assess the student's assistive technology needs and prescribe appropriate services.[20] Nevertheless, given the additional compensatory relief awarded in this proceeding, as well as evidence in the hearing record suggesting that the district may not have effectively utilized the student's iPad throughout the school day, staff training may be necessary for the student going forward (Oct. 14, 2014 Tr. pp. 281-83). Accordingly, when it next convenes, the CSE shall consider whether the student's teachers and providers require assistive technology training and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend such training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and federal and State regulations (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).

2. Home-Based ABA services

Finally, the parent appeals the IHO's finding that the student was not entitled to an additional 10 hours of compensatory home-based ABA services based upon equitable considerations. The IHO determined that the parent failed to provide "information requested by school staff" to the CSE and removed the student before the end of the school day "for at least one

[18] The hearing record also reflects that the district "[s]howed" the parent the Proloquo2Go application in an informal meeting on January 17, 2013 (Dist. Ex. 10 at p. 5).

[19] The notes also identify a topic for the "next meeting," but it is unclear from the evidence in the hearing record as to whether any additional meetings were held (Dist. Ex. 20 at p. 4).

[20] While the hearing record contains a July 2014 auditory and language processing evaluation report that recommended "parent training" regarding Proloquo2Go, this evaluation report is unhelpful for purposes of developing relief because the evaluator testified that she did not observe the student using Proloquo2Go and, while familiar with the program, had "never used [it] with a client" (Aug. 14, 2014 Tr. p. 359; Parent Ex. NN at pp. 13-14).

school year" (IHO Decision at p. 22).[21] The information in the hearing record does not support the IHO's conclusions; therefore, these findings shall be reversed.

First, the evidence in the hearing record does not support a finding that the parent withheld documents from the district. According to the assistant principal of the public school the student attended during the 2013-14 school year, the July 2013 CSE sought to obtain progress reports from providers who delivered services to the student outside of school (Dec. 18, 2014 Tr. pp. 930-32). The assistant principal testified that she and the student's then-current classroom teacher requested these reports "[a]t least six times" from the parent by sending a written request home in the student's backpack (Dec. 18, 2014 Tr. pp. 931-32, 1017-19; see Dist. Ex. 19 at pp. 1-5). The assistant principal further testified that the CSE received one of the requested progress reports at a June 2014 CSE meeting (Dec. 18, 2014 Tr. pp. 932-33). While the hearing record reflects that the district made multiple requests from the parent for these progress reports, there is no indication that the district contacted the student's providers directly to obtain this information (see Dec. 18, 2014 Tr. p. 933). And while the assistant principal contended that the district did not possess contact information for these individuals, the evidence in the hearing record strongly suggests that the district was responsible for the provision of at least the student's home-based ABA services (see Parent Exs. C at p. 2; F at p. 15; Q at p. 1; R at pp. 1-2). Therefore, this evidence does not support a finding that the providers' failure to provide certain documents to the CSE should weigh against the parent.

As for the student's early departures from school, the evidence in the hearing record reveals that, during the 2013-14 school year, the parent picked up the student on unspecified dates before the conclusion of the school day (Dec. 18, 2014 Tr. pp. 711-12, 921-23). The student's teacher for the 2013-14 school year testified that the student was "[s]ometimes" picked up approximately 40-55 minutes before the end of the school day "a few days a week" (Dec. 18, 2014 Tr. pp. 711-12, 752-53). The assistant principal estimated that the student was picked up 55-60 minutes before the end of the school day and was picked up early by a parent "[m]ore often" than any other student during the 2013-14 school year (Dec. 18, 2014 Tr. pp. 921-22; see Dec. 18, 2014 Tr. p. 887). The assistant principal further testified that the student was picked up approximately three hours before the end of the school day during the "summer" (Dec. 18, 2014 Tr. pp. 921-22).[22] It was the assistant principal's understanding that the purpose of these early departures was so the parent could bring the student to "[d]octor's appointments" (Dec. 18, 2014 Tr. p. 923).

Although this testimony reveals that the student was taken home early from school on multiple occasions during the 2013-14 school year, there is no indication in the hearing record that the district considered these removals unexcused. Moreover, while the district solicited the

[21] At one point in his decision, the IHO noted that the parent "chose not to testify" at the impartial hearing and that this "may have equitable import" (IHO Decision at p. 20). The hearing record reflects that the parent, however, testified at the impartial hearing (see Jul. 16, 2014 Tr. pp. 291-314). While the parent testified on a limited number of issues, neither the IHO nor the district explained why this should result in a negative inference against the parent.

[22] The assistant principal testified that the student was picked up early for 50 percent of certain school days "on average" (Dec. 18, 2014 Tr. p. 922). While it appears that the assistant principal was referring to summer 2013, it is unclear because the witness answered the question before it was completed and the substance of the question was not repeated or clarified (see Dec. 18, 2014 Tr. pp. 922-23).

testimony summarized above, it did not seek to introduce any documents that established the frequency and duration of the early departures. Indeed, a frequency data sheet documenting the student's behaviors contradicts the district's argument as it reveals only a handful of absences between September 9, 2013 and March 27, 2014 (see Dist. Ex. 15 at p. 6). Therefore, the evidence in the hearing record does not support a finding that the parent's compensatory award should be reduced on an equitable basis. Accordingly, 10 hours of compensatory services shall be added to the IHO's award.

VII. Conclusion

A review of the evidence in the hearing record supports the parent's contentions that the student is entitled to a compensatory award to meet his assistive technology needs in the form of a second iPad. Additionally, this evidence supports a finding that the student is entitled to 10 hours of compensatory services in the form of home-based ABA services in addition to the 80 awarded by the IHO.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that, to the extent it has not already done so, the district shall provide the student with the services to which he is entitled pursuant to pendency including the services identified in the IHO's December 9, 2013 interim decision in a manner consistent with the body of this decision unless the parties otherwise agree; and

IT IS FURTHER ORDERED that the district shall immediately purchase and provide to the student a second iPad as described in the body of this decision; and

IT IS FURTHER ORDERED that, at the next annual review regarding the student's special education programming, the district shall consider whether the student's teachers or related service providers require assistive technology training, and, after considering this issue, provide the parent with prior written notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that the IHO's decision dated May 5, 2015 is hereby modified in accordance with the body of this decision to award an additional 10 hours of compensatory, home-based ABA services to the student in addition to the 80 hours previously directed by the IHO.

Dated: **Albany, New York**
September 3, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER