The University of the State of New York

The State Education Department
State Review Officer
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No. 21-041

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

Appearances:
The Cuddy Law Firm, PLLC, attorneys for petitioner, by Francesca Adamo, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which did not grant all of the relief sought by the parent to remedy respondent's (the district's) failure to offer or provide the student with an appropriate educational program and services for the 2017-18, 2018-19, and 2019-20 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student is nonverbal and has received diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (ADHD) (Parent Ex. A at pp. 1-2). As a young child he received services through both the Early Intervention Program and the Committee on Preschool Special Education (Parent Exs. A at pp. 1-2).

According to the parent, on March 16, 2017 a CSE met to develop an IEP for the student's 2017-18 school year (kindergarten) and found the student eligible for special education as a student

with autism (Parent Ex. A at p. 3).[1] The parent indicated that the March 2017 CSE recommended a 6:1+1 special class together with related services consisting of individual and group speech-language therapy, occupational therapy (OT), and parent counseling and training (id.). According to the parent, at the time of the March 2017 CSE meeting, the student was at a pre-kindergarten academic level (id.). The parent stated that, on March 15, 2018, a CSE convened and made changes to the student's related services (id.).

On November 1, 2018, during the student's 2018-19 school year (first grade), a CSE met to develop an IEP with an implementation date of November 13, 2018 (Parent Ex. A at p. 4; see Parent Ex. B). An assessment showed that the student was at a pre-kindergarten level in writing, math and reading (Parent Ex. B at pp. 1, 11). A "major problem" identified for the student was attending and focusing (id. at p. 1). In speech-language therapy, the student could "expressively communicate using [one] picture symbol at a time" but had difficulty attending to tasks and demonstrated "oppositional behaviors" (id.). Since the student did not meet his speech-language therapy goals (for the 2017-18 school year), the goals were continued to address the student's deficits in expressive and receptive language skills (id.). During counseling, the student demonstrated difficulty "following directives and completing tasks" (id. at p. 2). According to the school counselor, he had difficulty identifying emotions and "effectively communicating his wants and needs" (id.). As a result of the student's "difficulties in attending and non-compliant behaviors," a behavioral intervention plan (BIP) was developed to address the following behaviors: "[p]assively not complying/looking around room," "[p]ulling shirt up/taking shoes off and/or vocalizing," "[o]ut of seat," and "[t]ouching/pinching/laying on others" (id. at pp. 2, 3). In terms of physical development, the student's occupational therapist reported that he had "deficits in sensory regulation, visual motor and perceptual skills, motor planning and sequencing, and dexterity," which affected his independence within the school environment (id. at p. 2). The student required "maximal prompting and redirection" to attend to structured tasks (id.). As supports for the student's management needs, the CSE recommended visual and verbal cues and prompts, refocusing and repetition, and high-interest and multi-sensory materials (id. at p. 3).

The November 2018 CSE recommended a 6:1+1 special class for activities of daily living, English language arts (ELA), math, social studies, science, and art in a district specialized school (Parent Ex. B at pp. 8, 11). The November 2018 CSE also recommended one 30-minute session per week of individual counseling, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group (6:1) speech-language therapy, and one 60-minute workshop per month of parent counseling and training (id. at p. 8). The November 2018 CSE also recommended a full-time 1:1 paraprofessional for behavior support (id.). Finally, the CSE recommended extended school year services (id. at p. 9).

According to the parent, by letter dated May 16, 2019, she notified the district of her disagreement with the November 2018 IEP "and the [district's] evaluations because it failed to comprehensively evaluate [the student]" and requested the following independent educational

[1] Given the state of the hearing record, some facts recited herein are derived from allegations contained in the parent's due process complaint notice dated December 3, 2019 (see Parent Ex. A).

evaluations (IEEs): neuropsychological, OT, and assistive technology, as well as an independent functional behavioral assessment (FBA) and a BIP, if required (Parent Ex. A at p. 4).

A CSE convened during the 2019-20 school year (second grade) and formulated an IEP with an implementation date of November 13, 2019; the IEP reflects that the CSE convened on October 30, 2019 but the parent maintains that the CSE meeting took place on November 18, 2019 (see generally Parent Exs. A at p. 5; C).[2] The student was assessed and continued to function at a pre-kindergarten level in writing, math, and reading (Parent Ex. C at pp. 1, 17). The student's limitations in "[a]ttending and focusing continue[d]" to affect his ability to engage during instructional time and interact with peers (id. at pp. 2-3). In OT, the therapist described the student as having deficits in "fine motor & visual perceptual skills, sensory regulation, focused attention and bilateral hand coordination" (id. at p. 4). The student also required physical assistance with activities of daily living (id.). The 2019-20 CSE stated that the student's management needs required a: "[p]icture communication system and individualized picture exchange communication book," small classroom setting, individual work area, first/then board for transitions, token board, schedule board, small group instruction area, break/play area, and cubby area with identifying photo (id. at p. 5). Due to the student's behavioral management needs he continued to need a BIP (id. at p. 6).

The 2019-20 CSE recommended a 6:1+1 special class for activities of daily living, ELA, math, social studies, science, and visual arts in a district specialized school (Parent Ex. C at pp. 11-12, 16, 18). In addition, the 2019-20 CSE recommended three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and one 50-minute workshop per month of parent counseling and training (id. at p. 12). The 2019-20 CSE also recommended a 1:1 daily 0.8 paraprofessional for behavior support and full-time paraprofessional for transportation (id.). The CSE recommended extended year services and special transportation accommodations (id. at pp. 13, 16).

According to the parent, upon receiving no response from the district to her May 2019 request for IEEs and an additional letter requesting a speech-language evaluation, she filed a due process complaint notice requesting the district to fund the requested IEEs (Parent Ex. A at p. 4). The parent reported that, on September 19, 2019, an IHO ordered the district to fund independent neuropsychological, speech-language, OT, and assistive technology evaluations, as well as an independent FBA and, if indicated, a BIP, and an applied behavior analysis (ABA) skills assessment (id.). The IEEs were conducted between November and December 2019 (Parent Exs. D-J).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 3, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (see Parent Ex. A).

[2] Given the ambiguity as to the date of the CSE meeting, for purposes of this decision, all references to this CSE or IEP will be to the 2019-20 CSE or IEP.

The parent alleged that the CSEs for each school year developed IEPs that were not reasonably calculated to allow the student to make meaningful progress (Parent Ex. A at p. 6). The parent argued that since the 2016-17 school year, the student had been at a pre-kindergarten level for reading, writing, and math and failed to make any academic progress (id. at pp. 6, 8). In addition, the parent argued that the IEPs failed to contain appropriate present levels of performance and, more specifically, the IEPs failed to provide a detailed description of the student's needs and abilities and failed to include appropriate evaluative data to describe the student's needs and abilities (id. at p. 6). Further, the parent contended that the goals on each of the IEPs were vague and failed to address the student's behavioral needs (id. at p. 7). The parent also argued that that the district should have conducted a new FBA and/or modified the BIP when the student's behaviors did not improve and that the district failed to appropriately address the student's sensory needs (id.). The parent argued that the CSEs failed to recommend the appropriate level of speech-language therapy services and parent counseling and training (id. at p. 8). The parent also contended that the CSE should have conducted an assistive technology evaluation to determine whether and what devices would be appropriate for the student's communication needs (id. at p. 9). Furthermore, the parent argued that the CSEs failed to recommend an appropriate placement with ABA or another research-based methodology to specifically address the student's delays relating to his diagnosis of autism (id. at p. 8).

As relief, the parent sought a finding that the district denied the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years and requested an immediate interim order for 10 hours per week of home-based ABA (Parent Ex. A at p. 9). The parent also requested that the IHO order the district to hold a CSE meeting within 15 days to review the results of the IEEs ordered by the previous IHO on September 19, 2019 and develop an appropriate IEP that included a recommendation for placement of the student with other students with similar needs and abilities in a small, supportive placement; specific, meaningful, and measurable goals based upon the student's current academic and functional levels and recommendations in the IEEs; and related services in accordance with the recommendations in the IEEs (id.). In the alternative, the parent requested that, if the CSE failed to identify an appropriate public-school placement, the district be required to defer the student's placement to the Central Based Support Team (CBST) to identify a State-approved nonpublic school for the student (id. at pp. 9-10). If the CBST could not locate an appropriate State-approved nonpublic school, then the parent requested that the IHO require the district to fund a nonapproved nonpublic school of the parent's choosing (id. at p. 10). The parent also sought a 1:1 behavior paraprofessional and a 1:1 transportation paraprofessional (id.). Finally, the parent sought compensatory education services in the areas of ABA, speech-language therapy, assistive technology training, OT, and parent counseling and training (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 2, 2020 and concluded on September 21, 2020 after four days of proceedings (Tr. pp. 1-58).[3]

[3] Before the impartial hearing convened, the parent filed a complaint with the Commissioner of Education alleging that the district failed to timely appoint an IHO after the filing of the December 3, 2019 due process complaint notice (see Parent Ex. FF). In a letter and written decision of State complaint, dated March 19, 2020, the State Education Department's Special Education Quality Assurance, Regional Office, determined that an IHO was not

In a decision dated December 28, 2020, the IHO determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (IHO Decision at pp. 4-5). The IHO held that the district failed to "present a case for any of the school years at issue" and, therefore, "conceded that the student was denied a FAPE" for each of the school years (id. at pp. 2, 5).[4]

The IHO found that the student's "functional and instructional levels" were at a pre-kindergarten level and the student had not made "academic progress for several school years" (IHO Decision at p. 3). Additionally, the IHO found that the student engaged in "maladaptive behaviors" at both home and school (id. at p. 4). The IHO further held that the compensatory services requested by the parent were appropriate (id. at p. 5). Specifically, as compensatory relief, the IHO ordered the following: 276 hours of compensatory speech-language therapy services to be provided by a licensed speech therapist at market rate; 517 hours of compensatory OT services to be provided by licensed occupational therapist at market rate; 276 hours of parent counseling and training to be provided by Manhattan Psychology Group at market rate; 5,520 hours of ABA to be provided by Manhattan Psychology Group at market rate; and 64 hours of assistive technology training to be provided by a licensed provider at market rate (id. at p. 6).

In addition, the IHO ordered the district to defer the student's placement to the CBST to locate a State-approved nonpublic school for the student with an ABA program (IHO Decision at p. 5). The IHO also ordered door-to-door transportation to and from the student's placement on a minibus with travel time of no more than 90 minutes (id. at pp. 5-6). Further, the IHO ordered a 1:1 behavior paraprofessional and 1:1 transportation paraprofessional (id. at p. 6).[5]

IV. Appeal for State-Level Review

The parties' familiarity with the particular raised issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and, therefore, the parties' allegations and arguments will not be recited here in detail.[6] The gravamen of the parties' dispute on appeal is:

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timely appointed and directed the district to "timely resolve this matter" in accordance with the corrective actions identified in the New York City Department of Education Compliance Assurance Plan issued on May 3, 2019 for addressing due process complaints (Parent Ex. GG at pp. 1, 4, 6).

[4] At the hearing, the district representative stated that the district was not defending any of the school years in question, and not taking a position with respect to the parent's requested relief but stated that she was "not conceding FAPE" (Tr. pp. 49-51; see IHO Decision at pp. 3, 5).

[5] In a "corrected" decision, the IHO addressed typographical errors but declined the parent's request for substantive changes to the relief ordered in the original decision. To the extent the district objects to the parent's submission on appeal of a copy of a December 28, 2020 email exchange relating to the IHO's corrected decision, the district's argument is without merit as the email exchange should have been included in the hearing record as a written request by the parent for an order for consideration by the IHO and the IHO's order granting and/or denying such request (8 NYCRR 200.5[j][5][vi][a]-[c], [e]-[f]; 279.9[a]).

[6] In its answer, the district contends that the parent's request for review should be dismissed as it fails to comply with Part 279 of the State regulations in that it fails to "specify the reasons for challenging" the IHO's decision

1. Whether the IHO erred in failing to order the district to incorporate the specific IEE recommendations and placement in the student's IEP;

2. Whether the IHO erred in failing to order the district to hold a CSE meeting to develop an appropriate IEP to include and extended school year program in a small, specialized, non-public school placement with an ABA program; develop specific, meaningful and measurable goals tailored to the student's current academic and functional levels; and provide individual speech-language therapy three times a week for 30 minutes, group speech-language therapy one time per week for 30 minutes; individual OT five times per week for 45-minute sessions;

3. Whether the IHO erred in failing to order the district to fund a non-approved nonpublic school for the remainder of the 2020-2021 and 2021-2022 school years, if the district failed to locate a State-approved non-public school;

4. Whether the IHO erred in failing to address the parent's request for private school tuition as compensatory education; and

5. Whether the IHO erred in failing to order the district to provide the student with certain assistive technology devices.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

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and further argues that the parent's memorandum of law raises and discusses arguments that are not contained within the parent's request for review and as such should be rejected or disregarded. Here, the parent, generally complies with State regulations by setting forth issues presented for review in separately numbered paragraphs and including citations to the hearing record (see generally Req. for Rev.). Moreover, contrary to the district's argument, the parent does request prospective relief in the request for review and solely expands upon that argument in the memorandum of law using citations to caselaw (Req. for Rev. at pp. 5-6). The memorandum of law elaborates on the parent's argument (i.e., regarding prospective relief) and explain the parent's position as to why the IHO erred in his finding on the issue. Therefore, the district's argument that the request for review be rejected or that the scope of review be limited is without merit.

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

VI. Discussion

A. Assistive Technology

The IHO awarded the parent 64 hours of assistive technology training (IHO Decision at p. 6). However, the decision did not identify the device or devices for which such training was required.

At the outset of this discussion, before reaching the merits, the district argues that the parent's request for assistive technology was outside the scope of the impartial hearing as it was not raised in the parent's due process complaint notice. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). In the due process complaint notice, the parent argued that the district failed to conduct an assistive technology evaluation to determine if "an [assistive technology] device would be appropriate for the [s]tudent to develop his speech and language skills" (Parent Ex. A at p. 9). As relief, the parent sought compensatory assistive technology training together with "[a]ny further relief that the [IHO] may deem just and proper to ensure the student a [FAPE]" (id. at p. 10). Additionally, in her closing brief, the parent argued that the student required certain assistive technology devices "to address his communication difficulties" (Parent Post-Hr'g Br. at p. 30). Here, the parent requested assistive technology training in her due process complaint notice and, as such, an award of such training would—as the parent argues—be meaningless without an order requiring the district to provide the student with assistive technology tools (Req. for Rev. at p. 5; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *9 [S.D.N.Y. Mar. 30, 2017] ["[A]ssistive technology is not itself an appropriate award of compensatory education, but rather, is appropriately included as a supplement when necessary to implement the awarded compensatory education."]). Thus, I find that the district was sufficiently on notice of the parent's request in this instance. Accordingly, the

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

parent's request for assistive technology was within the scope of the hearing and shall be considered herein.

On November 25, 2019, a speech-language pathologist conducted both a speech-language evaluation and an assistive technology evaluation to determine whether the student needed an augmentative alternative communication (ACC) device to support his functional communication (see Parent Exs. H, R). The student was found to have "significantly delayed" literacy skills, "severely delayed" expressive language skills, "significantly delayed" pragmatic skills, and no "consistent way to communicate" with peers and adults (Parent Ex. R at p. 3). These delays were found to negatively affect his ability to participate in the curriculum (id. at p. 4). The speech-language pathologist further concluded that the student "need[ed] to establish foundational language skills so he c[ould] continue to develop further language skills" (id.). She noted that the student's language comprehension was at the "word and simple sentence level" (Parent Ex. H at p. 2). The speech-language pathologist stated that the student required the use of a speech-generating device to participate in the "academic curriculum," communicate with peers and adults, and express and communicate his own needs (Parent Exs. H at pp. 2-3; R at p. 4). In her report, the speech-language pathologist also noted that any speech-generating device for the student must include the following features: voice output, use of picture symbols, text-to-speech functioning, independent navigation between pages, language and vocabulary growth, and portability (Parent Ex. H at p. 4). After considering several voice output devices, the speech-language pathologist concluded that the student required an "iPad (9.7 inch) with TouchChat HD-ACC with WordPower" in order to communicate in "all of his naturally occurring language environments" (Parent Exs. H at pp. 5-6, 9; R at p. 6).[8] She recommended certain goals in relation to using the speech-generating device and improving the student's communication (Parent Exs. H at p. 6; R at p. 6).

Additionally, the speech-language pathologist opined that the student was "functioning below his cognitive level" (Parent Ex. R at p. 5). The student was noted to have "reading deficits in the area of decreased phonemic awareness, decoding, and spelling" (Parent Exs. H at p. 7; R at p. 5). She further found that the student presented with writing challenges and required prompting to use a writing instrument (Parent Exs. H at p. 8; R at p. 5). Based upon these findings, the speech-language pathologist recommended certain software programs for reading and writing (Epic!, phonemic awareness applications, Notability, and tracing letter and number applications) (Dist. Exs. H at pp. 7-8, 10; R at p. 7). Overall, the speech-language pathologist concluded that the student would benefit "from a multi-sensory, dynamic approach to learning" with the recommended hardware and software to increase the student's functional communication and develop reading and writing skills (Parent Exs. H at p. 9; R at p. 5). The speech-language pathologist recommended that the assistive technology devices be used on a 12-month basis in school and at home (Parent Ex. R at p. 7). Finally, the speech-language pathologist recommended "64 hours of training to ensure confident access" to the recommended assistive technology tools (Dist. Exs. H at p. 10; R at p. 7).

[8] Although in one place, the speech-language pathologist stated that "the iPad mini was the best option" for the student, elsewhere she recommends an iPad 9.7 and this device seems to be her primary recommendation (Parent Ex. H at pp. 4-5, 8-9).

In the request for review, the parent argues that the IHO failed to award assistive technology tools and seeks an order for the district to provide the assistive technology recommended in the November 2019 evaluation (see Req. for Rev. at pp. 5-7).

As noted above, the compensatory award of assistive technology training cannot be effectuated without the provision of a device in relation to which such training is to occur (see M.M., 2017 WL 1194685, at *9). While an argument could be made that the parent's requested devices and programs may be more than the district would have been required to provide as part of a FAPE,[9] as detailed above, there is support in the hearing record for some of the devices and programs requested by the parent, and the district did not rebut the speech-language pathologist's recommendations or propose alternative assistive technology devices or programs to address the student's needs at the impartial hearing. Specifically, the assistive technology evaluation recommended an iPad 9.7 (5th or 6th generation) with TouchChat with Word Power, a Speech Case 9.7 manufactured by Tobii Dynavox, and a shoulder strap (Parent Ex. H at p. 9). In addition, as described above, the speech-language pathologist also detailed specific applications to support the student's reading and writing needs (id. at p. 10). On the other hand, the speech-language pathologist also made recommendations for assistive technology for the student for use in the home, including an iPad mini and accessories (id. at pp. 9-10); however, there is insufficient basis in the hearing record to support a finding that the student would require a second device in order to access the compensatory assistive technology training.[10] Therefore, in this instance, I shall order the district to provide the parent with the iPad and accessories, as well as the applications, as detailed above, but not the requested iPad mini and accessories.

B. Prospective Relief

On appeal, the parent seeks various forms of prospective relief. First, the parent contends that the IHO failed to direct the CSE to amend the student's IEP to include the recommendations

[9] State regulations provide that assistive technology devices and services are generally required to the extent necessary to permit a student to benefit from instruction (8 NYCRR 200.4[d][2][v][b][6], [d][3][v]).

[10] A CSE must consider whether the use of a school-purchased assistive technology device is required to be used in the student's home or in other settings for the student to benefit from his or her educational program (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]). In her affidavit testimony, the speech-language pathologist indicated that the student required a second device to use at home to improve his literacy and encoding, as well as to use simultaneous with the first so that he could "communicate while accessing his curriculum-based software" (Parent Ex. R at p. 6); however, in the assistive technology evaluation, the recommendation was for the iPad mini in the home, without reference to the need for a second device simultaneous with the first (see Parent Ex. H). Despite the speech-language pathologist's affidavit, the recommendations detailed in the evaluation do not support a finding that a second device is warranted. As the recommended iPad is a portable device, there is no basis for a finding that the iPad, alone, would not allow the student to access the compensatory education award of assistive technology training. If the parent continues to feel that the student requires a second assistive technology device, she may request the same at the student's next CSE meeting. And after due consideration of the request, the district shall 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 a second assistive technology device 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 State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

contained within the various IEEs ordered by a different IHO on September 19, 2019 (see Parent Exs. D-I). Second, the parent argues that the IHO failed to direct the CSE to hold a meeting and develop an IEP that includes "[p]lacement in a small, specialized, non-public ABA program," "specific, meaningful and measurable goals tailored to [the student's] current academic and functional levels," "speech and language therapy individually three times a week for thirty minutes and in a group of two, one time per week for thirty minutes, on a twelve month basis," "individual OT five times a week for 45 minute sessions on a twelve month basis," and 12-month programming. Third, the parent contends that the IHO failed to order the district to fund a nonapproved private school of the parent's choice for the remainder of the 2020-21 school year and the 2021-22 school year, if the district failed to locate an appropriate State-approved nonpublic school.[11] Further, the parent contends that the IHO failed to address the parent's request for private school tuition as compensatory education.[12]

Relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, such as the order sought by the parent in this matter directing the specific contents of a future IEP and nonpublic school placement, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

At this point, the school years at issue—2017-18, 2018-19 and 2019-20—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2020-21 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record and the resulting award of compensatory education

[11] To be clear, in his decision, the IHO ordered that the CSE defer the student's placement to the district's CBST to locate a State-approved nonpublic school with an ABA program (IHO Decision at p. 5). However, the parent argues that the IHO failed to go the next step to order a prospective alternative remedy in the event the district failed to identify a State-approved nonpublic school for the student in a timely manner.

[12] For a detailed discussion of relief in the form of future placement in a nonapproved nonpublic school, including the varying characterizations of the relief as either as prospective placement, tuition reimbursement or funding, or compensatory education, see Application of a Student with a Disability, Appeal No. 19-018 (also discussing at length the potential pitfalls that may arise as a result of an award of prospective placement). Here, were I to view the parent's request for future funding of the student's attendance at a nonapproved nonpublic school as compensatory education, the outcome would not differ. This is particularly so given the amount of compensatory education already awarded by the IHO (see IHO Decision at p. 6).

by the IHO. Accordingly, there is no reason to grant the parent's request for a prospective placement.

Moreover, if—as the parent argues—the district fails to locate a State-approved nonpublic school as the IHO ordered, the appropriate course in that instance would be for the parent to seek enforcement of the IHOs order. Ultimately, the hearing record in this matter is insufficiently developed regarding any further remedy beyond that which the IHO ordered. There is no evidence in the district's efforts or lack thereof to implement the IHO's order other than the parent's unsubstantiated allegations on appeal.[13] And I decline to engage in the practice of crafting alternative remedies based on hypothetical future failures by the district. Moreover, there is no evidence in the hearing record regarding a nonapproved nonpublic school that the parent may wish the student to attend. In short, this is not the forum for the parent's request for alternative relief based on an allegation that the district has not implemented the IHO's decision. Rather, the parent may file a State complaint against the district through the State complaint process for failure to implement the IHO's decision, or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

VII. Conclusion

Based upon the foregoing, the parent is not entitled to prospective relief beyond that ordered by the IHO in the form of IEP amendments or placement in a nonapproved nonpublic school for the 2020-21 and 2021-22 school years. However, the parent is entitled to the assistive technology device and programs, as detailed in the body of this decision, to implement the compensatory award of 64 hours of assistive technology training.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED the district shall provide the student with an iPad 9.7 (5th or 6th generation) with TouchChat with Word Power, a Speech Case 9.7 manufactured by Tobii Dynavox, and a shoulder strap, as well as access to reading and writing programs recommended in the November 2019 assistive technology evaluation.

Dated: **Albany, New York**
March 22, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[13] Nor could there be a record of the same since any evidence regarding the district's failure to implement the IHO's decision would necessarily post-date the close of the hearing record.