



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-175

Application of a STUDENT WITH A DISABILITY, by her 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 Law Offices of H. Jeffrey Marcus, attorneys for petitioner, by H. Jeffrey Marcus, Esq. and Nora Lynch, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2018-19 and 2019-20 school years were appropriate and that the parent was not entitled to reimbursement for a neuropsychological independent educational evaluation (IEE). The district cross-appeals from the portion of the IHO's decision which ordered three hours of compensatory vision services. 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, as a young child the student received private occupational therapy (OT) services to address proprioceptive and vestibular delays (Parent Ex. D at p. 1). In January 2018 (first grade) she was diagnosed with legal blindness secondary to optic nerve atrophy (Parent Ex. D at p. 1; see Tr. pp. 185-87; Dist. Ex. 20).

By letter dated February 7, 2018, the parent requested that the student be evaluated for "assistive technology for her vision disability and [OT] for her sensory processing delays" (Dist.

Ex. 21). On March 29, 2018, the parent signed consent for the student to be evaluated (Dist. Ex. 22). The district subsequently conducted an initial evaluation of the student that included a social history, a psychoeducational evaluation, a teacher report, a classroom observation, an OT evaluation, a functional vision assessment, and an assistive technology evaluation (see Dist. Exs. 13-19). The social history was conducted on March 29, 2018, with the parent serving as informant (see Dist. Ex. 19). The parent reported that the student was easily overly stimulated and had "sensory delays in her proprioceptive and vestibular systems" (id.). Further, the parent reported that the student was having a tough time dealing with her father's death and that she attended therapy two times per week (id.). According to the social history, the parent also reported that the student could get physically dysregulated at home and had a hard time with organization and staying on task (id.). The parent believed that the student would require non-vision strategies, such as braille, in order to help her when her eyes fatigued (id. at pp. 1-2).

On or around April 12, 2018 the student's teacher completed a teacher report for the school assessment team that indicated that the student was performing on grade level in reading and math but that her writing skills were below grade level (Dist. Ex. 18 at pp. 1-2). The teacher noted that the student required more direction than other students in the class but that she had an ability to demonstrate independence when completing math and English-language arts (ELA) assignments (id. at p. 2). The teacher deemed the student's ability to concentrate and follow directions as an area of concern (id.). With regard to social/emotional development, the teacher indicated that the student had established appropriate friendships and this was not area of concern (id. at p. 3). The teacher reported that the student had been provided with several effective interventions including preferential seating, breaks as needed, and the ability to move as she saw fit in order to see the work being presented (id.).

The district completed an OT evaluation on April 16, 2018 (see generally Dist. Ex. 16). The evaluator determined that the student's school function and participation was comparable to her classmates and that OT services were not warranted or recommended for the student (id. at p. 7). The evaluator noted that any issues with legibility of the student's handwriting in the future "due to fatigue and poor endurance secondary to her diagnoses," would be "best addressed through modifications, accommodations, appropriate instructional technology, and/or assistive technology and academic support" (id.). Further, the evaluator indicated that any concerns regarding self-management or focusing would be best addressed by the student's teachers via classroom strategies (id.).

The district also conducted a psychological/educational evaluation of the student on June 6, 2018 (see Dist. Ex. 17). As part of the evaluation, the student was administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) on which she scored in the high average, superior, or average range on all subsets, except for processing speed, where she scored in the low average range (id. at pp. 2-4). However, the evaluator noted that the student struggled to use a hand-held magnifier comfortably for one of the processing speed subtests and opined that the student's score in this area was not representative of her true ability (id. at p. 4). The evaluator reported that on achievement testing the student received average scores for reading comprehension, math problem solving, and numerical operations (id.).

A district assistive technology evaluation was conducted on June 12, 2018 (Dist. Ex. 13 at p. 1). The evaluator recommended that the student be provided with a handheld magnifier and have access to a tablet with supporting applications for a trial period to determine whether it

“would assist in her ability to access the curriculum” (id. at pp. 5-6). The evaluator indicated that the trial period for the tablet would begin in September 2018 (id. at p. 6). At the time of the evaluation, the evaluator indicated that student would not benefit "from sophisticated equipment such as [closed circuit television (CCTV)] but she might benefit from use of the iPad with application" (id. at p. 1).

A classroom observation, conducted on June 13, 2018, indicated that the student's vision issues "did not appear to be negatively impacting her learning or classroom performance" (Dist. Ex. 14).

A functional vision assessment of the student took place on May 22, 2018 (Dist. Ex. 15 at p. 1). The evaluator recommended several school accommodations including that the student be encouraged to move closer to instruction anytime during the school day during any class, that pictures containing small details should be enlarged or magnified, that the student's materials be enlarged or that she have access to magnification when reading for extended periods, that the student be allowed to take breaks as necessary, and that the student receive extra time on tests longer than 45 minutes (id. at pp. 6-7). The evaluator also recommended that the student receive individual vision services one time per week for 30 minutes (id. at p. 7).

A CSE convened on June 18, 2018 and found the student eligible for special education as student with a visual impairment (Dist. Ex. 11 at pp. 1, 12).¹ The CSE recommended that the student receive one 30-minute session of vision services per week, as well as testing accommodations, in the general education setting (id. at pp. 8-9). The CSE also recommended that the student be provided assistive technology in the form of an individual magnifier to be used daily as needed both in school and at home (id. at p. 8).

The parent signed consent for the initial provisions of services on June 22, 2018 (Dist. Ex. 12). The student attended the district school for the 2018-19 school year (see Dist. Ex. 23).

A CSE convened on May 30, 2019 and recommended that the student continue to receive one 30-minute session per week of vision services along with testing accommodations (Dist. Ex. 9 at pp. 6-7, 10). The special factors section of the resultant IEP indicated that the student did not require assistive technology but the IEP noted that an assistive technology evaluation was planned for fall 2019 "to determine if [the student] ha[d] matured to the point to use devices effectively" (id. at pp. 2-3).²

The district conducted an assistive technology evaluation on October 15, 2019 (Dist. Ex. 8 at p. 1). The evaluation report indicated that the student struggled to view text and other school

¹ The student's eligibility for special education as a student with a visual impairment is not in dispute (see 34 CFR 300.8[c][13]; 8 NYCRR 200.1[zz][13]).

² A June 5, 2019 prior written indicated that the May 30, 2019 CSE had reviewed a March 2018 social history, a June 2018 psychoeducational evaluation, a June 2018 classroom observation, a June 2018 assistive technology evaluation, a June 2018 OT evaluation, and a June 2019 IEP (Dist. Ex. 10 at p. 1). The prior written notice also indicated that the student was "able to complete grade appropriate work with the appropriate tools and training" and that she was "able to navigate the general education classroom in a manner that parallel[ed] her peers" (id. at p. 2).

curriculum information presented on either the white board or SmartBoard at the front of the classroom (id.). However, the evaluation report also noted that, when the student was provided with enlarged text using a CCTV digital magnifier, she was able to effectively view and sustain reading without major fatigue issues, and when using the distance viewing feature the student could see text and other images at a six to twelve foot distance (id.). The evaluation report recommended that the student receive CCTV at home and at school as this "would provide immediate and independent access to curricular materials and presentations projected on the board" (id. at p. 2). The evaluation report also recommended four assistive technology goals for the student (id. at p. 3).

A CSE convened on November 6, 2019 to review the results of the assistive technology evaluation (Dist. Exs. 5 at p. 14; 6 at p. 1). As with the previous CSEs, the November 2019 CSE recommended that the student receive one 30-minute session of individual vision services per week in a separate location and testing accommodations in a general education setting (id. at pp. 10-11). The CSE also recommended that the student be provided assistive technology in the form of an individual CCTV daily for both the entire school day and at home (id. at p. 10). The IEP indicated that the student gets along well with her peers during group projects and was helpful to others, that she was willing to speak up for her needs and had started to self-advocate more (id. at p. 3). The parent expressed concern that the student could become overly silly and brave and that these behaviors were worrisome and required attention (id.). The parent indicated that the student could become fatigued due to her vision challenges, which could result in "some dysregulation" (id.). Lastly, the parent informed the CSE that the student was seeing a private therapist two times per week (id.).

By letter dated February 23, 2020, the parent informed the district that she disagreed with its most recent evaluation of the student (Parent Ex. B at p. 1). The parent asserted that the June 6, 2018 psychological/educational evaluation "failed to comprehensively evaluate [the student] and fully identify her needs" (id.). The parent indicated that the district failed to adequately assess the student's "sensory motor and social emotional needs" and indicated that the cognitive and educational assessments might "be inaccurate as they were performed by an evaluator who does not regularly work with children with visual impairments" (id.). The parent noted that the evaluator admitted that she believed the student's visual impairment affected at least one domain of testing and the resulting score was not an accurate reflection of the student's true abilities (id.). The parent requested an independent neuropsychological evaluation in order to "obtain a more comprehensive picture of [the student's] needs" (id.). The parent transmitted the IEE request via facsimile, and the transmission verification report accompanying the letter indicated that the parent submitted the letter on February 25, 2020 and that it was successfully submitted to a telephone number listed on the verification report, which was different than the telephone number listed on the letter itself (id. at pp. 1-2).³

³ During the impartial hearing, the district denied having received the parent's February 2020 letter requesting an IEE (see Tr. pp. 35-36).

A. Due Process Complaint Notice

By due process complaint notice dated May 7, 2020, the parent alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (Parent Ex. A at pp. 1, 5).⁴

The parent asserted that the district failed to evaluate the student's social/emotional needs or provide her with social/emotional support (Parent Ex. A at p. 4). The parent argued that she expressed her concerns regarding the student's social/emotional needs to the CSE but the district failed to conduct any assessment of the student's "social-emotional state" or respond to the parent's concerns that were reflected in the May 30, 2019 IEP (id.).

Next, the parent argued that the district failed to provide the student with an adequate assistive technology evaluation, an appropriate device, or training for using the device (Parent Ex. A at p. 3). The parent contended that the student required assistive technology to access the curriculum due to her visual impairment (id. at p. 4).

Lastly, the parent contended that the district failed to respond to the parent's request for an IEE (Parent Ex. A at p. 4). The parent asserted that she sent the IEE request indicating her disagreement with the district's evaluations on February 23, 2020 but that the district failed to either respond or file a due process complaint within a reasonable time (id.). The parent argued that the district's failure to respond to her IEE request further constituted a denial of a FAPE (id.).

For relief, the parent requested a finding that the district deprived the student a FAPE for the 2018-19 and 2019-20 school years and significantly impeded the parent's procedural and substantive rights, an order requiring the district to fund a neuropsychological IEE and an assistive technology IEE, an order that the district provide the student with appropriate assistive technology devices with training; and an order for compensatory education services (Parent Ex. A at p. 5).⁵

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing which concluded on June 23, 2020 following five days of proceedings (see Tr. pp. 1-284).⁶ The IHO, in a decision dated July 8, 2021, found

⁴ The district also introduced a copy of the due process complaint notice with its exhibits as district exhibit 1 (see Dist. Ex. 1). The due process complaint notice will be cited to as the parent exhibit A.

⁵ The parent request for compensatory education included, but was not limited, to counseling services and "academic assistive technology training" (Parent Ex. A at p. 5).

⁶ The parent obtained a neuropsychological IEE in September 2020 (see Parent Ex. D). The evaluator reported that the student's full-scale IQ was 118, which fell within the high average range (id. at p. 5). In addition, the evaluator indicated that the student scored in the average or high average on measures of academic achievement (id. at pp. 8-9). Behavior rating scales, completed by the parent and the student's teacher, suggested that the student had difficulties with hyperactive/impulsive behaviors and behavioral regulation (id. at pp. 7, 11). The rating scales responses also indicated depressive symptomology, anxiety, heightening self-esteem issues, and decreased self-efficacy (id. at p. 11). The evaluator diagnosed the student with other specified trauma and stressor-related disorder (id. at p. 11). The evaluator recommended numerous classroom modifications and testing accommodations, including that the student receive small group and individual counseling services in school (id. at pp. 12-13).

that the student was offered a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at pp. 7-8).

Regarding the parent's claim that the district failed to evaluate the student's social/emotional needs or provide social/emotional support, the IHO found that the "evidence d[id] not establish that the Student required school based therapy or that [the district] failed to carry out a required evaluation" (IHO Decision at p. 4). The IHO noted evaluations that are mandated by State regulations and found that "[a]s a matter of law," there is no requirement that a district must conduct a "social/emotional evaluation" of a student (*id.* at p. 5). The IHO also noted that there was no issue raised as to the adequacy of the evaluations conducted by the district (*id.*). The IHO determined that the evidence in the hearing record "d[id] not establish knowledge of the Student's social/emotional issues on the part of the" district (*id.* at p. 6). The IHO noted that the neuropsychological IEE indicated that no signs of acute physical or emotional distress were observed during testing and that any at-risk behaviors and depressive symptomology occurred in the home, noting further that this was consistent with the testimony of the vision services provider (*id.*). Moreover, the IHO held that any social/emotional issues the student might have had "were not found to impact her ability to thrive in school" (*id.*).

The IHO found that the parent's claims regarding assistive technology were not supported by the evidence in the hearing record (IHO Decision at p. 1). The IHO credited the testimony of the district vision services provider (*id.* at p. 2). The IHO found that the vision services provider explained why the assistive technology used by the student was not listed on the IEP and that there was never a time when the student did not have the appropriate assistive technology (*id.*). Further, the IHO noted the vision service provider's testimony that there was never a time that the student was unable to access the curriculum because of her disability (*id.* at p. 3). The IHO also cited the testimony of the district IEP teacher as well as documentary evidence indicating that the student was performing at or above grade level and that the student made meaningful educational progress during the two years at issue, which supported a finding that the student was able to access the general education curriculum (*id.* at pp. 3-4).

Next, the IHO noted the parent's position that the district did not provide the student with a sufficient amount of vision services but cited the parent's testimony that she "had no issues with the quality of educational services" provided by the vision services provider (IHO Decision at p. 4). The IHO indicated that the parent was unable to "articulate a cogent basis for her belief" that the IEP did not allocate enough time for the student to work with the vision service provider (*id.*).

Next, the IHO addressed the parent's claim that the district did not properly respond to her request for IEEs (IHO Decision at pp. 6-7). The IHO held that it was undisputed that the number the parent faxed the IEE request to was not a district CSE number and that, therefore, the parent was not able to establish that she actually made the request for an IEE to the district (*id.* at p. 6). Based on this, the IHO found that the parent was not entitled to reimbursement for the neuropsychological IEE (*id.*).

In sum, the IHO determined that the district had the burden of proof, that the district met its burden, and that the parent did not introduce sufficient evidence to rebut the case put on by the district (IHO Decision at p. 7). However, the IHO noted that the district conceded that the student did not receive vision services during September and early October 2018, and as such, the IHO granted compensatory education to make up for this failure (*id.* at p. 8). The IHO awarded the

student three hours of the compensatory vision services, representing one half hour per week for a six-week period (id.). The IHO noted that the student established a good relationship with the district vision services provider and that ideally these compensatory education services would be provided by him; however, if he was unable or unwilling to provide the services or the parent did not want him to provide the services, the IHO indicated that the parent would be entitled to select a provider of her choice so long as the cost of the services were reasonable for the type of services provided (id.).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent reiterates her requested relief from the due process complaint notice. The parent argues that the district and IHO repeatedly confused the standard for a FAPE under the IDEA and the standard for a FAPE under section 504. Specifically, the parent alleges that the district "framed" the issue of a FAPE by claiming that the student was able to "access" her education. The parent contends that this was the incorrect legal standard and that the proper standard is whether the IEP was "designed to meet the child's unique needs."

The parent argues that the district failed to evaluate the student's social/emotional needs and that the IHO's findings on this point were "clearly in error." The parent asserts that the evidence in the hearing record established that the district was on notice that the student was suffering from trauma and "exhibiting severe social/emotional issues at school." The parent contends that she demonstrated that she had extensive communication with the district regarding the student's father's death and that the emails submitted into evidence demonstrated that the district was aware of these issues and concerns. The parent asserts that the IHO erred by finding that the district did not need to assess the student in this area. Moreover, the parent argues that the IHO erred in failing to find that the district should have assessed the student's sensory needs and sensory processing delays. Next, the parent contends that the IHO erred in failing to find that the district's assistive technology evaluation "did not adequately address the [student's] distant vision needs or her near-point vision needs." The parent alleges that the district failed to defend its evaluations and demonstrate that the student was assessed in all areas of suspected disability. The parent also alleges that the inappropriate evaluations "resulted in the development of inappropriate IEPs with inadequate social/emotional, sensory processing, vision and assistive technology supports for" the student. Additionally, the parent argues that the IHO improperly shifted the burden of proof to the parent by relying on the testimony of the district witnesses and concluding that the hearing record did not establish that the student required school-based therapy.

Further, the parent argues that the district failed to demonstrate that the assistive technology evaluation or assistive technology device adequately addressed the student's needs. According to the parent, the magnifier dome which was recommended in the 2018-19 IEP was of "no use to" the student. The parent contends that the student was without adequate assistive technology for the entirety of the 2018-19 school year and for a portion of the 2019-20 school year. Furthermore, the parent asserts that the district failed to demonstrate any of the accommodations recommended in the IEP were actually implemented.

The parent argues that the IHO erred by finding that the parent did not rebut the district's position that vision services were sufficient to address the student's needs and that district's evidence to that effect was uncontroverted because the parent witness was not credentialed to work with the visually impaired. The parent asserts that there is no requirement for her witness to be

credentialed and that her evidence "clearly and persuasively controverted" the testimony of the district's vision services provider. The parent contends that the IHO erred in finding that she did not put on any evidence to rebut the district's case in chief. In addition, the parent argues that the IHO erred in finding that she did not put on evidence that the student was not making educational progress. The parent contends that she demonstrated the student was not making progress commensurate with her very high cognitive abilities and the student's progress was not appropriate in light of her unique abilities.

Lastly, the parent asserts that the IHO erred in determining that the parent was not entitled to be reimbursed for the cost of the neuropsychological IEE. The parent claims that the district agreed that the parent was entitled to partial reimbursement and therefore there was no genuine issue before the IHO. The parent contends that IHO's conclusion that she improperly sent the IEE request to the incorrect phone number was contrary to the parent's testimony. Even if the parent sent the request to the wrong number, she argues that the due process complaint was additional notice for the district of the request for the IEE. Moreover, the parent asserts that the district's request to limit reimbursement to only \$5,500 was unsupported by any evidence in the record and contrary to applicable law.

In an answer with cross appeal, the district contends that the SRO should limit funding for the neuropsychological IEE to \$5,500. The district asserts that the record reflects that the IHO correctly found that the parent did not properly send the IEE request to the district; however, the district concedes that the parent is entitled to district funding for the IEE. The district argues that funding should be limited to \$5,500 because the parent did not send proper notice of the request. The district indicates that it was first on notice when the parent filed the due process complaint and following receiving the due process complaint, the district contends that it timely responded to the parent's request and offered to fund an IEE up to \$5,500. Further, the district argues that the only evidence regarding the rate of the IEE was the parent's testimony as no proof of payment or testimony regarding rate was entered into the hearing record. Therefore, the district asserts that funding should be limited to \$5,500.

Next, the district argues that the IHO correctly determined that the student was offered a FAPE for both the 2018-19 and 2019-20 school years. In addition, the district asserts that the issues should be limited to those raised in the due process complaint notice as the parent only raised that the student was not adequately evaluated in the areas of her social/emotional needs and assistive technology needs. s. Regarding the claim that it failed to demonstrate that any of the accommodations were implemented, the district asserts that this claim was not raised in the due process complaint notice and is outside the scope of review.

The district cross-appeals the IHO's order of compensatory education for vision services. The district argues that the IHO erred in ordering compensatory education as such an award should have been a fact-specific inquiry, rather than a simple 1:1 calculation for services. The district contends that the "IHO failed to find that these services were necessary for the Student to be placed in the position she would have been in had services been provided during the six week period." The district argues that the record demonstrates that those three hours of compensatory services are unnecessary because the student made progress each school year and was performing above grade level in reading. Moreover, because the IHO found that district offered a FAPE for both school years, the district argues that no compensatory education services were warranted. As such,

the district contends that the award of three hours of compensatory vision services should be reversed.

The parent, in her answer to the cross-appeal, acknowledges that reimbursement for the neuropsychological IEE should be contingent on proof of payment but argues that there is no support to limit the amount to be reimbursed as requested by the district. Regarding the district's cross-appeal, the parent contends that the district's position is in direct contradiction to its stance at the hearing. At the hearing, the district conceded that the student should be compensated for the district's failure to provide all vision services to the student at the start of the 2018-19 school year. The parent asserts that implicit with this concession was that there was denial of FAPE for which the student is entitled to relief. The parent argues that the district should now be barred from making a contrary argument to their stance at the hearing. Finally, the parent contends that there was nothing barring the 1:1 compensatory award.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew 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).

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" (Andrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

On appeal, the parent contends that the district failed to properly evaluate the student's sensory needs, that the district failed to sufficiently evaluate or recommend appropriate services to address the student's vision needs, and that the district did not demonstrate the IEP accommodations were implemented. The district contends these issues are outside the scope of review because the parent only raised the sufficiency of the evaluative information regarding the student's assistive technology and social/emotional needs in the due process complaint notice (not with respect to sensory or vision needs) and that the parent wholly failed to raise implementation in the due process complaint.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parent only raised the following claims in the due process complaint notice: the district failed to provide the student with an appropriate assistive technology evaluation, device and training; the district failed to evaluate the student's social/emotional needs or provide social/emotional support; and that the district failed to properly respond to her request for an IEE (Parent Ex. A at pp. 3-4). As such, the parent did not raise claims that the district failed to assess the student's sensory processing needs, failed to assess or address the student's vision needs, and failed to implement the IEP accommodations. Further, there is no indication that the district agreed to expand the scope of the impartial hearing or that the parent requested to amend her due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the question of the district's alleged failure to evaluate or address the student's sensory needs was first raised in the opening statement of the parent's attorney and thereafter during the parent's attorney's direct examination of the district IEP teacher (see Tr. pp. 40-44, 83-84). The district representative raised a question related to implementation of the student's IEP in direct examination of the district IEP teacher, but the line of questioning appeared to be specific to identifying the anticipated implementation date for the services contemplated by the June 2018 IEP (i.e., in September 2018, as opposed to June 2018) rather than for the purpose of showing that the district delivered the student's IEP services and accommodations (see Tr. pp. 62-63). Therefore, except as noted below with respect to implementation of vision services, the hearing record does not support a finding that the district opened the door to the issues relating to the student's sensory needs or implementation of her IEPs, and these issues were outside the scope of the impartial hearing and are outside the scope of review in this appeal.

Although, the district did not open the door to those two issues, the district did open the door to the issue of whether the recommended vision services were appropriate and whether they were implemented. The district conceded in its opening statement that it failed to provide all of the recommended vision services during the 2018-19 school year and reiterated this statement in its closing brief, indicating in both instances that the student should be compensated for that failure (Tr. p. 39; Dist. Post H'rg Brief at p. 2). Moreover, during her direct examination of the student's vision services provider, the district representative pursued a line of questioning regarding whether the recommended vision services were appropriate for the student (Tr. pp. 124-25). Therefore, the IHO appropriately addressed the issue of whether vision services were appropriate for the student and whether the district delivered the services, and I will address these issues further below.

2. Burden of Proof and Legal Standard

The parent argues that the IHO applied an incorrect legal standard and impermissibly shifted the burden of proof from the district to the parent.

Regarding the legal standard that the IHO applied, the parent specifically takes issue with characterizations that the district's obligation was to provide supports to enable the student to "access" her education. The parent argues that a student's ability to access an education is the standard for reviewing the appropriateness of an accommodation 504 plan under section 504, not for evaluating a district's offer of a FAPE under the IDEA (see Parent Mem. of Law at p. 26, citing 34 CFR 104.31-104.39).⁸ However, review of the decision reveals that the IHO set forth the correct legal standard, stating that the district had the burden to show that it provided "an

⁸ To the extent that the parent also argues that the district failed to meet its burden to demonstrate that it provided the student with a FAPE under section 504, an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (IHO Decision at p. 7, quoting Endrew F., 137 S. Ct. at 1001). Moreover, the Supreme Court has specifically used the word "access" to describe the IDEA's promise of a FAPE, i.e., noting that "access to an 'education' is what the IDEA promises" (Endrew F., 137 S. Ct. at 999, quoting Rowley, 458 U.S. at 203). Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is, in turn, defined by regulation as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv] [emphasis added]; see 34 CFR 300.39[b][3]). The IHO did not use the term "access to education" in her decision regarding the legal standard, but only used the phrase when citing to witness testimony (IHO Decision at pp. 3, 4).⁹ In any event, the IHO's consideration of this testimony—i.e., regarding the student's ability to access the general education curriculum—was appropriate given the requirement set forth in regulation that the district ensure the student's access to the general education curriculum (see 34 CFR 300.39[b][3]; 8 NYCRR 200.1[vv]).

Overall, a review of the IHO's decision does not support a finding that the IHO applied the wrong legal standard. Moreover, even if the IHO did apply an incorrect legal standard, this would not be grounds to reverse the decision as I have fully reviewed the IHO's findings and the evidence in the hearing record, applying the legal standard set forth by the Supreme Court.

Next, I turn to the IHO's application of the statutory burden of proof. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). There is no indication in the hearing record that the IHO did not properly apply the burden of proof to the district and the parent does not assert that the IHO shifted the burden of proof.

In her decision, the IHO correctly stated that the district bore the burden of proof (IHO Decision at p. 7). In support of her argument that the IHO improperly shifted the burden of proof, the parent cites the IHO's finding that the evidence did not show that the student had social/emotional needs that warranted school-based therapy (see IHO Decision at p. 4). The parent argues that it was not her burden to demonstrate that the student needed school-based therapy. However, the IHO did not state that the parent failed to meet her burden of production or persuasion on this issue. Instead, the decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses in evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one

⁹ Although, the district did frame the case several times regarding the student's ability to access her education (Tr. pp. 39, 58, 76, 127, 129, 140, 142, 148), the district does not apply the legal standard, the IHO does.

party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the sufficiency of the district's evaluations and recommendations related to the student's social/emotional needs (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Social/Emotional Evaluation and Services

The parent contends that the district failed to evaluate the student's social-emotional needs or recommend counseling services for the student. The parent further alleges that the district's failure to evaluate or provide services to address the student's social-emotional needs demonstrates that the district did not offer the student a FAPE for either the 2018-19 or 2019-20 school years.

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

As an initial matter, to the extent that the IHO's statement regarding the evaluation of students meant that school districts are not required to conduct a social/emotional evaluation of a student (IHO Decision at p. 5), such a finding would be error because as set forth above, a district must ensure that a student is evaluated in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). However, the IHO also quoted State regulations and therefore the precise meaning of her statement was ambiguous. A review of the evidence in the hearing record supports the IHO's determination that the information available to the district was not such that it triggered an obligation on the part of the district to conduct an assessment of the student specific to her social/emotional needs and/or to recommend in-school counseling on the student's IEPs.

The creative arts therapist, who provided the student with private counseling, testified that she began working with the student in fall 2016 due to difficulties the student was experiencing within her family and also because she had a sensory processing disorder (Tr. pp. 180-81, 184-86). She noted that when she would talk with the student about difficult feelings the student would get physically wild, throw her body, and trash the therapist's office (Tr. pp. 181-83, 224-26). The creative arts therapist opined that trauma and sensory processing difficulties contributed to the student's behavior in equal amounts (Tr. p. 183). She noted in her work with the student she witnessed that the student was performing very well academically in spite of how poorly she could control herself (Tr. p. 184). The creative arts therapist reported that in December 2017 the student was diagnosed with a "frayed retina" and she was subsequently found to be "legally blind" (Tr. p. 187). She reported that the diagnosis helped to explain why the student "got in your face" when she was talking, leaned in close when looking at stuff, and felt things with her hands and mouth (Tr. p. 188).

The creative arts therapist testified that by March 2018 the district was in the process of evaluating the student, but she was having some issues at school, so the creative arts therapist offered to go in to school and meet with the team before the IEP was finished (Tr. p. 190; see Parent Ex. E at pp. 3-10). The therapist suggested that some of the student's issues were related to processing grief but also noted that in winter and spring of that year the student reported during therapy sessions that she felt that she was being bullied and was concerned that another student and her teachers did not like her (Tr. pp. 190-91). According to the therapist, the parent requested that she contact the school (id.). She reported that she talked to the student's teaching team and requested to go into school and observe the student and offer the team insight as to how the student's emotional, sensory, and visual needs might be contributing to how the student felt in school (id.). The therapist reported that the school was aware of the personal issues the student was dealing with, specifically her father's death and her blindness (Tr. p. 192).

The creative arts therapist testified that she visited the school and spoke with the student's teachers (Tr. pp. 192-93). She watched the student to see how she behaved in class and watched her transition to extracurriculars (Tr. p. 193). The creative arts therapist reported that she specifically asked to watch the student's movement class because the student had told her that the teacher was "very rough" with her and also because the therapist wanted to make sure nothing in the class was triggering the student's "sensory stuff" (Tr. p. 192). The therapist indicated that she went to the school twice and then reached out to the student's team via phone, shared some things she had observed, and offered suggestions for the team to accommodate the student in school (Tr. pp. 194-96). Both visits took place prior to the June 2018 CSE meeting (Tr. p. 222). The therapist concluded that the movement teacher was "perfectly nice" but had more of a stern tone, which the student picked up on (Tr. p. 196). The therapist indicated that she had to work with the student on understanding people's tones (Tr. p. 197).

The parent offered a similar account of events as she stated that due to concerns over the lack of support the student was receiving at school, her therapist offered to visit the school and perform an observation (Parent Ex. F at p. 3). She noted that the student's therapist was concerned that the student's teachers did not appreciate the significance of her visual impairment and need for social/emotional support (id.). The parent reported that the therapist met with the student's teachers and tried to explain her need for social/emotional support and extra attention due to her trauma and vision limitations (id.). The parent indicated that the therapist spoke with the student's team about encouraging understanding and implementing strategies to help her succeed

academically as well as behaviorally (*id.*). The parent noted that, at the time, the student was having issues behaving safely at school and with being respectful of peers' personal space when overstimulated (*id.*). The parent stated that because of the student's desire to act like a "normal" kid she was hesitant to self-advocate and had a tendency to internalize stress (*see* Tr. pp. 255-58; Parent Ex. F at p. 3). The parent reported that the student was sensitive that people didn't like her and that she was different (Tr. p. 259). She opined that the student could not tell people that she needed "more patience, more understanding, a calmer voice, that things felt very loud, very scary, and very punitive quite easily" (*id.*). The parent testified that these things were reported to her by the student and her therapist (Tr. p. 260). She indicated that it was not "unpacked" that way by the teachers (*id.*). According to the parent, the teachers reported that they were not hearing the student speak up for herself, that they were seeing the student fall apart, but they were not hearing what was happening (*id.*). She noted that this was not entirely the teachers' story as she was "unpacking it" based on what she heard from the student (*id.*).

The parent offered as evidence copies of emails, mostly between her and the creative arts therapist, which corroborate both the therapist's and parent's testimony, as well as offer a timeline of events with regard to the parent's concerns about the student's social/emotional state (*see* Parent Ex. E). The emails show that the creative arts therapist observed the student two times in her district class, the first on March 20, 2018 and the second on March 27, 2018 (*id.* at pp. 15, 18). On March 20, 2018, the therapist observed the student transition from library to math and then back to her class after math (*id.* at p. 18). The therapist reported that the student "did not seem to struggle at all in class" that day; she noted that the student had some behavior that looked like "typical fidgety 7 year old behavior" but opined that the student's fidgeting was driven by poor vision and needing "to feel the thing [the class] was discussing" (*id.* at pp. 18-19). The therapist suggested that it would be helpful for the student to have more tactile engagement and stated that she would think about strategies she could provide the teachers that would allow them to be more lenient with the student, without drawing attention to her, when she pulled tactile materials close (*id.* at p. 19).¹⁰ The emails also show that on March 27, 2018, the creative arts therapist observed the student during dance class and reported that the teacher "had nothing but great things to say about [the student]" (*id.* at p. 15). According to the creative arts therapist, the teacher reported that the only issue she observed in class was that the student could be physically intrusive with classmates (*id.*). However, the therapist noted that the student struggled with the transition to calming down at the end of the dance class as it was "a little too abrupt for her" and suggested that the student be provided a sensory tool "for her lay down time" (*id.*). The therapist reported that the class was energetic but when the music stopped the student was looking for sensory input, which was why she started to touch and squeeze her friends (*id.*). The creative arts therapist stated that the student struggled with her vision in the dance class as she could not see the teacher well (*id.*). Based on her observation, the creative arts therapist opined that the student had "very high expectations of herself and work[ed] hard to 'get it right' but because of her vision difficulties she struggle[d] with being able to keep up or 'get it'" (*id.*). She noted that the student appeared frustrated and would sometimes stop for a minute and suggested that the student was "coming down on herself internally" in those moments, which left her feeling liked she messed up or was not good enough (*id.*). The therapist further opined that when the student got called out for being "wiggly or intrusive" it confirmed for the student that she was not good enough and was in trouble

¹⁰ The email exchange dated March 20, 2018 was between the parent and the creative arts therapist (Parent Ex. E at pp. 18-19).

(id. at pp. 15-16). The therapist reported that "[w]ith the exception of a few things" she found the student's teachers to be "very supportive and creating a lovely classroom environment" (id. at p. 16). In addition, she noted that the student was "by far one of the better behaved kids in the class" (id.). The creative arts therapist recommended that next steps should include talking to the student's teachers about what she was struggling with and ways that they could be more aware of the student's "vision issues and how they informed her behavior"; helping the student understand her vision difficulties and developing "little tricks" to help her manage when she was having trouble seeing; and, for the creative arts therapist, working with the student on her internal narrative and helping her address negative self-talk and get better at receiving external feedback that was "actually quite positive" (id.). The therapist also suggested that an important part of the student's IEP and vision services would be learning how to adapt as her academic and life requirements became more intense and demanding (id.).¹¹

In a May 29, 2018 email to the parent, the creative arts therapist reported that the student's teacher seemed to have "great instincts" and worked really well with the student (Parent Ex. E at p. 21). She stated that she hoped the teacher would "ask the team to do so as well" (id.). The therapist recalled how one teacher pointed out that it would be easier for everyone to be on the same page once an IEP was in place (id.). The parent responded that she thought the meeting was "very productive" but noted that she was "amazed how little the teachers and staff talked to each other unless an IEP makes them" (id. at p. 20).

The CSE met on June 18, 2018 and reviewed the assessments completed as part of the student's initial evaluation including a March 2018 social history, an April 2018 teacher report, an April 2018 OT evaluation report, a May 2018 functional vision assessment, a June 2018 assistive technology evaluation report, a June 2018 psychoeducational evaluation report, and a June 2018 classroom observation (Dist. Exs. 11; 12; 13; 14; 15; 16; 17; 18; 19). Overall, the evaluations indicated that the student demonstrated appropriate social/emotional skills at school. The assistive technology evaluation indicated that the student was comparable to her classmates in terms of her ability to identify feelings and manage emotions (Dist. Ex. 13 at p. 2). The classroom observation indicated that during the time the student was observed she was working independently and appeared hard working (Dist. Ex. 14 at p. 1). In addition, the observation indicated that vision issues did not appear to negatively impact the student's learning or classroom performance (id.). According to the April 2018 OT evaluation report, during the evaluation the student was able to interact and self-regulate on par with her peers (Dist. Ex. 16 at p. 5). The student's classroom teacher reported that sometimes the student would come close to classmates and interact through touching (id.). The student was observed practicing backbends with friends (id.). With regard to social-emotional learning, the OT evaluation described the student as "a happy child, who made a lot of friends" during the school year (id. at p. 6). The evaluation report indicated that the student's ability to identify feelings/manage emotions, develop friendships/work cooperatively in groups, and consider actions to make responsible choices supported her school function (id.). The June 2018 psychoeducational evaluation indicated that the student liked school and had friends, while the April 2018 teacher report indicated that the student was animated, a generally active participant and established friendships (Dist. Exs. 17 at p. 1; 18 at p. 2). The teacher report indicated that social/emotional development was not an area of concern at the time (Dist. Ex. 18 at p. 3). The

¹¹ The email exchange dated March 27, 2018 was also between the parent and the therapist (Parent Ex. E at pp. 14-16).

social history indicated that with respect to the student's school performance the student was well liked and popular but at times could be physically intrusive (Dist. Ex. 19 at p. 2).

The creative arts therapist reported that she attended the student's June 2018 CSE meeting (Tr. p. 197). She recalled that the student's social/emotional needs were touched on at the meeting but that the main focus was on offering accommodations for the student's visual impairment (Tr. pp. 197, 226-27). The therapist reported that the CSE was aware of the difficulties the student had experienced including the loss of her father and finding out she was blind and was also aware that the student saw a therapist twice a week (Tr. pp. 198-99). The therapist testified that she was not aware of the CSE offering any individual or group counseling to the student (Tr. p. 199). The creative arts therapist acknowledged that she did not raise her concerns regarding the student's social/emotional needs at the June 2018 CSE meeting (Tr. p. 227). She explained that she had a lot of experience working with the district and how funding worked, and she assumed if the CSE was not offering a service it was because it could not provide it (Tr. pp. 232-33). Specifically, the therapist stated that she did not ask for services because she assumed it was futile (Tr. p. 233). In terms of the student's social/emotional development, the therapist opined that the student's vision difficulties had a "huge" impact on her ability to socialize with her peers (Tr. p. 199). She reported that the student got "wild with her body when she ha[d] a lot of feelings" (Tr. p. 200). Based on her observations of the student in school, she reported that the student could be physically intrusive, constantly touch her friends, and get too close (*id.*). The therapist opined that the student's vision difficulties in some ways inhibited her ability to engage with peers because they got easily frustrated with her or she would doubt herself and become quiet (*id.*). According to the therapist, the student was "so intelligent and perceptive yet her physical body h[eld] her back from actually taking in the input" which could cause emotional frustration (Tr. pp. 200-01). The therapist opined that from a social/emotional point of view the student was not capable of self-advocating for her vision needs because she was only seven (Tr. p. 203). Although the therapist asserted that the student's vision difficulties had a "huge" impact on her ability to socialize, she testified that she did not believe the student's "difference" disrupted her that much emotionally because she had been living with it since she was born (Tr. p. 204). However, she opined that the student's vision difficulties had "created a way that [the student] is in the world that causes her to feel very self-critical" and that people don't like her (Tr. pp. 204-05).

The parent, in her affidavit testimony, asserted that although she and the student's therapist had made the school aware of the student's trauma and social/emotional needs, the CSE did not perform a social/emotional evaluation as part of the student's initial evaluation (Parent Ex. F at p. 4). The parent reported that the CSE did not offer the student individual or group counseling despite her repeatedly telling CSE members about the trauma the student had experienced and explaining the difficulty the student was having accepting that she was different from her classmates and required additional support to access her education (*id.*). The parent testified that the overall impression from the student's teachers was that she "'looked like she was doing well'" despite the parent telling the CSE that the student was not doing well and needed more attention (*id.*). The parent opined that "normalizing" the student seemed to be a much higher priority than making sure her vision needs were addressed or providing her with social/emotional support (*id.*).

The district IEP teacher testified that she had been in the student's classroom and knew who she was but had never spoken to her (Tr. pp. 53, 77). She indicated that June 2018 CSE determined that, other than vision education services, no other services would be recommended for the student because she did not demonstrate any academic or social needs within the school

(Tr. pp. 55-56). The IEP teacher indicated that the CSE was aware that the student was receiving outside counseling but did not recommend in-school counseling because it would be very school based and noted that the student required support to deal with the death of her father, which was being provided to her outside of school (Tr. p. 60). The IEP teacher testified that there was no report to the CSE that the student was struggling socially or emotionally in school (Tr. pp. 60-61). Further, the IEP teacher testified that the input at the CSE meeting was that the student was doing well and any struggles were not impeding her academic work at school (Tr. pp. 59-60). Also, to her knowledge, there were no concerns regarding the student in school (Tr. p. 61). The IEP teacher agreed that if a student was behaving unsafely in school, not being aware of other people's space, or having difficulty negotiating the environment, that some type of intervention might be needed (Tr. p. 81). She testified that it was possible that parental concerns regarding the student's social-emotional abilities were not brought to her attention (Tr. p. 88).

The creative arts therapist testified that the student did not do well socially and emotionally in school during the 2018-19 school year (Tr. p. 205). She reported that the student had an "incredibly rough fall" due to the anniversary of her father's death and was struggling emotionally and with her behavior (*id.*). The therapist indicated that the student's teacher was fine but a little stern and her class was full of students who needed extra support (*id.*). She further indicated that the student described the atmosphere as "intense, maybe hostile sometimes" (*id.*). The therapist reported that the student was getting in trouble more for her behavior in school and noted the student accidentally broke a computer by jumping on a bench (Tr. p. 206). She described the student's self-esteem during the 2018-19 school year as "terrible" and reiterated that the student assumed that people acted the way they did because they didn't like her, and it was her fault (Tr. pp. 206-07). The therapist reported that the student started hanging out with boys more and getting more attached to male figures and dressing more like a boy (Tr. pp. 207-08). She stated that most of the student's social interactions were "pretty stressful" (Tr. p. 208). The creative arts therapist opined that the student did not receive sufficient social/emotional support in school (*id.*). The therapist described the student as a very motivated and a hard worker (Tr. p. 209). She opined that if the student had a stable home life and more nurturing educational environment, she would be performing above grade level academically (*id.*). The parent reported that she raised the issue of the student's exposure to trauma at the November 2019 CSE meeting but that the CSE failed again to recommend counseling (Parent Ex. F at p. 5).

Contrary to the testimony of the creative arts therapist, the student's vision services provider opined that with respect to social/emotional functioning the student was "a typical 3rd grade general ed student" and that he "did not see anything unusual" (Tr. p. 144). He reported that the student was curious, bright, able to complete a lot of tasks that they worked on and interested in being able to see better (Tr. p. 144). The student's report card and summary of State test scores for the 2018-19 school year indicated that was "proficient" with regard academic and personal behaviors (Dist. Exs. 23; 25).¹²

¹² For the first marking period of the 2018-19 school year the student's ability to "manage[] time and consistently demonstrate[] effort to independently achieve goals" was rated as "below standards"; thereafter it was rated as "proficient" (Dist. Ex. 23 at p. 2). All other skills in this area were rated as "proficient" for the duration of the school year (*id.*).

The May 30, 2019 IEP described the student as a "well adjusted 3rd grade student" but noted that the parent was concerned that the student was not connecting well to her peers (Dist. Ex. 9 at pp. 1, 10). The IEP indicated that student had some friends in her class, but that she was not particularly close with any of them (id. at p. 1). The IEP also indicated that the student got along with her table mates during group projects, was helpful to others, and was willing to speak up for her needs (id.). According to the IEP, the student's teacher reported that the student was animated, an active participant in the classroom and during group work, and that she had established appropriate friendships (id.). The teacher indicated that the student's social development was not an area of concern at that time (id.).

A second IEP for the 2019-20 school year, developed in November 2019 indicated that the student got along well with her peers during group projects, was helpful to others, was willing to speak up for her needs and had started to self-advocate more (Dist. Ex 5 at p. 3). The November 2019 IEP provided the same teacher report as the May 2019 IEP (id.). According to the November 2019 IEP, the parent reported that the student had more difficulty at that time of year which was around the anniversary of her father's death (id.). The parent indicated that the student could become silly and brave, which made her appear fearless (id.). However, she stated that the student's behaviors were worrisome and required attention (id.). The parent further stated that the student's fatigue from her vision issues could cause dysregulation (id.). She noted that the student was in private therapy two times per week and indicated that the private therapist was working on having a safe body, improving her body awareness and finding ways to self-regulate (id.).

Here, the hearing record demonstrates that the student was not displaying social/emotional difficulties in school at the time of any of the three CSE meetings that would rise to the level of requiring in-school counseling. The parent's emails and testimony regarding her concerns for the student's social/emotional well-being predate the initial CSE meeting and do not support a finding that the student was struggling in school (see Parent Ex. E at pp. 14-16, 18-21). Moreover, they also demonstrate that the district allowed the parent to have the student's creative arts therapist observe her in school and that school staff met with both the parent and the therapist to discuss those observations (id.). The June 2018 CSE had adequate information to determine the student's social/emotional needs as they related to school. Several evaluations reviewed by the CSE included social/emotional observations (see Dist. Exs. 13; 14; 16; 17; 18; 19). In addition, the student's therapist, who had been working with her since 2016 and who had observed her on two occasions in the district's school and met with her teachers, participated in the June 2018 CSE meeting (Tr. p. 197). The parent also weighed in on the student's social/emotional needs (Parent Ex. F at p. 4). To the extent that the creative arts therapist felt strongly that the student required counseling in the school setting, she did not convey that to the June 2018 CSE (Tr. pp. 227, 232-33). Consistent with the June 2018 IEP, neither the May 2019 nor November 2019 IEPs described deficits in the student's social/emotional functioning or suggested that she required social/emotional support, in the form of an additional service, during the 2019-20 school year (Dist. Exs. 5 at p. 3; 9 at p. 1). Although based upon the evidence in the record I find in favor of the district in this instance, it is beyond cavil that the events such as those that have occurred in the student's life can potentially affect a child in different ways over the long-term. One thing that is consistent about children is that they change over time, and, as such, I strongly encourage the district and parent to communicate with one another going forward to ensure that, if, in the future, the need should arise for in-school social/emotional support, that the parties are continuing to carefully monitor the student in-school.

C. Assistive Technology

One of the special factors that a CSE must consider 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]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Turning to the parent's claim that the district failed to provide the student with appropriate assistive technology devices and training, the evidence in the hearing record shows that the district Center for Assistive Technology (CAT) team conducted an assistive technology evaluation of the student on June 12, 2018 as part of her initial CSE evaluation (see Dist. Ex. 13). The student's vision services provider indicated that there were two types of assistive technology evaluations, a CAT evaluation and a District 75 evaluation (Tr. pp. 111-12).^{13, 14} He explained that a typical assistive technology evaluation was handled by the CAT team and was geared toward students in the general education population, while a District 75 evaluation was geared more toward students with special needs in District 75, which had a variety of students with different disabilities and skill levels (Tr. p. 112). The vision services provider suggested that a CAT assistive technology evaluation was conducted in June 2018, as opposed to a District 75 evaluation, because the student did not have a provider at that time to "promote" a District 75 evaluation (Tr. pp. 112, 150-51).

In order to obtain background information for the June 2018 assistive technology evaluation, the CAT evaluator reviewed the results of a January 2018 Lighthouse Guild evaluation and a May 2018 functional vision assessment and interviewed the parent, student, and the student's teacher (Dist. Ex. 13 at p. 1). The CAT evaluator noted that the Lighthouse Guild evaluation yielded diagnoses of "Optic Nerve Atrophy and Legally Blind" and recommended that the student receive "large print," training with low vision devices, assistive technology such as CCTV, an iPad linked to a Smartboard, "special instructions" in all subjects as needed, and orientation and mobility training as accommodations (id.). In addition, the CAT evaluator reported that "the vision teacher"¹⁵ recommended that the student be encouraged to move closer to the teacher during mini lessons at any time during the day in any class, provided with enlarged print or a way to magnify

¹³ The student's vision teacher testified that he was "licensed" in New York State as a teacher of the blind and partially sighted and as a special education teacher (Tr. p. 105).

¹⁴ The exact definition and functions of "District 75" within this district appears to have evolved over time. It is adequately described with respect to the particular evaluations at issue in this case, but the larger context of how district 75 compares to other schools within the district. It is not a critical need in this particular case because the CSE proposed placement in "non-specialized" or (District 1-32) and parties do not have a dispute over the placement within a "District 75" school.

¹⁵ The vision teacher who evaluated the student in May 2018 as part of her initial evaluation was not the same teacher who proved the student with vision services beginning in October 2018 (see Dist. Tr. pp. 107-08; Ex. 13 at p 1; Dist. Ex. 15 at p. 1). To avoid confusion, the teacher who provided the student with vision services will be referred to as the vision services provider.

material, and afforded breaks and extra time for testing because reading for long periods of time might cause fatigue (id.). According to the CAT evaluator, an informal conversation with the vision teacher who evaluated the student indicated that the student's vision was functional enough to implement those classroom accommodations (id.). Although, the Lighthouse Guild recommended assistive technology such as CCTV, the CAT evaluator noted that at that time the student would not benefit from such sophisticated equipment but might benefit from an iPad with applications (id.).

The CAT evaluator reported that according to teacher reports the student was performing at grade level academically (Dist. Ex. 13 at p. 1). She noted that the student's teacher adapted work for her by taking pictures of handouts and emailing them to the student's mother who would then enlarge them on an iPad (id.). The student's teacher reported that the student was performing comparable to classmates in terms of activities of daily living, management of classroom tools, and her ability to identify her feelings and manage emotions (id. at pp. 1-2). In addition, the student was independent in moving closer to the Smartboard for copying or sitting next to the teacher during mini lessons (id. at p. 2). The CAT evaluator reported that the student was able to access all areas of the building independently but that according to her teacher, the student sometimes had difficulty following directions and concentrating on assignments (id.). The CAT evaluator noted that at the time of the evaluation the student was receiving the following accommodations/modifications: large print books, use of a handheld magnifier, access to the digital library, and breaks if endurance was an issue in writing (id.). According to the CAT evaluator, the following technology was available in the student's classroom, but not available for student use throughout the school day: a computer lab with iOS, Mac, and Chrome operating systems, and a tablet (id. at p. 3). The student also had access to Google Apps for Education (id.).

With respect to her assessment of the student, the CAT evaluator reported that the student was attentive and motivated when completing evaluation tasks (Dist. Ex. 13 at p. 4). In addition, she was able to function in her school environment and was observed to move closer to materials and appropriately visualize all materials throughout the evaluation process (id.). The CAT evaluator noted that the student also accessed the handheld magnifier that had recently been provided to her (id.). With regard to work samples, the CAT evaluator reported that the student's notebook reflected appropriate legibility and per teacher report the student was able to fill out worksheets on par with her peers (id.). She noted that the student's writing sample was legible and reflected appropriate syntax, as well as good spelling and use of punctuation (id.). The CAT evaluator reported that, when accessing technology, the student was given the choice to increase the font size but seemed ambivalent about what size was better for her (id.). The CAT evaluator noted that the student used the 24-point font but stated that she could see the 11-point font just as well (id.). When reading 14-point font the evaluator observed the student in a slouchy posture with her face 3-4 inches away from the paper (id.). In addition, the CAT evaluator observed that when using the magnifier, the student read at a slower pace and still slouched in her seat (id.). Although, the student indicated that she did not care about the font size when using a tablet, the CAT evaluator observed that she had better seating posture when using a larger font (id.). The CAT evaluator reported that after typing the student indicated that she preferred to hand write instead (id.). She noted that the student showed little familiarity with the use of the keyboard and used a hunt and peck method with her right index finger (id.). She further noted that while typing the student looked only at the keyboard to find the desired keys and not at the screen (id.). Use of

the touchscreen keyboard yielded similar results and the CAT evaluator observed that the student lost her place when moving from the touchscreen to paper for a copying task (id.).

The CAT evaluator concluded that although the student was more efficient with handwriting than typing, she should begin to learn typing skills (Dist. Ex. 13 at p. 5). She noted that the student was able to use low tech – the handheld magnifier – and recommended it for her use in class (id.). According to the CAT evaluator, the student indicated that she preferred reading regular books but was willing to try a tablet to see if would like it (id.). The CAT evaluator recommended a one-month trial of a tablet with a reading application and opined that it would be beneficial for the student to access digital text and "hangouts" via Bookshare using the reading application (id.). The CAT evaluator emphasized that a trial period was deemed necessary to evaluate the effectiveness of using the technology in the classroom to ensure its use and determine whether it was the most appropriate technology at the time (id.). The evaluation provided information to allow the CSE the option of documenting what was taking place if the trial period extended beyond the IEP compliance date (id.).¹⁶ With respect to trial implementation, the CAT evaluator stated that the student should have access to the trial equipment throughout the day for independent reading tasks during the specified period, as determined by her teacher (id. at p. 6). The CAT evaluator reported that a goal was established for the trial in collaboration the student and her teacher — that the student would use a tablet with reading supports to access reading materials/handouts with greater independence (id.). The CAT evaluator reported that the teacher was provided with a log she agreed to complete and that the teacher and student would be trained on the basic features of the technology needed for the trial period (id. at p. 5). The vision services provider opined that the CAT evaluation was appropriate but indicated that if he had been working with the student at the time he would have advocated for a different evaluation at that time (Tr. p. 151).

The special factors section of the student's June 18, 2018 IEP indicated that she required an assistive technology device or service, and the use of a magnifier was included in the recommended special education programs and services (Dist. Ex. 11 at pp. 5, 8). The management needs section of the June 2018 IEP referenced the student's need for enlarged materials and access to magnification and one annual goal referenced the student's use of handheld magnification (id. at pp. 4, 6). The student's IEP included a testing accommodation that allowed the student access to low vision aids, such as personal handheld magnifiers, in order to access testing material at an appropriate size (id. at p. 9). The recommended assistive technology trial of a tablet with specialized reading applications was not reflected on the June 2018 IEP (see id.).

In her affidavit, the parent indicated that she was perplexed that the June 2018 CSE only recommended vision education services for the student, as the assistive technology evaluation had recommended a trial period with the tablet (Parent Ex. F at p. 4). The parent also indicated that the magnifier was not significantly helpful for the student (id.). She testified that she was told the trial period with the tablet would commence in fall 2018 and that the CSE would revisit the assistive technology recommendations later (id.). The parent testified that initially the student's

¹⁶ Diagnostic evaluations and programming can provide very useful information about potential services from which a child may benefit but cannot be otherwise obtained with reliability, but aligning the approach with IDEA's procedures can be a challenge and authorities have taken differing viewpoints of diagnostic placements in that regard.

vision services provider worked with the student using a tablet in school to better access the classroom curriculum (*id.* at p. 6). She noted that ultimately the provider concluded that the student would do better with a laptop than a tablet and he "was kind enough to facilitate this for her towards the end of 2018-19" (*id.*). She noted that the vision services provider "went out of his way to make sure [the student] had an appropriate [assistive technology] device" (*id.*). The parent testified that she did not believe the student could access visual information in the classroom because the student told her on multiple occasions that she could not see the board, that teachers were not moving her to the front to the classroom, and that she did not want to use her magnifying dome (Tr. p. 261). She noted that the student reported that the magnifier was not useful and she did not use it (Tr. p. 278). In addition, the parent reported that she heard from the student's teachers and vision services provider that the equipment the student had was not working for her because she was either not able to use it or was not using it (Tr. p. 261). The parent could not recall when she was first told that the student was not using the magnifier but noted that she did not remember ever hearing that the student was using the dome adequately (Tr. p. 262; *see also* Tr. p. 265). The parent asserted that once a week vision services were not enough for the student because she was not using her magnifier and she needed push-in services to help her use her devices more appropriately (Tr. pp. 264-65).

The IEP teacher who participated in the June 2018 CSE meeting testified that she could not recall how the CSE came to recommend that the student be provided with a magnifier (Tr. pp. 52, 62). She confirmed that the recommendation in the June 2018 assistive technology evaluation for an iPad linked to a Smart board or CCTV was not included in the student's IEP (Tr. pp. 89-90).¹⁷ The IEP teacher indicated that based on the June 2018 technology evaluation description of the student's posture and attitude, it did not appear that the student was reluctant to accept her limitations in terms of her vision, but rather that the evaluator was describing three different ways that the student looked at a book – one consisted of looking at printed material, the second of looking at materials with a magnifier, and the third one looking at materials with a tablet (Tr. pp. 91-92). She acknowledged that the document indicated that the student sat in a better position when she used the tablet (*id.*). She confirmed that the IEP recommended services did not include the recommendation for a tablet (*id.*). She further acknowledged that the IEP recommended the use of a magnifier, which according to the June 2018 assistive technology evaluation did not improve the student's reading or posture (Tr. pp. 92-93; *see* Dist. Ex. 13 at p. 4). She could not recall if anything was recommended to improve the student's keyboarding skills and was unaware if large print materials were provided to the student in the classroom or how the IEP was implemented in general (Tr. pp. 93-94).

The vision services provider confirmed that the June 2018 IEP included a recommendation that the student be provided with a magnifier (Tr. p. 120; Dist. Ex. 11 at p. 8). He noted that the student had the magnifier when he started working with her in October 2018 (Tr. pp. 119-20). He recalled that he spoke with the student's classroom teacher about the student's use of the magnifier in the classroom and the teacher indicated that the student did not need the magnifier all the time but that, when the student had difficulty with certain texts or viewing, she would opt to use it (Tr. pp. 120-21). The vision services provider noted that there was a learning curve involved with the

¹⁷ As noted above, the June 2018 assistive technology evaluation reflected the recommendations made by the Lighthouse Guild with respect to CCTV but the CAT evaluator indicated that the student would not benefit from such sophisticated equipment at that time (Dist. Ex. 13 at p. 1).

student learning to use the magnifier because she did not have any device prior to the magnifier and did not think she was visually impaired; therefore, she had to acclimate to using equipment to see better (Tr. p. 121). The vision services provider reported that when he first met the student she was in a classroom where a lot of the classwork was provided at the desk (Tr. p. 109). In addition, there was some group instruction where all of the students would sit close to the teacher in the front of the class (*id.*). The vision services provider reported that, at the time, the student was using the dome magnifier and was viewing things a little bit closer than she needed to (Tr. pp. 109-10). She would bend her head over or hold things closer to her eyes to view them (Tr. pp. 109-10). The vision services provider noted that based on the June 2018 assistive technology evaluation the student had been provided a tablet, which fulfilled some of her needs, but in spring 2019 it was concluded that she would need more assistance (Tr. p. 111). The vision services provider noted that as the year went by the text/materials provided to the class progressively got a little bit smaller and he was aware the student would need more assistance and possibly the use of more technology to access her schoolwork (Tr. p. 110). He indicated that as a result, the staff decided that the student would need a District 75 assistive technology evaluation (Tr. p. 112).

A CSE convened on May 30, 2019 and developed a revised IEP with a projected implementation date of June 7, 2019 (Dist. Ex. 9). According to the present levels of performance, the parent was concerned that the student was reluctant to use the tools she required to compensate for her visual impairment and suggested the student be provided with a companion dog (*id.* at p. 1). The IEP stated that the student was interested in using technology to assist with viewing text and pictures that she could not view clearly, but also stated that the student would not consistently interact with technology so that it benefitted her (*id.* at p. 2). According to the IEP, the student was able to compensate for her "visual barriers" by using low tech devices such as a dome magnifier or by getting closer to the curriculum being displayed (*id.*). The IEP also noted that the student relied on her classmates to describe what was seen (*id.*). With respect to the student's management needs, the IEP indicated that the student needed a method of viewing text and other school curriculum at her desk and at a distance in a manner that paralleled her peers (*id.*). The IEP further indicated that the student needed to use a magnification device for reading small print and noted that as her reading level increased the print size decreased in the books she viewed (*id.*). The IEP stated that the student needed to use e-books on a tablet more efficiently and the use of a screen sharing program needed to be revisited to determine its appropriateness (*id.*). According to the IEP, a technology evaluation was planned for fall 2019 to determine if the student had matured to the point where she could use devices effectively (*id.*). The special factors section of the May 2019 IEP indicated that the student did not need an assistive technology device or service, and none was listed under the recommended special education programs and services (*id.*). However, the student's IEP goals targeted her ability to read e-books using a tablet and her ability to use a screen sharing program to view classroom presentations (*id.* at p. 4). In addition, the student's testing accommodations indicated that the student should have access to low vision aids such as personal, handheld magnifiers or CCTV in order to access testing material in an appropriate size (*id.* at p. 7).

The vision services provider reported that the recommendation for vision education services in the May 2019 IEP remained the same as in the prior IEP because the student had shown some progress using her magnifier and tablet and she was able to access a lot of the school curriculum with these tools (Tr. pp. 124, 127). He noted, however, that there was some limitation with regard to their use (Tr. p. 127). The vision services provider explained that the tablet was

provided through the CAT team and even though the student was able to take screen shots and view electronic digital books and "somewhat effectively" use it for taking shots of what was happening at the front of the classroom for later use, she still experienced some difficulty with using an electronic device in the way it was expected (Tr. p. 126). More specifically, the vision services provider noted that the student would take pictures of her classmates and use the tablet as a toy (Tr. pp. 128-29, 162-63). He reported that staff tried to curb this behavior and have the student use her tablet for the sole purpose of accessing the school curriculum and books (Tr. p. 125). With regard to why no assistive technology device was listed on the student's May 2019 IEP, the vision services provider explained that the tablet was provided to the student by the CAT team for temporary use to see how she would respond to it (Tr. p. 129). He noted that the student had the CAT tablet when he started working with her in October 2018 and when it needed to be returned later that fall, he provided the student with a tablet through his own department (Tr. p. 130). The vision services provider reported that the CAT team had recommended the use of the tablet on a trial basis (*id.*). He noted that at the time of the May 2019 CSE meeting the trial period of the tablet had ended but the District 75 assistive technology evaluation had not yet taken place (Tr. p. 131). The vision services provider reported that on the tablet he had included applications that he wanted to try with the student related to word processing and note taking and had a screen sharing application for front-of-the-class presentations (*id.*). He explained that the team wanted to find out if the tablet was going to be a viable option for the student because one month (the CAT trial period) was a short time for a student to try a piece of equipment and he wanted to extend that time (Tr. 131; *see* Dist. Ex. 13 at p. 5). The vision services provider reported that staff extended the trial period through spring and the time of the CSE meeting (Tr. pp. 131-32). The vision services provider reported that there was never a time that the student was without assistive technology for her vision (Tr. p. 132).

A second "Educational Vision Services" (EVS) assistive technology evaluation was conducted on October 15, 2019 by the student's vision services provider, who was also a "tech solutions evaluator and turnkey trainer" (Tr. p. 136; *see also* Dist. Ex. 8). In his evaluation report, the vision services provider indicated that the student struggled to view text and other school curriculum information presented on either the white board or Smartboard in front of the classroom (Dist. Ex. 8 at p. 1). He reported that when text was two inches in size and in high contrast the student could view items from a distance of 5-6 feet (*id.*). He noted, however, that text on the Smartboard was one inch in size (*id.*). According to the vision services provider, when the student shifted her gaze between the text presented in the front of the classroom and her notebook, she could not effectively refocus the numerous times required to effectively take notes or complete assignments presented (*id.*). The vision services provider reported that when viewing text on handouts and books the student could decipher 12-point print from a 6 inch distance but she reported fatigue after 2-3 pages of reading (*id.*). According to the vision services provider, when provided with enlarged text using a CCTV digital magnifier the student could effectively view and sustain reading for over 20 minutes without major fatigue issues (*id.*). In addition, when using the distance viewing component of the CCTV the student could effectively adjust the movable lens to see text and other images presented at a 6-12 foot distance (*id.*). With regard to the student's visual functioning, the vision services provider stated that when completing reading and writing exercises presented on worksheets in 10-point font the student was able to view text using the CCTV when adjusted based on her preferred viewing size and contrast (*id.*). In addition, when viewing items and text presented in the front of the classroom the student could use the distance functions of the CCTV effectively, adjusting the contrast setting to black text on a green or blue background so

that the image was not overwhelmingly bright (id.). The vision services provider reported that when writing under the CCTV the student spent more time on carefully constructing her letter forms so as to complete neater text (id.).

In his EVS assistive technology evaluation report, the vision services provider indicated that the student had limited computer experience but completed web searches for information and participated with her class on educational web sites (Dist. Ex. 8 at p. 1). The vision services provider reported that the student was developing keyboarding skills and was able to access a variety of applications by navigating with key commands and with an enlarged cursor (id.). He concluded that a CCTV would allow the student to adjust the size and contrast of printed school materials (id. at p. 2). He noted that the student could comfortably read books in paper and e-book format in 12-14 point font size and although the student preferred standard print books, the books she was reading were not always available in a size that was workable for extended reading (id.). The vision services provider reported that the student showed a preference for using the CCTV when completing worksheets as it contained an illumination source (id.).

The vision services provider recommended that the student be provided with a CCTV for home and school and noted that she would benefit from learning accessibility features available in the computer operating system as well as those built into applications such as word processors and web browsers (Dist. Ex. 8 at p. 2). He indicated that the CCTV would provide the student with immediate and independent access to curricular materials and presentations projected on to the board (id.). He also noted that the student should work with her vision teacher to improve her keyboarding skills (id.). Included in his EVS assistive technology evaluation report was information regarding how to record assistive technology recommendations on the student's IEP (id. at pp. 2-3).

The vision services provider testified that he participated in the November 16, 2019 CSE meeting which was held for the purpose of adding the results of the assistive technology evaluation to the student's IEP (Tr. pp. 133-34). The provider described CCTV as a device that could take a picture of printed text and present it on a screen at eye level which enabled a person to sit straight and not have to bend over to view text (Tr. pp. 134-35). He indicated that the device enabled the individual to change font size, increase or decrease polarity, choose a colored or white background, choose different colored texts, and included a reading line to keep on a certain reading platform (Tr. p. 135). He indicated that some CCTVs also included a lens that could flip up and point toward the front of the room where other material and texts were presented, and the image could be pulled in and shown on a screen several inches away from the individual and be manipulated in the same way (Tr. p. 135). He noted that as compared to the tablet, the CCTV allowed a student to stay in their seat rather than get up close to the front of the room and take pictures (Tr. p. 136). The vision services provider noted that it also had a larger screen so that more text could be presented (id.). According to the vision services provider, if a student had difficulty filling in a worksheet, the CCTV screen allowed the student to see their hand and pencil filling in the worksheet in an enlarged fashion (Tr. p. 136). He noted that the tablet did not have the capabilities of the CCTV (id.). The provider reported that the student was provided with devices for both home and school (Tr. pp. 136-37). He indicated that the school device was provided to the student the first day of school while the home device was provided sometime around the November 2019 CSE meeting (Tr. p. 137). The vision services provider testified that the student had both home and school devices before the November 2019 IEP was created and that the IEP formalized the recommendation (id.).

The parent indicated she believed the student would have benefitted from "push in" vision services to guide her in using assistive technology in real time during classes (Parent Ex. F at p. 5). The parent acknowledged that a second assistive technology evaluation was conducted in October 2019, which recommended the use of a CCTV for the student and that the CSE met in November 2019 to consider the results of the October 2019 assistive technology evaluation (id.).

According to the student's vision services provider, when schools closed in March 2020 due to the pandemic, staff worked with the student remotely (Tr. p. 138). He explained that he provided services to assist the student with accessing the Google Docs classroom platform and show her how to shuffle through assignments and open PDFs (id.). He noted that the student still had issues with technology, including using a laptop with a qwerty keyboard, but that she had to quickly master the technology (id.). He recalled that the student was using an iPad for Google Docs at the time and was having difficulty split screening with open documents and trying to type up her work at the same time (id.). The vision services provider reported that he provided the student with a laptop and the student gained proficiency "quite quickly" in the late spring and early summer (id.). He testified that the student would not have been provided with the laptop if the school had not been closed (Tr. p. 139). The vision services provider testified that from fall 2018 to fall 2019 he had been giving the student some computer lessons and had tried to promote keyboarding as well as how to navigate between programs and how to search the internet, but the student liked to play around and was not ready for the structure of a computer (id.). He stated, however, that when the pandemic hit the student "suddenly blossomed and eased into it very quickly," noting that "it was a matter of necessity at that point" (Tr. p. 140). The vision services provider indicated that the school closing had an impact on the student's learning how to use the screening, built in magnification and Zoom features effectively on a small screen and that navigating with the mouse was very difficult (id.).

The vision services provider testified that there was never a time between October 2018, when he began working with the student, and the end of the 2019-20 school year when the student did not have an appropriate device for her disability or that the student was unable to access the curriculum because of her disability, even when the school closed, and she quickly had to learn new technology (Tr. p. 242). The vision services provider reported that he primarily trained the student to use technology along with the classroom teacher and other providers, including an occupational therapist (Tr. pp. 142, 159-60). He reported that the student was bright, curious, interested, and able to complete a lot of the tasks they worked on (Tr. pp. 144, 150). He noted that the student was also interested in being able to see better (Tr. p. 144). The provider reported that during the time he worked with the student he was in contact with the student's mother "every couple of months" via CSE meetings, emails and phone calls (Tr. p. 145). He recalled that during the CSE meeting the parent expressed concern that the student might need more assistance and raised the possibility of a service dog (Tr. pp. 145-46). The student's vision services provider opined that the training the student received on the different devices she used was sufficient (Tr. p. 148). He further opined that he did not believe she should have received more training because the student displayed the ability to use the CCTV for near point and distance viewing, and the student learned how to download electronic e-books and complete some internet searched to find information (id.).

The student's vision services provider was not aware how much time per week the classroom teacher worked with the student on using the iPad applications (Tr. pp. 161-62). He reported that the student had some discomfort accepting that she had a disability which was

evidenced by her reluctance to use the dome magnifier, even though she may have benefited from it, and that the student did not use the picture taking ability of the tablet as much as she could have or should have (Tr. p. 162).

The vision services provider reported that the student was using the tablet appropriately sometimes and sometimes she was not (Tr. p. 167). He explained that he did not recommend the laptop for the student even though she was being distracted by the iPad because there was a year between the two and having to work with the student remotely was much different than when she was in school and there were no other classmates around which would cause her to be more playful (Tr. p. 168). He said stated he did not know if the student might have benefitted from more key boarding instruction (Tr. p. 169). He reported that he worked with the student on keyboarding in some sessions in 2019, sometimes for the whole session and he recommended that follow-up be done with on-line typing programs at home (id.).

Regarding the student's need for assistive technology, the IHO failed to conduct a prospective analysis of whether the IEPs were appropriate at the time that they were drafted based on the information before the respective CSEs (IHO Decision at pp. 2-4). Instead, the IHO focused on evidence that the district provided the student with assistive technology that was not listed in the IEPs, which evidence was impermissibly retrospective in that it related to "additional services beyond those listed in the IEP" (R.E., 694 F.3d at 186). Likewise, because an IEP must be evaluated prospectively as of the time it is created, it was inappropriate for the IHO to rely on the student's progress to conclude that the IEP was appropriate (id. at 186-88).

Nevertheless, without factoring the retrospective evidence relied upon by the IHO into my calculus, the hearing record supports a finding that the recommendations of the June 2018 CSE regarding assistive technology were appropriate. As discussed in detail above, the June 2018 CSE relied on the recommendations of the June 2018 assistive technology evaluation and those recommendations were reasonable based on the information before the evaluator and the CSE.

However, the evidence in the hearing record does not support a finding that the May 2019 CSE's decision to not recommend any assistive technology for the student was appropriate. The May 2019 CSE knew that the student had assistive technology needs at the time it created the IEP (Dist. Ex. 9 at p. 2). Nonetheless, the CSE indicated that it would conduct an assistive technology evaluation at the start of the next school year. The CSE did not conduct the assistive technology evaluation until October 15, 2019 (see Dist. Ex. 8) and did not modify the 2019-20 IEP until November 6, 2019 (Dist. Ex. 5). The district failed to create an appropriate IEP to meet all of the student's needs by failing to recommend assistive technology services on the student's May 2019 IEP. Based on this failure to have recommended all of the necessary services prior to the start of the 2019-20 school year, the student was denied a FAPE for part of that school year. Thereafter, the CSE rectified this failure when it modified the IEP on November 6, 2019 and recommended assistive technology services (id. at p. 10).

Despite the denial of FAPE arising from the May 2019 IEP, I find that there is no relief to be granted under these circumstances. While the IHO erred in relying on evidence of the assistive technology supports that the district provided to the student that had not been listed on the IEP and of the student's progress in order to evaluate the district's offer of a FAPE, such evidence is germane to examining the need for a remedy. That is, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch.

Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Smith v. Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018] [noting that "a child must have 'lost progress' or a need for education 'restor[ation],' or else the child may be deemed 'whole' and no educational services may be necessary] [internal citation omitted] [alterations in the original], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Moreover, the parent has not requested specific relief related to assistive technology, instead confining her request to compensatory education to make-up for alleged deficiencies in district's recommendations related to the student's social/emotional needs and vision services (see Parent Mem. of Law at pp. 26-30). Accordingly, an award of compensatory education is not warranted to remedy the denial of a FAPE arising from the assistive technology recommendations in the May 2019 IEP.

D. Vision Services

Regarding vision services, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly determined that the district recommended and provided appropriate vision services to the student during the 2018-19 and 2019-20 school years (see IHO Decision at pp. 3-4). The IHO accurately recounted the facts of the case, set forth the proper legal standard to determine whether the district offered the student a FAPE, and applied that standard to the facts at hand (*id.* at pp. 3-4, 7). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (*id.*). Thus, the conclusions of the IHO relating to the vision services recommended for the student are hereby adopted.

Additionally, the IHO ordered three hours of compensatory vision services for the district's failure to provide these services for the first six weeks of the 2018-19 school year (IHO Decision at p. 8). The IHO noted that the hearing record was devoid of any evidence "as to how much compensatory services were necessary to make up for that failure" and therefore, the IHO awarded the services that the student would have received had the district provided them (*id.*). The IHO recommended that the district's vision services provider provide the student these make up services (*id.*). The district, in its cross-appeal, contends that the IHO erred by granting these three hours of compensatory education services, arguing that the IHO failed to engage in a fact-specific inquiry, but simply engaged in a 1:1 calculation. Moreover, the district argues that the IHO failed to find that these additional services were necessary for the student to be placed in the position that she would have been had the services been provided. The district contends that the student does not require compensatory vision services because she progressed during the 2018-19 school year and was performing at grade level.

Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [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 Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding

that, in 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]). Accordingly, an award of compensatory education 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"]; 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. of Fayette County 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"]).

Here, the district's arguments regarding the awarded three hours of compensatory vision services are wholly without merit. Initially, at the impartial hearing and in its post-hearing brief, the district conceded that it did not offer the student any vision services for first few weeks of the 2018-19 school year and that the student was entitled to compensatory services for this failure (Tr. p. 39; Dist. Post Hr'g Brief at p. 2). The district also failed to provide any evidence to demonstrate how much compensatory education should have been awarded to the student due to this failure to provide services. Nevertheless, the district is now attempting to reverse course away from this concession by cross appealing the IHO's decision.

With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]). The failure to provide six weeks of vision services to a legally blind student was a material deviation from the IEP and the IHO properly awarded compensatory services for this failure. Further, I see no reason to overturn the IHO's award of a 1:1 compensatory education for the missed vision services. The district has not demonstrated that the IHO abused her discretion by applying this method to calculate compensatory educational services, particularly given the district's failure to propose alternative calculations. Accordingly, the IHO's award of compensatory vision services will not be disturbed.

E. Independent Educational Evaluations

The parent asserts that the IHO erred by not ordering reimbursement for the neuropsychological IEE. The parent contends that district agreed that she was entitled to reimbursement and that there was no genuine issue for the IHO to resolve. The parent also argues

that the district's claim that reimbursement should be limited to \$5,500 rather than the full \$6,500 is not based on any evidence and is contrary to the law. Moreover, the parent asserts that she properly sent the request for the IEE to the district, and even if she did not, the request in the due process complaint notice constituted additional notice of the request. In its answer, the district acknowledged that parent is entitled to reimbursement of the neuropsychological IEE but continues to argue that reimbursement should be limited to \$5,500. The district asserts that the parent did not enter proof of payment into the hearing record and the only evidence regarding payment was her testimony, which was not sufficient proof.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the district has conceded that the parent is entitled to reimbursement for the neuropsychological IEE and that the IHO erred by denying such reimbursement. Thus, the IHO's decision will be modified to reflect the district's concession and the only genuine issue before me is whether the parent's request for reimbursement should be limited to \$5,500 rather than the full \$6,500 requested.

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent

evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In this instance, the parent is entitled to full reimbursement of \$6,500 as the district failed to submit any evidence into the hearing record to support its request that the cost for the evaluation be capped at \$5,500. During the impartial hearing, the district stated its position that reimbursement for the IEE should be capped at \$5,500 based on the district's offer to fund this amount during the resolution session (see Tr. pp. 37-38; Dist. Ex. 3). However, the district made no argument that \$6,500 was outside of its cost criteria or that such amount was excessive.¹⁸ Further, the district did not present any evidence that demonstrated the parent's request was unreasonable or exorbitantly high. Nor did the district offer any evidence regarding its IEE reimbursement policy or cost criteria or whether such policy or criteria was ever provided to the parent. Moreover, the district failed to refute the parent's testimony that she paid \$6,500 for the neuropsychological IEE. Therefore, the IHO's decision denying reimbursement for the neuropsychological IEE is reversed and the district will be required to reimburse the parent for the full cost of the neuropsychological IEE, upon proof of payment.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the IHO erred in finding that the district offered the student a FAPE for the entirety of the 2018-20 and 2019-20 school years in that the district's failure to implement the student's vision services for the first six weeks of the 2018-19 school year consisted a material deviation from the IEP that rose to the level of a denial of a FAPE. In addition, the inappropriate assistive technology recommendations in the May 2019 IEP denied the student a FAPE for the period of time that the May 2019 IEP was in effect until it was superseded by the November 2019 IEP. However, the IHO's award of compensatory vision services will not be disturbed. Finally, for the reasons set forth above, the district will be required to reimburse the parent for the full cost of the September 2020 neuropsychological IEE, upon proof of payment.

THE CROSS-APPEAL IS DISMISSED.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

¹⁸ State regulation concerning IEEs provides that, if a parent requests an IEE, the district must either ensure the IEE is provided at public expense "or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria" (8 NYCRR 200.5[g][1][iv] [emphasis added]; see 34 CFR 300.502[b][2][1]-[ii]).

IT IS ORDERED that the IHO's decision, dated July 8, 2021, is modified by reversing those portions which found that the district offered the student a FAPE for the first six weeks of the 2018-19 school year and for that period of time between the implementation dates of the May 2019 and November 2019 IEPs and which found that the parent was not entitled to district funding of the September 2020 neuropsychological IEE; and

IT IS FURTHER ORDERED that the district shall be required to reimburse the parent for the full cost of the neuropsychological IEE, upon submission of proof of payment.

Dated: **Albany, New York**
 October 7, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER