The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-190

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

Appearances:
Law Office of Anton G. Cohen, PC, attorneys for petitioner, by Anton G. Cohen, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for related services and reimbursement for the cost of a speech-language evaluation. The 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

During the 2019-20 school year, while attending a universal pre-kindergarten (UPK) program, the student was referred to the Committee on Preschool Special Education (CPSE) for an initial evaluation and to determine his eligibility for special education services (Parent Exs. G at pp. 1, 4; H at p. 1; J at p. 1; Dist. Exs. 3 at p. 2; 4 at pp. 1, 4; 6 at p. 1; 9 at p. 1).[1]

On December 11, 2019, the CPSE convened for an initial meeting regarding the student's eligibility for special education services (see Dist. Ex. 13). The CPSE determined that the student

[1] Although bilingual (Ukrainian/Russian/English), the student did not require a bilingual program (Parent Exs. G at pp. 1-2; H at pp. 1-2; J at p. 1; Dist. Exs. 3 at p. 1; 4 at pp. 1-2; 5; 6 at p. 1; 9 at pp. 1-2; 13 at p. 1; 31 at p. 3).

was eligible for special education services as a preschool student with a disability (id. at p. 1). The student's overall intelligence was found to be in the mildly impaired range with very poor scores in cognitive, receptive language, expressive language, and social/emotional areas; average scores in adaptive functioning; below average scores in gross motor skills; and poor fine motor skills scores (id. at p. 3).[2] The December 2019 CPSE recommended a daily 60-minute program of individual special education itinerant teacher (SEIT) services, together with two 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 13).[3]

For the 2020-21 school year (kindergarten), the CSE convened on April 24, 2020 (see Pendency Dist. Ex. 2).[4] The CSE determined that the student was eligible for special education and related services as a student with a speech or language impairment (id. at p. 1). The student's management needs were described as that he "benefit[ed] from a small environment with small student to teacher ratio that utilizes a multi-modal, systemic instruction learning approach" (id. at p. 7). The April 2020 CSE recommended an 8:1+1 special class placement in English language arts (ELA), math, social studies and science in a District 75 specialized school (Dist. Pendency Ex. 2 at pp. 15-16, 20; Dist. Exs. 21 at p. 2; 22 at p. 1). In addition, the April 2020 CSE recommended one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy (Dist. Pendency Ex. 2 at p. 16). The April 2020 CSE also recommended supplementary aids and services consisting of special seating arrangements, extra time to complete assignments, multi-sensory approach, and manipulatives (id.). Lastly, the April 2020 CSE recommended 12-month services for the student (id. at p. 17).

At the April 2020 CSE meeting, the parent expressed concerns, indicating that the student did not require special education services, should not be classified with the disability category of autism, and should be placed with nondisabled peers (Dist. Pendency Ex. 2 at p. 22). As a result,

[2] The school psychologist that conducted the bilingual psychological evaluation noted in her report that "[t]esting materials are not available in standardized form for the children with bilingual and bicultural background. Use of standardized scores would be inaccurate and misleading due to the lack of validity and reliability of appropriate test materials. Therefore, in compliance with IDEA 2004 and NYSED Guidelines, the results are provided based on 'Informed Clinical Opinion' and presented in a descriptive form" (Parent Ex. G at p. 2; Dist. Ex. 4 at p. 2). Similarly, this was noted by the educational evaluator who conducted the bilingual educational evaluation stating that results should be "interpreted with caution because standardized procedures and appropriate norms are not available to represent this population" (Parent Ex. J at p. 1; Dist. Ex. 6 at p. 1).

[3] The continuum of services for preschool students with disabilities includes special education itinerant services, which are services provided by a certified special education teacher of an approved program on an itinerant basis (8 NYCRR 200.16[i][3][ii]; see Educ. Law 4410[1][k]).

[4] During the impartial hearing, while the parent maintained the consecutive sequence of her exhibits from the pendency hearing, the district marked its exhibits with conflicting numbering with the exhibits previously entered during the pendency portion of the impartial hearing; for clarification, the district's exhibits that were entered during the pendency portion of the hearing will be referenced as "Pendency" exhibits (Parent Exs. A-R; Dist. Pendency Exs. 1-2; Dist. Exs. 1-32). For example, during the pendency hearing, the district offered into evidence the April 24, 2020 IEP as exhibit 2 which was admitted into evidence (Tr. pp. 29, 55). Therefore, citations to the April 24, 2020 IEP will note it as a pendency exhibit (Dist. Pendency Ex. 2). Additionally, there are duplicate page numbers in the hearing transcript (see Tr. pp. 235-236).

the parent "opted to place [the student] in his home zone community school" which did not offer the special education programing recommended in the April 2020 IEP (Dist. Ex. 31 at p. 3).[5]

A. Due Process Complaint Notice and Impartial Hearing Officer Decisions

In a due process complaint notice, dated June 28, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years (see Parent Exs. A).[6]

During the resolution period, the parent and district agreed to have the district conduct an assistive technology evaluation of the student (Dist. Ex. 23).[7] This was agreed upon as a "partial settlement" of the claims contained in the parent's due process complaint notice dated June 28, 2020 (id.).

After the resolution period concluded for the initial June 28, 2020 due process complaint notice, an impartial hearing was convened on December 17, 2020 (see Tr. pp. 1-13; Parent Ex. A). However, at the time of the initial hearing date, the parent and the student were not in the country, having left the country in October 2020 (Tr. pp. 3-10). The parties reconvened for a telephone conference on January 27, 2021, at which time the parent appeared and counsel for the parent confirmed that the parent and student had by that time returned to the country (Tr. pp. 14-27).

The parties appeared for a further prehearing conference on January 29, 2021 to discuss an interim decision for an independent neuropsychological evaluation and the student's placement for the pendency of the proceeding (Tr. pp. 28-64). At the conclusion of the January 29, 2021 conference, the IHO issued an interim decision ordering the district, as per an agreement, to "[f]und the cost of [an] Independent Comprehensive Neuro-Psychological Evaluation in Bilingual Russian not to exceed the cost of Five Thousand Dollars" (IHO Ex. IV). The IHO also issued an interim decision directing that the student's placement for the pendency of the proceeding would consist of placement in a general education class at the student's community school but with the special education services that had been proposed in the December 2019 IEP (IHO Ex. III).

Status conferences took place on February 25, 2021, March 17, 2021, and April 8, 2021, during which the parties discussed the completion of an assistive technology evaluation and the independent neuropsychological evaluation, as well as a reconvene of the CSE to discuss the results of the neuropsychological evaluation report (Tr. pp. 65-108).

---

[5] The decision to enroll the student in a community school rather than in the special class placement proposed by the district was described in a subsequent IEP developed in April 2021.

[6] In the due process complaint notice dated June 28, 2020, the parent requested that if the impartial hearing had not concluded before the end of the 2020-21 school year, "the requested relief should apply to the 2021-[]22 school year" (Parent Ex. A at p. 5).

[7] The assistive technology evaluation was conducted on March 19, 2021 (see Dist. Ex. 28).

The independent neuropsychological evaluation was conducted in February and March 2021 and the report was completed on March 16, 2021 (Parent Ex. M at p. 1).[8]

The CSE convened on April 5, 2021 and reviewed the results of the March 2021 neuropsychological evaluation (Dist. Ex. 31 at pp. 1-11, 26). The April 2021 CSE noted the student's recent medical diagnoses of autism with a language impairment and attention deficit hyperactivity disorder (ADHD) (id. at pp. 1, 13). The April 2021 CSE changed the student's disability classification to autism (id. at p. 1). The April 2021 CSE continued to recommend an 8:1+1 special class placement in ELA, math, social studies, science, and adapted physical education in a District 75 program (Dist. Exs. 31 at pp. 21, 28; 32 at pp. 1-2). Additionally, the April 2021 CSE recommended one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 60-minute monthly session of parent counseling and training (Dist. Ex. 31 at p. 21). The April 2021 CSE recommended a dynamic display speech generating device for use by the student throughout the school day and at home (id. at p. 22). Lastly, the April 2021 CSE found the student eligible for 12-month services (id.).

A speech-language evaluation was conducted in April 2021, to determine if the student's current speech-language mandate was appropriate and if the student was a candidate for PROMPT therapy (Parent Ex. N at p. 1).

The parties convened for additional status conference on April 26, 2021, May 4, 2021, and May 10, 2021 (Tr. pp. 109-234). During the conferences, the parties discussed the parent's request to amend the due process complaint notice; however, the district objected to any claims regarding the 2021-22 school year and the IHO was opposed to taking any evidence or making any determinations with respect to claims for the 2021-22 school year (Tr. pp. 115, 153, 159, 187-96). After some discussion, parent's counsel agreed to remove any claims for the 2021-22 school year and the district agreed to consider accepting the amended due process complaint notice with the 2021-22 school year claims removed (Tr. pp. 201-16).

In a May 10, 2021 amended due process complaint notice, the parent initially addressed her concerns pertaining to the December 2019 IEP (Parent Ex. R at pp. 2-3). Specifically, the parent alleged that the "frequency of the recommended services and the functional appropriateness of the speech and language therapy goals, were grossly insufficient" to provide the student with a FAPE for the 2019-20 school year (id. at p. 3). The parent also alleged that the pandemic "compromised" the student's receipt of the services recommended in the December 2019 IEP (id.). In addition, the parent argued that the district failed to evaluate the student in "all areas" of "his suspected disability" and consequently, the CPSE failed to recommend an applied behavior analysis (ABA)-based preschool program with home-based services on a 12-month basis (id.).

[8] The hearing record contains multiple duplicative exhibits. For example, both the district and parent entered copies of the March 2021 neuropsychological evaluation report into evidence (Parent Ex. M; Dist. Ex. 27). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are similar or identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

Next, the parent argued that the April 2020 IEP was "procedurally and substantively deficient" as the CSE failed to properly evaluate the student and failed to recommend an "ABA-based school" (Parent Ex. R at p. 3). According to the amended due process complaint notice, although the parent had requested an independent neuropsychological evaluation of the student at the April 2020 CSE meeting, the district did not authorize the evaluation until January 29, 2021 (id. at pp. 3-4).

In connection with the April 2021 CSE meeting, the parent claimed that the CSE rejected her request for placement of the student at an approved nonpublic school and continued to recommend an 8:1+1 special class in a District 75 program (Parent Ex. R at p. 4). The parent argued that the April 2021 CSE failed to follow the recommendations made in the March 2021 neuropsychological evaluation report, specifically identifying the recommendations for a nonpublic school, ABA instruction, home-based ABA, speech-language therapy five times per week, and OT three times per week (id. at pp. 5-6). The parent argued that the April 2021 CSE "accepted and fully relied" upon the March 2021 neuropsychological evaluation which indicated "clear consensus" that the student required the services in order to receive a FAPE (id. at p. 6). The parent also alleged that the April 2021 IEP failed to include activities of daily living (ADL) goals for development of the student's independence (id.). Further, the parent argued that the CSE had not performed a speech-language evaluation to develop appropriate speech-language goals and recommend appropriate services for the student (id. at p. 5). The parent argued that the April 2021 CSE "predetermined" the program recommendation which impeded the parent's ability to "meaningfully participate" in the CSE process (id.). Lastly, the parent argued that the April 2021 IEP was not timely implemented (id. at p. 6).[9]

As relief, the parent sought a finding that the district failed to provide the student with a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. R at pp. 6-7). The parent also requested a finding that the AHRC Brooklyn Blue Feather School (Blue Feather) was an appropriate placement for the student and requested prospective funding of tuition, related services, and transportation to and from Blue Feather for the remainder of the 2020-21 school year (id. at p. 7).[10] The parent argued that equitable considerations supported her claim for tuition reimbursement (id.). The parent also argued that she was entitled to "equitable relief" in the form of a "Nickerson Letter" for the placement of the student in a New York State approved nonpublic school (id.).[11] Additionally, the parent sought five hours per week of home-based special education teacher support services (SETSS) provided by a special education teacher or speech-

[9] The parent also alleged that the district failed to appoint an IHO to address the initial due process complaint notice, dated June 28, 2020, until November 2020, which "violated the parent's due process rights and denied her an opportunity to participate in the decision-making process" for the student for the 2020-21 school year (Parent Ex. R at p. 5).

[10] Blue Feather is a New York State approved nonpublic school (Tr. p. 251).

[11] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that resulted from a stipulation and consent order in a federal class action suit and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]).

language therapist trained in ABA (id. at p. 8).[12] The parent requested reimbursement for the cost of a speech-language evaluation (id.). Finally, the parent requested 14 months of compensatory education as follows: 20 hours per week of individual ABA "therapy" supervised by a board certified behavior analyst (BCBA), three 30-minute sessions per week of individual OT by a provider selected by the parent, and five 30-minute sessions per week of individual speech-language therapy using the PROMPT methodology by a provider selected by the parent (id.).[13]

The impartial hearing resumed on May 11, 2021 and continued for three additional hearing dates concluding on July 1, 2021 (Tr. pp. 236-823).

In a final decision dated July 30, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year but offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 16, 18).[14] The IHO noted in her decision that the parent's request for compensatory education was withdrawn and declined to award the parent any of the requested relief (id. at pp. 17-18).[15]

As an initial matter, the IHO found that the district had conceded that it did not offer the student a FAPE for the 2019-20 school year (IHO Decision at p. 7).

Turning to the 2020-21 school year, the IHO found the district school psychologist credible with respect to her opinions regarding the April 2020 IEP (IHO Decision at pp. 14-15). The IHO held that the school psychologist reviewed the documentation relied on by the April 2020 CSE, and therefore, could offer an opinion regarding the appropriateness of the April 2020 IEP (id. at p. 14). More specifically, the IHO relied on the school psychologist's opinion that the recommended 8:1+1 special class was appropriate and that the recommendations contained within the neuropsychologist's report could be provided in the recommended District 75 program (id. at p. 15). The IHO determined that the April 2021 CSE took into consideration and "followed many of the recommendations" contained in the March 2021 neuropsychological evaluation report but, held that the CSE was not required to follow "every recommendation" from the neuropsychological

[12] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

[13] The private speech-language pathologist testified that PROMPT therapy is "a tactile kinesthetic approach to speech therapy, meaning we use our hands with our clients to guide their muscles in order to improve their motor movements so that they can produce speech" (Tr. pp. 320, 338). The speech-language pathologist further described it as a "holistic program" that "links the social-emotional development, the language development, and the motor speech development all together so that those skills can be integrated for better functional outcomes" (Tr. pp. 320-21).

[14] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-23). As described above, the district marked its exhibits in a duplicative manner and the IHO's final decision also fails to contain a complete list of the documentary evidence received into evidence during the impartial hearing.

[15] The withdrawal of the compensatory education claims for the 2019-20 school year included "20 hours per week of individual one-to-one ABA therapy supervised by [a] BCBA, three hours of 30 sessions (sic) per week of individual OT by the provider of the parent's own choosing at the prevailing market rate, and [five] 30-minute sessions per week of individual PROMPT speech and language therapy by a provider of the parent's own choosing at the prevailing market rate for the denial of FAPE" (Tr. p. 817).

evaluation report (id.). The IHO cited case law to reason that a student is not entitled to the "best education" but an education "reasonably calculated" for the student to make progress (id.). Based upon the foregoing, the IHO held that both the April 2020 and April 2021 IEPs provided the student with a FAPE for the 2020-21 school year (id. at pp. 13, 16).

Next, the IHO held she did not need to address the appropriateness of the nonpublic school as she found a FAPE was offered by the district for the 2020-21 school year (IHO Decision at p. 16). However, she stated that "usually" she would not address the equitable considerations under these circumstances, but she felt "remiss" if the parent's actions were not noted (id.).[16] First, the IHO addressed the parent's placement of the student in a general education classroom at the community public school as it was closer to the student's home, despite knowing that the student required more support (id.). The IHO held that "[c]learly the student could not make educational progress in a general education setting and the IEP could not be implemented" (id.). Second, the IHO referenced that the parent removed from the country from October 2020 through January 2021, and it "appeared" that the student was not provided with any academic or related services during that time (id.). Based on the student not being in school from October 2020 to January 2021, the IHO held that "[a]ny regression" could not "be attributed to the actions" of the district (id. at p. 17).

The IHO next addressed the parent's request for a Nickerson Letter to allow the student to attend "any" New York State approved nonpublic school (IHO Decision at p. 17). The IHO held that this request was in the parent's amended due process complaint notice, and referenced in her closing brief and argument; however, the IHO held that the issue was not raised during the parent's direct case, and she did not submit any evidence to establish such relief (id.). Further, the IHO agreed with the district that the interim decision regarding the student's pendency placement remained in place during the proceedings and therefore, denied the parent's request for a Nickerson Letter (id. at pp. 17-18).

Finally, the IHO denied the parent's relief for tuition/funding at Blue Feather and her request for an order directing placement of the student at Blue Feather (id. at p. 18). The IHO also denied the parent's request for five 30-minute sessions per week of speech-language therapy, five hours per week of home-based ABA services, and reimbursement for the cost of the private speech-language evaluation (id.).

IV. Appeal for State-Level Review

The parent appeals seeking review of the IHO decision.

Of note, the parent raises facts in her request for review occurring after the close of the hearing. The parent asserts that on July 28, 2021, the district issued a Nickerson Letter providing her the right to place the student in a New York State approved nonpublic school. The parent then states that the "appropriateness" of Blue Feather is no longer in dispute because, on August 6, 2021, the district approved the student's placement at Blue Feather in an 8:1+4 special class with

[16] In the equitable considerations section of the IHO decision, the decision cuts off mid-sentence between pages; however, after inquiry into whether something was missing from the IHO Decision, the IHO confirmed that the decision was a "complete copy" (see IHO Decision at pp. 16-17).

one 30-minute session per week of individual counseling, two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of parent counseling and training.

The parent argues that the IHO erred in finding that the April 2020 IEP offered the student a FAPE for the 2020-21 school year. The parent argues that the April 2020 IEP was based on the "same inadequate evaluations" used to develop the December 2019 IEP and the district did not defend the IEP developed for the 2019-20 school year. The parent also argues that the IHO erred in "deferring" to the opinions of the school psychologist who did not participate in the development of the April 2020 IEP. However, the parent ultimately conceded that her "claims have been rendered moot by the passage of time, as the April 24, 2020 IEP [] expired," and the April 2021 IEP "superseded it."

Next, the parent argues that the IHO erred in finding that the April 2021 IEP offered the student a FAPE for the 2020-21 school year. The parent asserts that the district failed to implement the April 2021 IEP and failed to "offer the student an appropriate placement within 60 school days of his referral to the CSE." The parent then argues that the IHO erred in finding that the April 2021 IEP "was reasonably calculated to enable the student to make progress" because the IEP failed to recommend 1:1 or 2:1 ABA instruction for the student. The parent contends that the district's reliance on the neuropsychological evaluation coupled with the district's failure to present evidence contrary to the neuropsychological evaluation, mandated inclusion of ABA instruction on the April 2021 IEP. Similarly, to the parent contends that because the neuropsychologist recommended PROMPT speech-language therapy and home-based ABA, the CSE "was bound to include the recommended services" in the April 2021 IEP. In addition, the parent contends that any reliance on testimony of the district school psychologist that ABA was used in district schools was improper as it was retrospective.

The parent argues that the district should fund the cost of the speech-language evaluation and that although the private speech-language evaluation report was not presented at the April 2021 CSE meeting, it would "fill the gap in the administrative record" and provide "relevant and useful information" pertaining to the student's communication skills. According to the parent, since the district failed to evaluate the student in all areas of his disability, the district's attempt to preclude the private speech-language evaluation report is "baseless" (id.).

Lastly, the parent addressed the equitable considerations raised by the IHO. The parent contends that it was "absolutely reasonable" to place the student in the least restrictive environment (LRE) until he was properly evaluated, diagnosed, and recommended for specific services. The parent argues that the IHO's discussion regarding leaving the country for a period of time was a "biased attack" and a "baseless" argument. She argues that since the request for compensatory services was withdrawn, the IHO's findings with respect to the parent leaving the country should have no bearing on the requested relief (id.). Finally, the parent argues that if the district appointed an IHO within the timelines set forth in State regulations, "the student would have been evaluated and offered an appropriate program before the parent's trip to Ukraine."

The specific relief sought by the parent in this appeal is an order directing the district to amend the student's IEP to "recommend an appropriate educational placement" at Blue Feather and for the IEP to further specify the recommendations from the March 2021 neuropsychological evaluation report, including 1:1 or 2:1 ABA instruction and five 30-minute sessions per week of individual PROMPT speech-language therapy. The parent additionally seeks five hours per week of home-based ABA therapy and reimbursement for the cost of the private speech-language evaluation (id.).

In an answer, the district denies the material allegations set forth in the request for review. The district requests an affirmance of the IHO's decision that denied an order for a new IEP with placement at a New York State approved nonpublic school and denial of reimbursement for the speech-language evaluation.

The district argues that the IHO correctly found that the April 2021 IEP offered the student a FAPE by procedurally and substantively complying with the IDEA. The district maintains that it "stood ready" to implement the April 2021 IEP; however, the parent continued to enroll the student in a general education program at his community public school. The district argues that the recommendations by the neuropsychologist were considered by the April 2021 CSE, and some of the recommendations were placed on the IEP, but the CSE was not required to include all of the neuropsychologist's recommendations in the IEP. Additionally, the district argues that the IHO was "justified" in not directing the district to amend the IEP to include the student's placement at Blue Feather, home-based ABA, or PROMPT speech-language therapy as this is prospective relief which has the effect of "circumventing" the CSE process. The district confirms the parent's assertion that the district issued a Nickerson Letter permitting the parent to enroll the student at Blue Feather, which the district contends moots the parent's request for placement at Blue Feather. In terms of the home-based ABA, the district argues that the testimony of the neuropsychologist was that the services were to generalize the student's skills and that relief is "not required for [the student] to receive educational benefits." With respect to the parent's request for PROMPT speech-language therapy, the district argues that the recommendation was first made by the neuropsychologist who is not a speech-language pathologist and the recommendation from the private speech-language pathologist was made after the April 2021 CSE meeting, and therefore, the IHO's denial of the parent's request should be upheld.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[17]

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

VI. Discussion

A. 2020-21 School Year

Before addressing the relief requested by the parent, I must first address the parent's appeal from the IHO's determination that the district offered the student a FAPE for the 2020-21 school year. [18]

In connection with the 2020-21 school year, two IEPs were developed—April 2020 and April 2021 (see Dist. Pendency Ex. 2; Dist. Ex. 31). The IHO determined that both IEPs developed for the 2020-21 school year were "reasonably calculated to enable the [student] to make progress appropriate in light of the child's circumstances" and offered the student a FAPE (IHO Decision at pp. 15-16). On appeal, the parent concedes that the claims raised with respect to the April 2020 IEP have been "rendered moot by the passage of time" and the April 2020 IEP was "superseded" by the April 2021 IEP (Req. for Rev. ¶ 15; see Answer ¶ 16). Therefore, for purposes of this review the focus shall be limited to the April 2021 IEP.

Initially, the parent argues that based solely on the district's failure to implement the April 2021 IEP and its failure to offer the student an appropriate placement within 60 school days of the student's referral to the CSE, the district denied the student a FAPE (Req. for Rev. ¶ 16). The parent asserts that the IHO's interim order dated January 29, 2021 directing that the district fund an independent neuropsychological evaluation of the student "constituted a formal referral for review triggering the school district's obligations for placement within 60 school days" (id. n. 5; see IHO Ex. IV). Certainly, after the parent had the student evaluated in February and March

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

[18] Neither party appealed from the IHO's finding that the district denied the student a FAPE for the 2019-20 school year and therefore, this finding is final and binding on the parties and will not be discussed further, other than to the extent that it might impact the relief requested (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

2021, the CSE convened in April 2021 and reviewed the results of the evaluation (see Parent Ex. M; Dist. Ex. 31). The April 2021 IEP called for the special education and related services to be implemented starting April 19, 2021 (Dist. Ex. 31 at pp. 21-22). Prior written notice was sent to the parent on April 7, 2021 indicating that the program and related services would be put into place on April 21, 2021 and providing the parent with contact information to schedule a visit at the recommended placement site (Dist. Ex. 32 at pp. 1, 3). The parent had also received a school location letter prior to the start of the 2020-21 school year identifying where the special education program and related services recommended in the April 2020 IEP would have been implemented (Dist. Ex. 22). However, the district did not send a formal letter identifying the school which would have implemented the April 2021 IEP for the remainder of the 2020-21 school year. Such a failure may, at times, result in a denial of FAPE (see Application of the Dep't of Educ., Appeal No. 21-184). But notwithstanding that oversight, there are additional factors in this case that bear on the parent's implementation claim. First, at the time of the April 2021 CSE meeting, the student was receiving services pursuant to pendency because the parent had already initiated a due process proceeding which was ongoing (see IHO Ex. III). Additionally, the parent continued to object to the program recommended in the April 2021 IEP for similar reasons as the parent objected to the April 2020 IEP (compare Parent Ex. R, with Parent Ex. A). In these circumstances the district was required to implement the pendency programming due to the ongoing proceedings, not the proposed IEP (S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *6 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 F. App'x 65 [2d Cir. 2014]). Furthermore, there is no indication in the hearing record that the parent would have accepted the program recommended in the April 2021 IEP as the parent continued to object to the April 2021 IEP for some of the same reasons as she had objected to the April 2020 IEP any failure to implement argument must fail.

The parent also argues that the IHO erred in finding that the programming recommended by the CSE in the April 2021 IEP was appropriate. According to the parent, the April 2021 IEP failed to offer the student a FAPE because it did not recommend ABA instruction. The parent contends that the district "accepted and relied" on the neuropsychological evaluation as the "primary evaluative report in the development of the April 5, 2021 IEP" (Req. for Rev. ¶ 17). The parent argues that because the district did not present any evidence contrary to the neuropsychological evaluation, there was "clear consensus" at the April 2021 CSE meeting that the student required ABA instruction and as "a matter of law" the April 2021 IEP was mandated to include ABA instruction.

Additionally, the parent argues that the school psychologist testified that the results of the neuropsychological evaluation aligned with how she saw the student "in terms of his delays." The parent argues that the school psychologist's testimony that the district schools used ABA instruction was an "admission" by the school psychologist that the student required ABA instruction in his program.

The March 2021 neuropsychological evaluation report indicated that the student "require[d] a small, highly structured and specialized non-public, ABA-based school setting" (Parent Ex. M at p. 10). The report recommended that the student receive "intensive academic instruction and social skills training on a 1:1 basis or in a small group not to exceed 2 students" (id.). The neuropsychologist further recommended that the student's instruction should be delivered by "classroom instructors trained in ABA methodology" where the student could be "taught and treated through ABA" (id., see Tr. p. 407). The neuropsychologist elaborated on the

student's need for ABA instruction stating that it "is needed to build joint attention and engagement, reinforce appropriate behaviors, to lessen inappropriate behaviors and to help foster social development" (Parent Ex. M at p. 10).

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M., 845 F.3d at 544-45). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Here, the April 2021 IEP does not list ABA as a specific methodology for use with the student (see Dist. Ex. 31). However, in the management needs section of the IEP it states that the student "would benefit from a multimodal learning approach based on behavioral principals (e.g., with frequent verbal and physical prompts, redirection, modeling, hand-over-hand assistance, visual cues, manipulatives, sensory stimulating activities, and positive reinforcement)" (id. at p. 12). In addition, in the student's management needs, the student was described as needing "[p]ositive behavior supports such as the use of picture schedules, charts, and rewards" to increase the student's attention and "social engagement" (id.). Further, the IEP noted that the student was recommended for placement in a District 75 school and the school psychologist testified that the District 75 programs use ABA, discrete trials, and verbal behavior which is all "based on behavioral principles" (Tr. pp. 545-46, 591, 604; Dist. Ex. 31 at pp. 26, 28). She further testified that ABA is used in the District 75 programs to "build joint attention, to develop skills, to shape skills," and the district programs also use charts, "rewards, schedules to progress monitor and to

help shape behavior" (Tr. p. 608). The school psychologist testified that the district programs had the ABA "instructional methods" that the CSE believed the student needed (Tr. pp. 677-78).[19]

Based on the description of the District 75 program that included ABA instructional methods and the management needs described in the April 2021 IEP, the IHO determined that the April 2021 IEP followed many of the recommendations included in the March 2021 neuropsychological evaluation report (IHO Decision at pp. 14-15). The IHO credited the school psychologist's testimony that the provision of a District 75 program meant that the student would receive ABA methodology (id. at p. 15). But the witness also explained that District 75 serves many children that have the most highly specialized needs within the district (Tr. at p. 544) and, in my view, it is not permissible to assume that all children who attend District 75 automatically receive the ABA methodology. Instead, the student's IEP seems to indicate that the provision of behavioral principles may be a distinct possibility, without the district actually committing to providing ABA in student's IEP, yet later the district's witness testifies that the student would receive ABA. This is situation is too much like the situation addressed by the Second Circuit where the Court found that reliance on testimony that the student would have received ABA when it was not listed in the IEP was improper (see R.E., 694 F.3d at 193–94 [2d Cir. 2012]). Here the testimony simply describes the type of instruction the student would have received in the recommended 8:1+1 special class within the recommended District 75 program.

However, the only relief the parent requests that is attributable to the failure to recommend ABA instruction on the April 2021 IEP, is the request that the district be directed to place the student at Blue Feather.[20] However, as noted by the parties in their pleadings on appeal, as of August 6, 2021, the district has already approved and agreed to the student's placement at Blue Feather (Req. for Rev. ¶12; Answer ¶23).

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v.

[19] The principal from Blue Feather also confirmed that the District 75 schools utilize ABA, as well as verbal behavior techniques, discrete trial training, positive reinforcement, token boards, and visual aids and scheduling, and further indicated that all of that is ABA (Tr. pp. 300, 302-03).

[20] The parent's other requested relief, for the addition of five hours per week of home-based ABA services to the student's IEP and for an increase in the recommendation for speech-language therapy are tied to other recommendations included in the March 2021 neuropsychological evaluation report.

Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). In most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

Since the only relief for any failure to recommend ABA services is declaratory in nature [], there is little to no benefit that might arise from issuing a judgment regarding this issue for the 2020-21 school year (see Alan H. v Hawaii, 2007 WL 2790738, at *6 [D Haw Sept. 24, 2007] ["The mootness doctrine may be invoked to deny a declaratory judgment where the benefits of issuing such a judgment are too slight to justify the decision"]; see also A.A., 2017 WL 2591906, at *6-*9 [noting that "when considering the potential mootness of a claim for declaratory relief, '[t]he question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of declaratory judgment'"], quoting Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122 [1974]).

Therefore, the parent is correct that evidence shows that the IHO erred in relying on the testimonial evidence that the student would have received ABA therapy in the District 75 school that was not listed on the student's IEP, but the parent's requested relief of prospective placement in Blue Feather has been rendered moot by the parties subsequent agreement to place the student in that school.

B. Home-Based ABA Services

The parent argues that the IHO erred in failing to order the district to fund five hours per week of home-based ABA services for the student. The parent asserts that the neuropsychological evaluation reviewed by the April 2021 CSE recommended home-based ABA services. Again, the parent argues that since the district offered no contrary evidence to the March 2021 neuropsychologist's evaluation, the CSE "was bound to include the recommended services" in the April 2021 IEP (Req. for Rev. at ¶ 22).

The March 2021 neuropsychological evaluation report recommended, among other things, that the student receive five hours per week of home-based ABA "to assist parents with techniques (e.g., schedules, charts, rewards) at home to ensure generalization of learned skills and to increase functional independence" and that "generalization of skills" is a "must" (Parent Ex. M at p. 10). The neuropsychologist testified that ABA "must be at home" as the "parents know very little about what it is that [the student] presents with, what causes his behaviors, how to work with him at home" and therefore, "without continuity of services [] to home, he would not generalize whatever he learns in the classroom" (Tr. p. 413). Notwithstanding the neuropsychologist's opinion, the

hearing record did not contain evidence that the student needed the home-based services in order to support his learning in the school environment.[21]

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; Student X, 2008 WL 4890440, at *17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

Additionally, the April 2021 IEP recommended parent counseling and training one time per month for 60 minutes (Dist. Ex. 31 at p. 21). State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). The school psychologist testified that, in the District 75 program, parent counseling and training " help[s] parents manage . . . the behaviors associated with the . . . significant disabilities that the children have" (Tr. p. 606).

Based on all of the evidence in the hearing record—including evidence that the April 2021 IEP was designed with supports and services to address the student's needs during the school day—there is insufficient basis to reverse the IHO's determination that the student did not require home-based ABA services in order to receive educational benefit (see IHO Decision at p. 10; see also Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; M.L., 2014 WL 1301957, at *11 [finding no denial of FAPE based on the CSE's failure to recommend a home-based

[21] [I]n order to satisfy its obligation to consider the private evaluation, the CSE was not required to adopt the recommendations of the neuropsychologist (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]).

program, noting evidence that the student would make progress without the home services, "even if not at the same rate"]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360 [S.D.N.Y. 2010] [noting that, while some skills areas may be difficult to address in school, "such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress"]).

While home-based ABA services for the purpose of generalization are most likely beneficial to a student that is not alone a basis for providing them going forward,[] because [] the determination must be made each year based upon a review of the student's past progress and current needs (see Walczak, 142 F.3d at 131–32 [noting that the IDEA does require a program to maximize potential or "everything that might be thought desirable by loving parents" [quotation and other citations omitted]; see also Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 460 [6th Cir. 1993]). Therefore, because the recommendation in the March 2021 neuropsychological evaluation report for the student to receive home-based ABA services was primarily for the purpose of generalizing the student's skills to the home setting, and parent counseling and training was included on the April 2021 IEP to provide a similar support, there is an insufficient basis to conclude that the student required home-based ABA services.

C. Speech-Language Therapy and Reimbursement for Private Evaluation

The parent asserts that it was the district's "responsibility to assess the student in all areas of his disability" and since the district failed to do so it is the district's obligation to reimburse the parent for the private speech-language evaluation she obtained (Req. for Rev. at ¶ 24). Additionally, in support of her argument for reimbursement of the cost of the evaluation, the parent contends that the speech-language evaluation "would fill the gap in the administrative record and provide the SRO with relevant and useful information regarding the student's communication skills" (id.). According to the parent, the April 2021 speech-language evaluation also corroborates the March 2021 neuropsychological evaluation report's recommendation that the student required five sessions per week of speech-language therapy (id.).

The parent's argument in this regard is unclear with respect to whether she is seeking reimbursement for the private evaluation as a remedy for a denial of a FAPE or as a publicly funded independent educational evaluation (IEE) under the IDEA's procedures. As to the former, the evidence in the hearing record supports a finding that the district properly evaluated the student and offered the student a FAPE during the 2020-21 school year and, therefore, no relief is warranted relating thereto. As to the latter, the evidence in the hearing record also does not demonstrate that the parent is entitled to reimbursement of the private evaluation as an IEE.

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]).

Other than presenting the private speech-language pathologist as a witness, the parent failed to put forth any other evidence regarding disagreement with a prior evaluation prior to initiating due process in June 2020. While in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), I have also explained that this is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). But in cases such as this, it is becoming obvious that the parents are delaying making an IEE request and opting instead including it in their own due process complaint. This technical, "gotcha" approach is unnecessary, especially when the district appeared to be willing to work with the parent during the resolution process and even agreed to pay for some IEE elements by that point. It is unreasonable for the parent to deviate from IDEA procedures by not making a request to the district in the first instances, raising a request for an IEE in due process, then remain silent when asking the IHO such relief at the conclusion of the hearing initiated by the parent, and then faulting the IHO for not granting the relief. This is essentially what the hearing record shows.

In the parent's June 2020 due process complaint notice, the parent requested independent evaluations, including "an updated psychological evaluation, speech and language and assistive technology evaluation" (Parent Ex. A at p. 5).[22] As noted above, during the hearing, the parties and the IHO discussed the completion of an assistive technology evaluation and the March 2021 neuropsychological evaluation; however, there was no discussion of conducting a speech-language evaluation (Tr. pp. 21-22, 42-44, 60, 67-68, 71-73). The private speech-language evaluation report

[22] During the parent's closing argument, the parent's attorney represented that the cost of the evaluation was $500.00 (Tr. p. 773).

was conducted in April 2021 and was not available at the April 5, 2021 CSE meeting (see Parent Ex. N; Dist. Ex. 31). Instead, the evaluation report was first delivered to the district as part of the disclosure of exhibits during the hearing and the district promptly argued that at no time when evaluations were discussed (assistive technology or neuropsychological) did the parent raise the issue of a speech-language evaluation being conducted by the district or privately (Tr. pp. 223-27). Nevertheless, in the amended due process complaint notice, the parent requested reimbursement for the cost of the speech-language evaluation (Parent Ex. R at p. 8). However, after the discussion as to the admissibility of the speech-language evaluation, the parent did not further mention the evaluation or request reimbursement for the evaluation in her closing brief (IHO Ex. II; see Tr. pp. 223-27).[23]

Based on the above, I find that the parent is not entitled to reimbursement for the privately obtained speech-language evaluation. On a final note regarding the IEE, the parent should have the opportunity to present the private speech-language evaluation at the CSE meeting for the 2021-22 school year, and if the parent is dissatisfied with the CSE recommendations in connection with the consideration of the speech-language evaluation, she may challenge that IEP in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012]).

To the extent that the parent asserts that the hearing record supports finding that the student's program at Blue Feather should be supported by an increase in speech-language therapy services, although the April 2021 speech-language evaluation was not available to the April 2021 CSE, the March 2021 neuropsychological evaluation report recommended "intensive speech-language therapy services (30 minute sessions, 5x/week) with a therapist trained in using PROMPT methodology" (Parent Ex. M at p. 10). The neuropsychologist found that the student's "receptive and expressive language skills" were "markedly delayed" (id. at p. 9). The neuropsychologist noted that the student expressed himself with one-word phrases and occasionally two-word phrases and noted "frequent echolalia" (id.). The April 2021 IEP noted the student's difficulties with receptive and expressive language skills, as well as pragmatics and oral-motor skills, as reported by the student's speech-language therapy provider (Dist. Ex. 31 at pp. 6-8). The IEP also indicated that the student missed speech-language therapy sessions for several months while he was out of the country, which the IEP noted should be considered in assessing the student's slow progress towards his speech-language annual goals (id. at p. 7). The April 2021 IEP recommended that the student continue to receive the same level of speech-language therapy services he had been receiving, three 30-minute sessions of individual speech-language therapy per week (id. at pp. 6, 21). The IEP also included a number of annual goals to work on the student's speech-language skills (id. at pp. 14-16, 18-19). Based on the above, while the recommendation for three sessions per week of speech-language therapy was less than what was recommended in the March 2021 neuropsychological evaluation report, the recommendation was sufficient to

[23] The only citation to the speech-language evaluation report in the parent's 26-page post-hearing brief was in support of an argument that the April 2020 IEP lacked speech motor goals to address the student's planning as interfering with his speech production (IHO Ex. II at p. 4).

address the student's needs as identified in the present levels of performance and there is no basis to overturn the IHO's finding that the district offered the student a FAPE on this basis.[24]

Furthermore, the relief requested is attributable only to the 2021-22 school year and is therefore not within the scope of this proceeding. As noted above, in August 2021—well after the April 2021 CSE meeting, the district issued a Nickerson letter and approved the student's placement at Blue Feather for the 2021-22 school year and the "appropriateness" of Blue Feather is no longer in dispute (Req. for Rev. at ¶ 21). Moreover, the ABA instruction sought by the parent is provided at Blue Feather including positive reinforcement, visual schedules, token boards, discrete trials, and the other management needs (Tr. p. 263). The principal at Blue Feather testified that Blue Feather could provide the recommendations in the March 2021 neuropsychological evaluation report (Tr. pp. 269-70). Specifically, she testified that Blue Feather is "a small, highly structured and specialized nonpublic ABA-based school setting" that can "successfully manage" a student with autism and provide the student with an "appropriate ABA-based program" (Tr. pp. 269, 272-73). She also testified that Blue Feather could provide "intensive academic instruction and social skills training" on a 1:1 or 2:1 basis (Tr. pp. 269-70). She further testified that Blue Feather could provide the student with five 30-minute sessions per week of PROMPT speech-language therapy (Tr. p. 271).

However, regardless of what is available for the student at Blue Feather for the 2021-22 school year, as discussed above, the hearing in this matter was limited to the 2020-21 school year (see Tr. pp. 201-16; Parent Ex. R). Parent's counsel explicitly agreed to remove any claims for the 2021-22 school year in order to have the district agree to accept the amended due process complaint notice (Tr. pp. 201-16).

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

[24] The speech-language pathologist recommended "[i]ntensive, individualized PROMPT-based speech-language treatment three times a week, with 1:1 sessions lasting 30 minutes in duration" (Parent Ex. N at p. 3). The speech-language pathologist further stated that the "services should be provided in addition to the 3x30 services provided" by the district (id.). However, the recommendations by the speech-language pathologist were not presented at the April 2021 CSE meeting.

At this point, the school year at issue—2020-21—is over and the district has agreed to place the student at Blue Feather for the 2021-22 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). Accordingly, even if I were to find a denial of FAPE, there does not appear to be a sufficient reason to grant the parent's request for prospective relief. If the parent remains displeased with the CSE's recommendations for the student with the student attending her desired placement at Blue Feather, she may seek to obtain appropriate relief by challenging the student's current programming in a separate proceeding.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2020-21 school year, and that the student is not entitled to the requested prospective relief, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 29, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER