The University of the State of New York

The State Education Department
State Review Officer
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No. 21-206

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 Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 failed to order respondent's (the district's) Committee on Special Education (CSE) to reconvene to consider additional evaluative information that recommended assistive technology devices, additional accommodations and supports for her son. 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 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

Given the limited nature of the appeal, the parties' familiarity with the detailed facts and procedural history of the case is presumed and will not be recited here. Briefly, the student attended the Community Partnership Charter School (charter school) for the 2017-18 (kindergarten), 2018-19 (first grade), and 2019-20 (second grade) school years before transferring to a district public school in September 2020 (see Parent Exs. A; L at pp. 1, 3; N at p. 3).

In March 2018, during the 2017-18 school year while the student was attending the charter school, in response to concerns raised by the student's teacher that he was experiencing difficulties in "keep[ing] up with his classmates during reading and writing assignments," and acknowledging the student was struggling "academically, socially and emotionally," the parent requested the

"following evaluations" be conducted at "[d]istrict [e]xpense with an outside neutral assessor to include but not [be] limited to": an occupational therapy (OT) evaluation; an assistive technology evaluation "with a software for [d]yslexia and the hardware of a laptop"; a speech-language evaluation; a central auditory processing evaluation; a visual perceptual evaluation; a physical therapy (PT) evaluation; "[t]utoring with a [r]eading [s]pecialist ex. Orton-Gillingham, Lindamood-Bell"; counseling; and accommodations and modifications for testing and classroom management needs (Tr. p. 62; Parent Ex. R). However, the district did not test the student and while response to intervention (RtI) services were offered by the charter school, "[a]t no time was a case for initial evaluations opened by the school"; the charter school offering the explanation that "[d]istrict protocol has undergone a change, so a letter requesting an evaluation is no longer adequate to proceed with a formal evaluation" (Tr. pp. 59-60; Parent Exs. S at p. 6; U ¶ 2).

A private neuropsychological evaluation was conducted in May 2019 for the student at which time he received diagnoses of a specific learning disability that included a specific reading disorder and a mathematics disorder, and attention deficit/hyperactivity disorder (ADHD), combined type (Tr. p. 63; Parent Ex. L at pp. 1, 9). The parent again requested evaluation of the student in November 2019 at district expense to include: an OT evaluation "with sensory integration testing"; an assistive technology evaluation; a PT evaluation; a visual perceptual evaluation; a vision skills evaluation; a central auditory processing evaluation; and a tutoring evaluation with a research based reading specialist (Parent Ex. S). District evaluations were conducted for which the parent provided consent including OT and PT in January 2020, and speech-language in February 2020 (Parent Exs. I; J; K). As a result of these evaluations, speech-language services were recommended to address the student's receptive language skills specifically in the areas of auditory comprehension, vocabulary, word classes, and following multi-step directions with embedded linguistic concepts, as well as OT to work on the student's learning and behavior needs (self-regulation, working independently, attention, following multi-step directions) and sensory motor processing needs, and offer strategies (sensory diet) for him and his teacher within the classroom; however, no PT was recommended (Parent Exs. I at p. 1; J at pp. 5-6; K at p. 5). A Lindamood-Bell evaluation was also conducted in October 2020 which recommended sensory-cognitive instruction to support the student's needs in reading, writing, spelling, and math (Parent Ex. G at pp. 2-3).

A CSE convened on November 13, 2020 to conduct the student's initial eligibility meeting (see generally Parent Ex. F). Finding the student eligible for special education and related services as a student with an other health impairment, the CSE recommended a 10-month program in a non-specialized school consisting of integrated co-teaching (ICT) services in English language arts (ELA), math, social studies and sciences, together with one 30-minute session per week of group counseling, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of group speech-language therapy (Parent Ex. F at pp. 1, 19-21, 25). The CSE also recommended that the student receive 12-month services consisting of five periods per week of special education teacher support services (SETSS) in both math and ELA, OT, and speech-language therapy (id. at pp. 20-21).

The parents disagreed with the recommendations contained in the November 2020 IEP and, as a result, notified the district on November 18, 2020 of their intent to unilaterally place the student at the Lowell School (Lowell) (see Parent Ex. A). According to the parent, the November 2020 IEP was inappropriate because the CSE recommended an ICT class for the student despite

its "actual knowledge" of the student's specific learning disorders in reading, writing and math, as well as his receptive and expressive language delays, and also was aware that the student needed additional evaluations yet made IEP recommendations based on incomplete evaluative data (Parent Ex. U ¶ 6).[1] Additionally, the school psychologist had indicated that the CSE would be reconvened after all the evaluations were completed (id. ¶ 7).

Certain district evaluations were completed after the CSE met, including an assistive technology remote evaluation on January 5, 2021, an auditory processing evaluation on January 6, 2021, and an audiological evaluation on January 6, 2021 (see Parent Exs. N; O; P). The assistive technology remote evaluation recommended assistive technology to address concerns with the student's reading, writing, and spelling due to his diagnosed language-based disorder, including a laptop computer with the supports of word processing, word prediction, auditory feedback, dictation (speech-to-text), document scanning annotation, and e-text reader to assist in meeting instructional demands (Parent Ex. N at pp. 2, 8, 10). The results of the student's auditory processing and audiological evaluations found that while the student's hearing was normal, he did have an auditory processing disorder and the evaluator made recommendations including an FM unit, speech-language therapy, specific multisensory reading instruction (i.e., Lindamood Bell etc.), and computer and software supports (Parent Exs. O at pp. 7-9; P at p. 3).

The CSE did not schedule a reconvene meeting to consider the additional district evaluations of the student; rather, the school psychologist informed the parent in January 2021 that "since [the student] was being placed at another school she was no longer assigned to his case and that the CSE would follow up with [the parent] to hold another meeting once the case was reassigned" (Tr. p. 66; see Parent Exs. T; U at ¶ 8). However, according to the parent, "no one from the CSE or the [district] contacted [the parent] to discuss dates for the reconvene IEP meeting" despite the identification of additional needs and recommendations for the student in the auditory processing and assistive technology evaluations "that should have been captured in a proper IEP" (Parent Ex. U at ¶ 8). The student began attending Lowell on January 19, 2021 (Parent Exs. D; U).

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 29, 2021, the parent alleged that the district failed to meet its child find obligations and denied the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, 2019-20, and 2020-21 school years (see Parent Ex. C).

Specifically, the parent alleged that despite the parent's written requests in the 2017-18, 2018-19, and 2019-20 school years for the student to be evaluated, the district failed to conduct an initial evaluation of the student to determine whether he required special education (Parent Ex. C at pp. 1-2). The parent contended that she sought independent evaluations for the student which were completed and shared with the CSE and, when contacted by the "CSE after the procedural

[1] The district declined to cross-examine the testimony of the witnesses presented by the parent by affidavit (Tr. p. 52).

timelines were long exceeded," gave consent for district evaluations during the 2019-20 school year (id. at p. 2).

Regarding the November 13, 2020 CSE meeting during which the student was determined to be eligible for special education services, the parent contended that the IEP was inappropriate in that "all evaluations still ha[d] not been completed and considered in the development of an appropriate IEP in this initial case" and that the "recommendations made of [the student] f[e]ll short in addressing all of [his] special and unique needs" (Parent Ex. C at p. 2). The parent further contended that the CSE failed to offer the student a timely placement for the 2020-21 school year (id.).

The parent argued that the CSE failed to convene to consider the student's needs in the 2017-18, 2018-19, 2019-20, and 2020-21 school years as required by child find thus denying the student a FAPE (Parent Ex. C at p. 2). The parent further argued that the CSE failed to timely create an IEP "and has still failed to act to do so" (id.). Arguing that the student had been denied educational benefit for all the complained of school years, the parent sought an award of compensatory education services to remedy the FAPE denials (id. at p. 3). The parent also asserted that, given the inaction of the CSE, the student was "Nickerson eligible" as the district exceeded procedural timelines with respect to the parent's request for an initial evaluation and that the procedural violations rose to the level of a denial of a FAPE (id.).

The parent argued that Lowell was an appropriate unilateral placement for the student and that there were no equitable considerations that weighed against reimbursement (Parent Ex. C at p. 3). The parent further asserted that due to significant financial hardship, the district should be ordered to directly fund the costs of Lowell for the 2020-21 school year (id.).

As relief, the parent requested a determination that the district violated its child find obligations and denied the student a FAPE for the 2017-18, 2018-19, 2019-20, and 2020-21 school years; a determination that the student was "Nickerson" eligible and an award of a Nickerson letter for the student;[2] a deferment for nonpublic school placement for the student; an award of tutoring at the enhanced rate at district expense to remedy the denial of a FAPE in the complained of school years; a determination that Lowell was an appropriate placement for the student; a determination that equitable considerations weighed in favor of the parent so as not to deny the requested relief; and an award of tuition funding for the 2020-21 school year as well as tuition reimbursement for all monies paid by the parent for the student's placement at Lowell (Parent Ex. C at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 25, 2021 and concluded on August 2, 2021 after four days of proceedings (Tr. pp. 1-119). In a decision dated September 3, 2021, the IHO

[2] 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]). As a remedy, a Nickerson letter was available to parents and students who were class members in accordance with the terms of the consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]).

determined that the district failed to prove that it provided a FAPE to the student for the 2017-18, 2018-19, 2019-20, and 2020-21 school years (noting that the district presented no witnesses or evidence nor refuted the parent's evidence and witnesses' testimony), that Lowell was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement and compensatory services (IHO Decision at pp. 6-10, 13, 14). As relief, the IHO ordered the district to provide direct funding for the student's attendance at Lowell for the 2020-21 school year from January 2021 through the end of the 2020-21 school year, as the parent had established financial hardship, less the $1,500 paid by the parent to Lowell as a tuition deposit for the partial 2020-21 school year which was ordered to be paid to the parent (id. at pp. 9-10, 13-14). Finally, the IHO ordered a bank of 700 hours of compensatory tutoring be provided by the Lindamood-Bell Learning Center at a rate not to exceed $157 per hour to compensate for the four-year denial of FAPE (id. at pp. 13, 14).

IV. Appeal for State-Level Review

The parent appeals. The sole issue on appeal is whether the IHO should have ordered that the CSE be reconvened to consider additional data in order to provide the student with appropriate assistive technology, accommodations and supports in an appropriate IEP. Specifically, the parent argues that the IHO should have "fashioned a remedy" to address the district's failure to consider all data collected during the initial evaluation process and after the November 13, 2020 IEP meeting (Req. for Rev. at p. 5). The parent contends that the additional evaluative data and reports reflected recommendations for the student to receive "assistive technology in the form of a laptop with software" to assist him with his reading and writing deficits due to his specific learning disabilities and "an FM unit" due to his auditory processing disorder (id.). The parent states that "[o]ne 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])." Further stating that "[t]he [district] did not challenge any of the evaluative findings at the hearing," the parent argues that the district's failure to consider the recommendation of specific assistive technology devices and services "rises to the level of a denial of a FAPE" as it did not challenge the determinations that the devices and services were required for the student to access his educational program. As relief, the parent requests an order directing the district to consider all evaluative data collected after the November 13, 2020 CSE meeting and to reconvene a CSE meeting to consider the additional data for the student to include assistive technology devices and additional accommodations and supports.

In an answer, the district contends the parent's claim for a reconvene of the CSE was not "raised below," noting that the parent did not request "a reconvene of the CSE meeting to specifically consider the results of assistive technology evaluations" in the original or amended due process complaint notices, at the impartial hearing, or in the parent's closing memorandum. As such, the district argues that the IHO acted appropriately in awarding the relief specifically requested by the parent and in declining to award relief that was not raised because, while IHOs are granted "leeway to fashion an appropriate award of relief," they cannot grant relief that the parent did not seek during the hearing process. The district further argues that the parent's request for review does not contend that the specific request for a reconvene was raised below or that the parent's use of a "catch-all" claim in the amended due process complaint notice and closing brief

(for "other relief related to the denials of FAPE alleged herein" or "for such other further and different relief" deemed "appropriate to fashion as a remedy") covered a specific request that the CSE reconvene to consider specific evaluative materials, particularly when there were other instances of the parent requesting specific relief, such as deferral for placement in a nonpublic school. The district also notes that the parent did not disagree with the IHO's decision which awarded compensatory educational services along with tuition funding for the partial 2020-21 school year at Lowell, arguing that this award fully compensated the student for the four-year FAPE denial. The district argues that to allow the parent to seek this specific relief on appeal while never raising it below would "run afoul" of the administrative hearing process and "it would be an end run of pleading requirements and the hearing process."

Finally, the district argues that the issue concerning a reconvene may have been rendered moot by the passage of time as the CSE has issued meeting notices indicating (most recently) that the CSE will convene on November 18, 2021, so that, regardless of any award in this appeal, the CSE will have already reconvened to develop a new IEP for the student by the time a decision is issued. The district also notes that the parent has filed a new due process complaint notice for the 2021-22 school year in which the parent has withdrawn the student from Lowell and unilaterally placed the student at Winston Preparatory School, and which includes among other things, a claim that an assistive technology evaluation has not been considered by the CSE nor incorporated into an IEP despite the recommendations in the evaluation report. The district requests that the SRO accept these documents as SRO Exhibits A through C as additional evidence in order to complete the record and to render a determination on the district's mootness claim.[3]

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]).

[3] A review of the additional evidence submitted by the district with its answer reflects that SRO Exhibits A-C consist of CSE meeting notices dated November 2, 2021 (Answer SRO Ex. A) and November 9, 2021 (Answer SRO Ex. B) for the student's annual IEP review, as well as a due process complaint notice dated September 21, 2021 related to the student's 2021-22 school year (Answer SRO Ex. C). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). These documents were not available at the time of the impartial hearing and they are not necessary in order to render a decision in this appeal. Nevertheless, I will exercise my discretion to consider the submitted documents for the limited purpose of noting that the parent's claim, that assistive technology evaluation data should be considered by the CSE and incorporated into a "proper" IEP for the student, is more appropriately brought as part of her due process complaint proceeding for student's 2021-22 school year.

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]).[4]

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. Scope of the Impartial Hearing

The issue presented in this appeal is whether the IHO should have ordered that the CSE be reconvened to consider additional data in order to provide the student with appropriate assistive technology and accommodations and supports in an appropriate IEP, as the parent contends.[5] The district argues that the IHO acted appropriately in awarding the relief specifically requested by the parent, and in declining to award relief that was not raised below, either in the due process complaint notice, amended due process complaint notice, at the impartial hearing, or in the parent's closing brief.

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). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR

[4] 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).

[5] Here, neither party challenged the IHO's findings that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, 2019-20 and 2020-21 school years, that Lowell was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for tuition relief and compensatory educational services. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). 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, a review of the parent's amended due process complaint notice shows that it did not explicitly seek relief in the form of an order to reconvene the CSE (see Parent Ex. C). As alluded to by the district, although the amended due process complaint notice does include language stating that "there are no equitable reasons to deny the 2020-21 requests for relief" or "other relief related to the denials of FAPE alleged herein," this general language without any further specificity cannot be found to be an explicit request for a CSE reconvene (Parent Ex. C at p. 3).

However, the district's arguments that a request for a specific form of relief must always be raised in a due process complaint notice is an overly simplistic view of the requirements. Instead, with respect to relief (as opposed to alleged violations), State and federal regulations require that the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). While an award of relief not explicitly requested in a due process complaint notice may be appropriate in some circumstances, parties should not wait until after the hearing is complete to articulate the relief sought (see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [declining to address the parent's request for compensatory education that was raised for the first time in a post-hearing brief]).

In this instance, as noted by the district, the parent did not request a reconvene of the CSE meeting during the hearing or in the parent's closing brief. A reconvene of the CSE was raised in the parent's opening statement and as part of counsel for the parent's examination of witnesses; however, it was not connected with a request for relief. For example, in her opening statement, connected with her argument that the evaluative information the CSE considered was at issue, counsel for the parent asserted that "[t]here were at least three outstanding evaluations. And the [d]istrict was supposed to reconvene, and that never happened" (Tr. p. 11). In addition, on direct examination, the parent's attorney asked the parent advocate whether "after the November 2020 IEP meeting was held, was the IEP ever reconvened to consider the new evaluations that hadn't been completed at the time that first IEP meeting was held" to which the witness replied "[n]o, there was not a second IEP meeting" (Tr. p. 66). Further, in response to why the reconvene did not occur, the witness replied that the "school psychologist wrote [the parent] a[n] email, stating that since [the student] would be leaving the school that another district would pick it up, another CSE would pick it up" but that this "did not" happen (id.).

Additionally, based on a review of the hearing record, while the parent's closing brief discusses the issue of a CSE reconvene, it does not specifically request it as relief (see Parent's

Post-Hr'g Br.). For example, the parent's closing brief indicates that although the district stated that an IEP meeting would be reconvened after all remaining evaluations were completed, no reconvene was ever held for the student to consider the results of the auditory processing, audiological or assistive technology evaluations, as it should have been because additional needs were identified (id. at pp. 1, 11-12, 16-17, 18). The parent's closing brief does not specifically request a CSE reconvene as relief, but concludes with requests for seven enumerated findings (id. at p. 18).

Based on the above, the hearing record demonstrates that the parent did not raise the issue of relief in the form of a CSE reconvene during the hearing (see A.K., 2019 WL 4736969 at *12). Accordingly, the issue was not properly raised and was outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

B. Relief and Mootness

In any event, the parent was not aggrieved by the IHO's ultimate decision. The IDEA and State regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). Here, the parent did not disagree with the IHO's decision, which found a four year denial of FAPE for the 2017-18, 2018-19, 2019-20 and 2020-21 school years, as well as awarded compensatory educational services along with tuition funding for the partial 2020-21 school year at Lowell, which arguably, as the district asserts, fully compensated the student for the denial of a FAPE even without a specific award for a CSE reconvene. That is, despite the parent's argument that the district's failure to consider the recommendation of specific assistive technology devices and services "rises to the level of a denial of a FAPE" as it did not challenge the determinations that the devices and services were required for the student to access his educational program, the parent already received a finding that no FAPE was offered for the 2020-21 school year and the school year is at an end. Although the parent may have preferred that the CSE reconvene, as noted above, the parent never put forth that issue for the IHO to consider in the first place and the IHO's final decision resolved the issue of FAPE entirely in the parent's favor; therefore, the parent is not entitled to appeal this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

Furthermore, as the district contends in its answer, the appeal may have been rendered moot by the passage of time as the CSE indicated that it would convene for the student's annual review in November 2021 (which has passed) to develop a new IEP for the remainder of the student's 2021-22 school year, and the parent has filed a new due process complaint notice for the 2021-22 school year in which the parent, among other things, included a claim that an assistive technology evaluation had not been considered by the CSE or incorporated into an IEP despite the recommendations in the evaluation report.

In making a recommendation, in a case for an initial referral, as referenced by the parent in her request for review, or in a student's annual review, 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]). As noted above, although not part of this proceeding, the parent's claim, that assistive technology evaluation data should be considered by the CSE and incorporated into a "proper" IEP for the student, is more appropriately considered as part of her due process complaint proceeding for the student's 2021-22 school year.

VII. Conclusion

Having determined that there is no basis to depart from the IHO's decision, and that more specifically, a CSE reconvene was not properly requested as relief during the hearing and that the appeal may have been rendered moot by the passage of time, 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**
December 16, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER