The University of the State of New York

The State Education Department
State Review Officer
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No. 14-014

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, Vanessa Jachzel, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter for the 2012-13 school year and ordered the district to contract with independent evaluators to determine the appropriate amount of compensatory services. 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

The student began receiving early intervention services at two years of age to address her cognitive, speech-language, and fine and gross motor delays, as well as behavioral problems (Parent Exs. B at p. 1; C at p. 1; D at p. 1; E at p. 1). The student thereafter transitioned to receiving services pursuant to a recommendation by the committee on preschool special education (CPSE) and, for the 2011-12 school year, the CPSE determined that the student was eligible for special education and related services as a preschool student with a disability and recommended placement in a 12:1+2 special class in a 12-month program with related services of speech-language therapy, OT, PT, and counseling (Parent Exs. E at p. 3; V at pp. 1-2, 16, 18).

After the student aged out of preschool services, she was referred to the CSE, which convened on March 20, 2012 to develop the student's IEP for the 2012-13 school year (Parent Ex. X). The March 2012 CSE recommended a 10-month program in a 12:1+1 special class in a community school and related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (3:1); and one 30-minute session per week of counseling in a group (3:1) (id. at pp. 5-6). Subsequently, on June 6, 2012, the CSE reconvened and determined that the student was eligible for special education and related services as a student with a speech or language impairment (Dist. Ex. 18 at pp. 1, 7).[1, 2]

Thereafter, the parent apparently received a Final Notice of Recommendation (FNR) advising the parent that the student had been assigned to a specific public school site (school 1) (Tr. pp. 41-42, 52, 58-59).[3] When the parent attempted to enroll the student at school 1, she was advised that the student could not attend school 1 because it was not her neighborhood school (id.). School 1 personnel then directed the parent to another public school site within the district (school 2) (Tr. pp. 59-60). The parent attempted to enroll the student at school 2; however, she was advised by school 2 personnel that school 2 did not offer a 12:1+1 special class placement as recommended in the March 2012 IEP (id.). Eventually, the parent enrolled the student in a charter school colocated in the same building as school 1 (Tr. pp. 41-42). On August 28, 2012, the student began attending the charter school in a general education classroom (Tr. p. 52; Dist. Ex. 5). The parent testified that although the charter school did not offer any special education classes or related services, upon review of the student's IEP the charter school advised her that they "would work with" the student (Tr. pp. 42, 52). The student remained at the charter school for two months, but was forced to leave in early October after the student was suspended multiple times for physically aggressive behavior (Tr. pp. 42-43; Dist. Ex. 5). In a handwritten letter to the district dated October 9, 2012, the parent requested that the district conduct a neuropsychological evaluation of the student so that "she can be placed in the appropriate setting[]" (Dist. Ex. 6). On October 15, 2012, the district conducted a neuropsychological evaluation of the student (Parent Ex. Z). Thereafter, the CSE reconvened on November 7, 2012 to discuss the results of the October 2012 neuropsychological evaluation (Dist. Ex. 15 at p. 1; Parent Ex. AA). The November 2012 CSE made modifications to the student's June 2012 IEP, including changing the student's disability classification to a student with an other health-impairment, reducing the amount of English language arts instruction provided to the student, and adding one individual 30-minute counseling session per week (compare Parent Ex. AA at pp. 1, 5-6, with Dist. Ex. 18 at pp. 1, 4-5).[4]

[1] The student's eligibility for special education programs and related services as a student with speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The June 2012 IEP is substantially similar to the March 2012 IEP (compare Dist. Ex. 18 at pp. 1-10, with Parent Ex. X at pp. 1-10).

[3] The FNR was not submitted as evidence in the hearing record. The hearing record is also unclear as to the date of the FNR, although it appears from the context of the hearing record to have been sent after the June 2012 CSE meeting and before August 28, 2012 (Tr. pp. 51-52, 58-29).

[4] The student's eligibility for special education and related services as a student with an other health-impairment is not a matter in dispute on appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1 [zz][10]).

In a FNR dated November 7, 2012, the district summarized the 12:1+1 special class placement and related services recommended in the November 2012 IEP and identified school 2 as the public school site to which the district assigned the student to attend (Dist. Ex. 11). In November 2012, the student began attending school 2 in a general education kindergarten classroom providing integrated co-teaching (ICT) services because school 2 did not offer a 12:1+1 special class placement (Tr. p. 44, Parent Ex. W at p. 1). At some point during the year, a paraprofessional was assigned to the student because of her behavioral needs; however, the parent stated that the paraprofessional was unable to manage the student's behaviors and that she was called "every day" to pick up the student from school early (Tr. pp. 44-46). Later in the year, there was an incident at school 2 in which emergency medical services were called because the student had a tantrum and scratched a teacher (Tr. pp. 47-48). After this incident, the parent was advised by school 2 personnel that in order for the student to continue attending school 2, the parent would be required to accompany the student for the entire school day (Tr. p. 48). As a result, for the remainder of the 2012-13 school year the parent attended school 2 with the student (id.; see Parent Ex. A at p. 5).

A. Due Process Complaint Notice

By due process complaint notice dated June 25, 2013, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at p. 3). In particular, the parent asserted that the district failed to provide the student with instruction from the time the student left the charter school to when the student attended school 2 (id.). The parent further asserted that the March 2012 and November 2012 CSEs failed to conduct a functional behavioral assessment (FBA) and to develop a behavioral intervention plan (BIP), despite reports and documentation available to the CSEs which indicated that the student exhibited behavioral problems which interfered with her ability to learn (id. at pp. 3-4). Additionally, the parent argued that without supporting evaluative information, the CSE eliminated occupational therapy (OT) from the student's IEP, reduced the amount of speech-language therapy she was recommended to receive, and failed to recommend that the student receive instruction on a 12-month basis (id. at p. 4). The parent also asserted that the March 2012 IEP failed to sufficiently describe the student's needs (id. at p. 6). The parent further alleged that the November 2012 CSE failed to evaluate the student to determine the appropriate level of speech-language therapy she required to address her language-based needs (id. at p. 4). The parent also alleged that the November 2012 CSE "ignored" recommendations from the October 2012 neuropsychological evaluation, including that the CSE conduct an OT evaluation to address the student's difficulties with fine motor skills and consider a placement in a day treatment center (id.). Furthermore, the parent contended that the annual goals contained in the March 2012 and November 2012 IEPs were immeasurable, vague, and did not address the student's needs (id. at p. 6).

With respect to the student's "current placement," the parent asserted that it was inappropriate because the student was not making any progress (Parent Ex. A at p. 5). In addition, the parent asserted that the district failed to implement the student's March 2012 and November 2012 IEPs by not providing the student with a 12:1+1 special class in a community school and placing her in a general education class providing ICT services without additional supports (id.). The parent further asserted that the district failed to conduct additional evaluations to address the student's significant social/emotional and behavioral needs, despite the parent being called on

several occasions to pick up the student due to the school's inability to handle the student's behavior (id.). The parent noted that because of the incident during which emergency personnel were called, the parent was required to accompany the student to school every day (id.) The parent argued that as a result, she suffered economic injury because she was required to leave her employment based on the school's condition (id.).

For relief, the parent requested: (1) the student's placement in an 12:1+1 special class in a community school, or public placement in a State-approved nonpublic school; (2) that an FBA be conducted and a BIP developed; (3) speech-language and OT evaluations; (4) that the CSE reconvene and develop an IEP in accordance with the recommendations set forth in recent evaluations; and (5) compensatory tutoring to remediate the district's failure to offer the student a FAPE for the 2012-13 school year (Parent Ex. A at p. 7).

B. Impartial Hearing Officer Decision

A prehearing conference was convened on August 30, 2013 (Tr. pp. 1-14), after which the IHO issued an interim order on pendency, dated September 11, 2013, memorializing an agreement between the parties that the student's pendency placement consisted of a 12:1+1 special class in a community school along with a 1:1 paraprofessional (Interim IHO Decision at p. 2; see also Tr. pp. 8-13). An impartial hearing convened on October 10, 2013, and concluded after one day of testimony (Tr. pp. 15-82). Subsequently, the IHO issued a second interim order dated November 4, 2013, ordering that the student receive as a component of her pendency placement the following related services as recommended in the November 2012 IEP: two individual 30 minute sessions of speech-language therapy per week, one 30-minute speech-language therapy session per week in a group (3:1), one 30-minute individual counseling session per week, and one 30-minute counseling session per week in a group (3:1) (Second Interim IHO Decision at p. 2; see Tr. pp. 57-58; Parent Ex. AA at p. 6).

By decision dated December 17, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year because it did not conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (IHO Decision at pp. 5-6).[5] The IHO further found that the hearing record established that the student required placement in a day treatment facility and OT (id. at pp. 7-8). Based on the foregoing, the IHO ordered the district to conduct an FBA and develop a BIP for the student (id.) . The IHO also ordered the CSE to reconvene to amend the student's IEP to recommend placement in a day treatment program, provide for appropriate behavioral interventions consistent with the FBA and BIP, and recommend OT in accordance with an August 2013 district evaluation of the student recommending that she receive OT services (id.).

With respect to the parent's request for speech-language and OT evaluations, the IHO found that such evaluations were not necessary as the assessments had been conducted recently (IHO Decision at p. 8). Lastly, turning to the parent's request for compensatory tutoring services, the IHO found that the hearing record was inadequate to determine the appropriate amount of compensatory services and ordered the district to contract with independent evaluators to assess

[5] The IHO noted that the district chose to present no witnesses or argument that it offered the student a FAPE, despite bearing the burden of proof on that issue (IHO Decision at p. 5; see Educ. Law § 4401[1][c]).

the student and determine the appropriate amounts of compensatory services necessary to remedy the district's failure to provide the student with a FAPE in tutoring, speech-language therapy, OT, and counseling (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals, arguing that the relief ordered by the IHO regarding compensatory services was not properly raised in the parent's due process complaint notice and thus was not before the IHO.[6] More specifically, the district contends that the IHO erred in ordering the district to retain independent evaluators to determine the appropriate amounts of compensatory services to remedy the district's failure to provide a FAPE to the student for the 2012-13 school year because the parent did not request such relief in her due process complaint notice. Similarly, the district argues that the IHO erred in awarding compensatory speech-language therapy, OT, and counseling services for the same reason. Alternatively, the district asserts that even if an SRO finds that these issues were raised in the due process complaint notice and were properly before the IHO, the SRO should either (1) order the CSE to reconvene to determine the appropriate amount and scope of additional services the student should receive; or (2) remand the case to the IHO for further development of the hearing record to determine the appropriate amount of compensatory services.

Lastly, the district asserts that the orders that the district retain an independent evaluator to conduct an assessment of the student to determine the appropriate amounts of compensatory OT services and that the CSE reconvene to recommend an appropriate amount of OT were "potentially duplicative."

In an answer, the parent responds to the district's petition by admitting or denying the allegations raised and asserts that the IHO ordered appropriate relief with respect to compensatory services for the student. In the alternative, the parent argues that in the event it is determined that the IHO exceeded his authority in ordering the district to contract with independent evaluators, the appropriate relief would be to remand the matter back to the IHO for further development of the record rather than order the CSE to reconvene to determine the appropriate amount and scope of additional services the student should receive.

V. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 150-51 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988];

[6] The district does not appeal the IHO's finding that it did not offer the student a FAPE for the 2012-13 school year or his orders that the district conduct an FBA and develop a BIP for the student, and that the CSE reconvene to amend the IEP to recommend a day treatment program, appropriate behavioral interventions, and OT services. The district also asserts that the IHO correctly found that it was not necessary to award speech-language and OT evaluations as they had been conducted subsequent to the filing of the due process complaint notice.

Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d at 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *24 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. Mar. 6, 2008], adopted at 2008 WL 9731174 [Jul. 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of the Dep't of Educ., Appeal No. 13-236 [upholding an additional service award of physical therapy]; Application of a Student with a Disability, Appeal Nos. 13-226 & 13-228 [awarding additional services in the form of tutoring or other direct support from a special education teacher]; Application of a Student with a Disability, Appeal No. 13-208 [upholding an additional service award of 100 hours of compensatory one-to-one tutoring in math and reading]; Application of the Dep't of Educ., Appeal No. 13-048 [awarding the student with 1:1 counseling services and 1:1 speech-language therapy in compensatory additional services]).

In fashioning an appropriate award of compensatory education, one must be mindful that the central purpose of such award is to provide a remedy for a specific denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational

problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

VI. Discussion—Relief

1. Relief Ordered

On appeal, the district argues that the IHO erred by awarding relief to the parent which was not specified in the due process complaint notice. Specifically, the district argues that the IHO erred in awarding compensatory speech-language therapy, OT, and counseling services to the student because the parent did not request such relief in her due process complaint. Similarly, the district argues that the IHO erred in ordering the district to retain independent evaluators to determine the appropriate amounts of compensatory services for the student because the parent did not request such relief.

Initially, pursuant to the IDEA, the due process complaint notice must provide "a proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. § 1415[b][7][A][ii][IV]; 34 C.F.R. § 300.508[b][6]; 8 NYCRR 200.5[i][1][v] [emphasis added]). In this case, at the time the parent filed the due process complaint notice, she requested that the student receive "additional tutoring hours" as relief to remediate the district's failure to provide the student with a FAPE for the 2012-13 school year (Parent Ex. A at p. 7). In addition, the parent also requested in her due process complaint notice that the district conduct speech and OT evaluation to determine what level of services were necessary to address the student's needs (id. at pp. 4, 7).[7] Furthermore, although the parent did not specify compensatory services with regard to related services as relief in her due process complaint, counsel for the parent requested that the student receive "any other compensatory educational services that the [IHO] deems appropriate to make up for the deprivation of FAPE" during the impartial hearing (Tr. p. 32). Ultimately, in the parent's closing brief, the parent requested a compensatory remedy that included "remedial related services" (IHO Ex. 2 at p. 13). In view of the foregoing, it was appropriate for the IHO to award compensatory services in relation to related services as relief because although the parent did not explicitly request compensatory related services at the time she filed the due process complaint notice, the parent foresaw the possibility of the need for additional compensatory services for the student during the impartial hearing and specified the particular related services in her closing brief . In any event, under the circumstances of this case, I find that the parent's request for "additional tutoring services" in the due process complaint notice, may reasonably be read to include compensatory services in regards to related services despite the fact that the parent did not use the exact terminology (Parent Ex. A at p. 7; see Application of a Student with a Disability, Appeal No. 11-065; Application of as Student Suspected of Having a Disability, Appeal No. 11-044;

[7] As noted above, subsequent to the filing of the due process complaint the district conducted an OT evaluation of the student in August 2013, which recommended that the student receive OT (Dist. Ex. 3 at pp. 1, 4-8).

Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-002).

Turning to the district's contention that the IHO erred by ordering the district to retain an independent consultant to determine the amount of compensatory services the student should receive, as stated above, the "IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]" (see Newington, 546 F.3d at 123). At the outset, the district's argument is troubling as it finds fault with the parent's attempt to identify an appropriate compensatory education remedy but fails to offer any evidence or argument regarding an appropriate remedy itself. In the instant case, although the district conceded that it did not offer the student a FAPE for the 2012-13 school year, the IHO noted that because the hearing record contained insufficient information to determine an appropriate amount of compensatory services for the student, it was necessary to obtain additional information to determine the amount of compensatory services the student should receive (IHO Decision at p. 8). While the district conceded that it did not offer the student a FAPE for the 2012-13 school year, it was nevertheless incumbent on the district to develop the hearing record to establish the appropriate amount of relief needed to remediate the district's failure to provide the student with a FAPE for the 2012-13 school year. In this case, the district did not offer any evidence that could have assisted the IHO in identifying an appropriate amount of compensatory services for the student nor did the district present any testimony relevant to such a determination (see Tr. pp. 15-82). .It is not persuasive for the district to simply fault the parent's request for relief without also explaining its own view of what type of compensatory education relief would be appropriate to remediate the district's failure to provide the student with a FAPE for the 2012-13 school year. The IHO appropriately fashioned an equitable remedy, which was well within the scope of the IHO's broad authority (Newington, 546 F.3d at 122-123 [approving an IHO's directive ordering the district to retain a consultant to develop an FBA and provide advice with respect to an appropriate amount of mainstreaming]; Dracut Sch. Comm. v. Bureau of Special Educ. Appeals, 737 F. Supp. 2d 35, 56 [D. Mass. 2010] [finding that the hearing officer had the equitable power to order that the district "hire and compensate" independent consultants]; Matanuska-Susitna Borough Sch. Dist. v. D.Y., 2010 WL 679437, at *4 [D. Alaska Feb. 24, 2010] [finding that in fashioning an appropriate remedy, a hearing officer has the authority to require a district to retain the services of an expert]; see Decatur County Cmty. Sch. Corp., 45 IDELR 294 [SEA IN 2006] [ordering the district to retain a consultant to conduct an FBA and develop a BIP for the student]; Worcester Pub. Schs., 43 IDELR 213 [SEA MA 2005] [directing the district to "obtain an outside mutually agreed upon consultant" to assist the district in addressing the student's needs]; see also Bell v Bd. of Educ., 2008 WL 5991062, at *35 [D.N.M. Nov. 28, 2008] [directing the district to either retain a consultant to determine the necessary amount of services to remediate a denial of FAPE or provide compensatory services in accordance with the student's prior IEP]; Elizabeth M. v. William S. Hart Union High Sch. Dist., 2003 WL 25514791, at *5 [C.D. Cal. Sept. 22, 2003] [holding that where the hearing record contained insufficient information regarding the student's needs for compensatory services, it was necessary for an evaluation to be conducted "to determine the nature and extent of the remedial services [the student] presently requires"]).

2. Alternative Arguments

The district argues in the alternative that the SRO should order the CSE to reconvene to determine the appropriate amount and scope of additional services the student should receive to

remediate the denial of FAPE for the 2012-13 school year. However, in this case, the parent's request for compensatory services as relief is inextricably intertwined with the parent's continued requests for an appropriate placement for the student. The main issue is whether the district should be afforded administrative flexibility in deciding the appropriate amount of compensatory services the student should receive. The evidence in the hearing record demonstrates the following course of events:

(1) after receiving an FNR from the district assigning the student to school 1, the parent attempted to enroll the student in school 1, but was advised by district personnel that she could not because the school was not the student's neighborhood school;
(2) the parent attempted to enroll the student in school 2, but was advised by district personnel that the school did not contain any 12:1+1 special classes, which was the placement recommended for the student by the CSE;
(3) the parent placed the student in the charter school after being refused by school 1 and school 2, only to be forced to withdraw the student from the charter school two months later due to the student's behavioral issues;
(4) the parent contacted the district to request a neuropsychological evaluation for the student;
(5) the CSE reconvened to discuss the results of the neuropsychological evaluation;
(6) the parent received an FNR that identified school 2 as the student's assigned public school site;
(7) the student was assigned by the district to an ICT class in school 2 because it lacked a 12:1+1 special class as identified in the student's November 2012 IEP;
(8) after the student's behavior continued to deteriorate, a paraprofessional was assigned to the student; and
(9) after an incident in which the student injured a teacher, the parent was informed that in order for the student to continue to attend school, the parent would be required to accompany the student to school on a daily basis and remain with her throughout the day.

First, I find the district's actions and inactions under the specific facts of this case were both appalling and indefensible. Second, and perhaps most egregious in the instant case, is the district's inability to place the student in a 12:1+1 special class in a district public school despite the parent's repeated attempts to enroll the student in a district school. Even more shocking, during the prehearing conference on August 30, 2013, the representative for the district stated that she would contact the "parties to see if they can find a 12:1+1 for the [student]" (Tr. p. 10). However; the hearing record indicates that the parent did not receive a FNR providing a placement for the student until October 8, 2013 (Tr. pp. 36-37, 54-55; Parent Ex. FF). Under the circumstances of this case, it is demonstrable on the face of the hearing record that the district's actions constituted a gross denial of a FAPE by excluding the student from receiving educational services for a substantial period of time (Mrs. C., 916 F.2d at 75). Furthermore, it does not escape my attention that an extraordinarily onerous and entirely unlawful condition was placed on the parent by the district in order to secure the district's agreement to let the student continue her education at school 2.[8]

[8] Although not necessary to my determination in this matter, counsel for the parent asserted in the parent's due process complaint notice and during the prehearing conference that the parent had to leave her employment in order to comply with the condition placed on the student's attendance at school 2 by the district (Tr. p. 9; Parent Ex. A at p. 5). The very notion of requiring the parent to attend school to control the student with the threat of prohibiting the student from attending school is abhorrent.

Moreover, the hearing record is devoid of any evidence that a resolution meeting took place in this matter, which might have exculpated the district, to some degree (34 CFR 300.510[a]; 8 NYCRR 200.5[j][2]). The district is reminded that it must conduct a resolution meeting prior to proceeding to an impartial hearing, unless the parties agree in writing to waive the meeting (34 CFR 300.510[a][3][i]; 8 NYCRR 200.5[j][2][iii]). The resolution meeting would have provided an opportunity for the district to show that it was beginning to cure its failure to implement the IEP and provide the student with an appropriate placement. Based on the foregoing, under the unique facts of this case, there is no justification whatsoever for allowing the district the flexibility typically accorded to administrative decision making in deciding the amount of compensatory services the student needs. Here, where the process followed by the district has been replete with violations that amount to substantive denial of a FAPE heaped upon substantive denial of a FAPE, to put it mildly, I have serious reservations in returning the matter to the district and its CSE, which in this case so utterly failed to comply with its statutory obligation to provide the student with an appropriate education. Accordingly, I find no reason in this case to issue an order directing the CSE to reconvene to determine the appropriate amount and scope of additional services for the student and will not disturb the IHO's order.

With regard to the district's alternative request to remand the matter to the IHO, I note that the IHO also had the authority to develop the hearing record for the purpose of determining an appropriate award of equitable relief; however, in these circumstances, in which the district already had the opportunity to present a case and failed to do so, the district will not be granted yet another chance to delay this matter further. The time has come to put the solution in place and the IHO acted within the bounds of discretion in fashioning a viable if not perfect remedy under the circumstances of this case and it is upheld.

Lastly, with respect to the district's argument that the two remedies ordered by the IHO pertaining to the student receiving OT are "duplicative," I disagree and note that they are distinguishable and two separate remedies. The first remedy, that the CSE reconvene to amend the student's IEP and recommend an appropriate amount of OT for the student, constitutes prospective relief, ensuring that the student is recommended to receive OT in her current IEP. In comparison, the second remedy, that the district contract with independent evaluators to determine the appropriate amount of compensatory services, constitutes a remedy which is retroactive relief designed to compensate the student for the district's failure to offer her a FAPE for the 2012-13 school year.

VII. Conclusion

Based on the above, the hearing record shows that the IHO properly ordered the district to hire independent evaluators to assess the student and determine the appropriate amounts of compensatory services the student should receive with respect to tutoring, speech-language therapy, OT, and counseling, as a result of the district's failure to offer the student a FAPE for the period from September 2012 through the day the student began attending the district public schools.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER