The University of the State of New York

The State Education Department
State Review Officer
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No. 16-060

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Florida Union Free School District

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael Lambert, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied, in part, the parents' request for compensatory education services for their son for the 2015-16 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which awarded the student compensatory education services for the 2015-16 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student's educational program has been the subject of a previous administrative appeal (see Application of a Student with a Disability, Appeal No. 16-041). The parties' familiarity with the student's prior educational history is presumed and the educational history described in that appeal will not be repeated herein.

As relevant to the instant case, a CSE convened on February 4, 2016 to review the student's progress and discuss the appropriateness of the student's then-current placement (Dist. Ex. 9 at pp. 1-2). Based on the committee's discussion, the February 2016 CSE recommended that the student continue to attend a 6:1+2 special class with the assistance of a 1:1 aide, and receive related services of individual occupational therapy (OT) three times per week, speech-language therapy in a small group two times per week, and individual speech-language therapy two times per week (id. at p. 9). However, the February CSE also determined that the student's current school setting was unable to meet his needs, and agreed to provide home instruction to him until a different school was found (Tr. pp. 382-84, 474-75; Dist. Ex. 9 at pp. 1-2). Beginning in February 2016, the student

received tutoring for one hour a day, five days per week at home, and OT and speech-language services at a district elementary school (Tr. pp. 383-84, 754-57; Dist. Ex. 28 at pp. 1, 4-5). The at-home instructor's last day working with the student was April 1, 2016 (Dist. Ex. 28 at p. 5). Beginning on April 13, 2016, the student received all of his services, including 1:1 instruction, at the elementary school (id. at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated April 11, 2016,[1] the parents requested an impartial hearing and alleged that the district failed to offer the student a FAPE for the 2015-16 school year (Dist. Ex. 1 at pp. 1, 8).[2] The parents raised numerous claims related to the student's classification; child-find; the district's failure to conduct a manifestation determination review; the sufficiency of the evaluations of the student and unanswered requests for independent educational evaluations (IEEs); the sufficiency of the speech-language therapy provided to the student and the appropriateness of the student's speech-language goals; assistive technology; the district's failure to meet the student's behavioral needs, including the failure to develop a behavior plan until December 2015 and the appropriateness of the December 2015 BIP; the sufficiency of the "minimal education" the student received through home instruction; the lack of parent counseling and training or other services to support the parents in managing the student's behaviors at home; the transportation of the student; and problems communicating with the district, including the district's failure to respond to e-mails and the lack of an interpreter during CSE meetings (id. at pp. 1-27).[3] One of the parents' central claims is that the district refused to consider placement of the student at New Beginnings Annex (New Beginnings), a nonpublic school located out of State (id. at pp. 1-2, 14, 22-24, 28).

As for relief, the parents requested: (1) that the student's classification be changed to autism, (2) placement at New Beginnings, (3) "make up services of 10 hours per week of [] behavior therapy/neurofeedback/cognitive therapy" for the district's failure to provide an appropriate behavior plan, (4) OT sessions to develop a sensory diet "with parent counseling and training," (5) "make up" OT and speech-language therapy sessions for the days that the district had "suspend[ed]" the student, (6) reimbursement of mileage for the days the parents transported the student to the public elementary school, (7) "full compensation for all legal fees," (8) reimbursement of mileage for "each time we went to the school due to the district demanding [the student be removed] from school early," (9) reimbursement of mileage and meals associated with the parents' visits to potential new schools for the student, (10) payment for an independent

[1] The original due process complaint notice was filed on March 28, 2016.

[2] The parents identify that the "issues of this due process hearing request are to address violations that have happened within the past two school years starting on March 28, 2014 to present" (Dist. Ex. 1 at p. 8). However, a settlement agreement signed by both parties on May 17, 2015 indicates that all issues regarding the 2014-15 school year through June 30, 2015 have been settled (Dist. Ex. 2 at pp. 10-13). Furthermore, the IHO issued an order which found that "[t]he parents shall not raise any claims that accrued prior to July 1, 2015" and neither party has appealed from that decision (May 25, 2016 IHO Decision at p. 5, 8). Thus, the only issues raised on appeal relate to the 2015-16 school year.

[3] The parents also alleged that the student had been "discriminated against by school staff who excluded him from school activities" and that the district failed to address the student's medical needs (Dist. Ex. 1 at p. 7).

neuropsychological evaluation, and (11) payment for additional evaluations (Dist. Ex. 1 at pp. 27-32).

B. Impartial Hearing Officer Decision

The parties proceeded to an expedited hearing on May 3, 2016 which concluded the same day (see Tr. pp. 49-309). The factual background, including the findings made by the IHO in a decision dated May 17, 2016, was discussed in Application of the Board of Education, Appeal No. 16-041 and, as such, need not be repeated. As a result of the expedited hearing, the IHO awarded the student 50 hours of compensatory education to be provided by a special education teacher (May 17, 2016 IHO Decision at p. 10).

The IHO then addressed the district's April 23, 2016 partial motion to dismiss, dismissing the parents' claim relating to the student's classification as moot, and the parents' claims regarding the district's failure to allow the student to attend a "Halloween party" and failure to "attend to [the] [s]tudent's medical needs during [an] injury," finding that the parent was not seeking relief for these claims that could be awarded as part of the impartial hearing process (May 25, 2016 IHO Decision at pp. 2, 5, 6-8). The IHO also dismissed the parent's request for attorneys' fees, ordered that the student be classified as a student with autism, and ordered that "[t]he parents shall not raise any claims that accrued prior to July 1, 2015" (id. at pp. 5, 8).

The parties proceeded to an impartial hearing on June 1, 2016, which concluded on June 16, 2016, after three days of proceedings (see Tr. pp. 310-1153). In a decision dated August 9, 2016, the IHO concluded that the district did not provide the student a FAPE for a portion of the 2015-16 school year (IHO Decision at pp. 14-16).

Initially, the IHO found in favor of the district on some of the parents' claims and found that the July 2015 IEP was reasonably calculated to provide the student with a FAPE (IHO Decision at pp. 9-13). The IHO found that the parents' child find arguments were misplaced since the student had been eligible for services during the "entire time period at issue" (IHO Decision at p. 9). The IHO also determined that while the parents correctly alleged that the district failed to produce evidence that a prior written notice related to their request for an IEE was provided, ultimately the parents failed to explain how such a failure caused them harm (id. at pp. 9-10). The IHO further rejected the parents' allegation that the district's failure to conduct a neuropsychological evaluation was a failure to assess the student in all areas of suspected disability (id. at p. 11). The IHO also found that the district had conducted a well-written and thorough functional behavioral assessment (FBA) of the student in 2014, and that the FBA was "sufficient until the student began to present . . . new behaviors in the . . . 2015-16 school year" (id.).

Regarding the July 2015 IEP, the IHO found that the parents were not entitled to parent counseling and training for the period of time during which the student was not classified as a student with autism (IHO Decision at p. 12). The IHO also determined that the district should have been on notice of the student's significant sensory needs; however, the IHO did not find a denial of FAPE on this issue as the IEP provided for OT, which "can encompass sensory issues," the parents failed to call a witness to establish that the lack of interventions on the IEP rose to the level of a denial of FAPE, and the student had "done reasonably well at [the Board of Cooperative Educational Services (BOCES) placement] previously" (id. at pp. 12-13). In addition, the IHO determined that there was nothing in the hearing record to establish that the speech and language goals were inappropriate, were not reasonably calculated to provide educational benefit, or would

have resulted in a denial of a FAPE (id. at p. 13). Regarding assistive technology, the IHO concluded that there was no clear argument that the student required assistive technology (id.). As for the parents' allegations concerning the behavioral intervention plan (BIP), the IHO found that there was no denial of FAPE as the district created a "quite detailed" BIP and the student had exhibited some success with the BIP at the BOCES placement during the 2014-15 school year (id.). Overall, the IHO found that the July 2015 IEP was "reasonably calculated as of July, 2015" to provide the student with educational benefit (id.).

Regarding the December 2015 IEP, the IHO found that the student's IEP and the December 2015 BIP were inappropriate, thereby denying the student a FAPE for that portion of the 2015-16 school year (IHO Decision at p. 14). The IHO determined that the district's practice of having the parent pick up the student from school because the school could not "maintain" him in the classroom was inappropriate (id.). The IHO also determined that the February 2016 IEP and the "home services" provided to the student were inappropriate; the IHO found that there was no reason why the student only "receive[d] one hour per week of tutoring when a school day is ordinarily six to seven hours," and that the district should have determined the number of hours a student receives per day based upon the needs of the individual student, not on what is "usual practice" in the district (id. at p. 15).[4]

With respect to the parents' request for a neuropsychological IEE, the IHO determined that the district waived its right to object to the parents' request because the district should have responded to the parents by either granting their request for an IEE or initiating an impartial hearing, but failed to respond in any capacity (IHO Decision at p. 16).

As for relief, the IHO noted that while the parents sought compensatory education they did not submit a "compensatory education plan," and so, "[found] it incumbent upon [himself]…to fashion a remedy" (id. at pp. 17-18). The IHO awarded 100 hours of compensatory special education services from a special education teacher to be provided to the student "on a 1:1 basis" in addition to the 50 hours ordered in the expedited decision (id.). The IHO also awarded 50 hours of instruction using applied behavioral analysis (ABA) methods based upon the recommendations of the student's physician (id. at p. 18). While the parents requested placement of the student at New Beginnings, the IHO determined that hearing officers may not order school districts to place students in non-approved schools, and so, denied the parents' request for placement at the school (id. at pp. 18, 20). The IHO also noted that the parents failed to call a witness from the school to establish whether the requested placement was proper (id.). However, the IHO did order that "[t]he student shall receive a placement at a school that is specially designed for students with autism that have severe behavioral problems and require a significant amount of individualized attention" (id. at p. 20). Additionally, the IHO ordered that the parents be reimbursed for a neuropsychological evaluation "to be provided by a neuropsychologist with at least five years of experience" (id. at p. 19).

[4] The IHO incorrectly stated that the student was receiving one hour per week of instruction, but this appears to be a typographical error, as he indicated that the student was receiving "one hour per day of tutoring" elsewhere in the decision (see IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO incorrectly denied their request for placement at New Beginnings. The parents argue that, as parents, they are allowed to "choose a non-state approved school" when the public school program is not appropriate and there are no appropriate State-approved schools. The parents also contend that they "don't have the money to place [the student] at [New Beginnings]," and for that reason were "forced" to continue the student's BOCES 6:1+2 special class placement. The parents generally request an order from an SRO that places the student at New Beginnings.

The parents also disagree with the IHO's determination that the student's speech-language annual goals were appropriate. The parents contend that the goals "don't address [the student's] need for functional communication training and social skills to improve his behavior." The parents also contend that the student's speech-language goals have been the same for the past two years and the student has been unable to make progress toward those goals. The parents also claim that the student has never received an appropriate BIP and the district never conducted a CSE meeting to "write a [BIP]."

The parents request that an SRO order the district to comply with the IHO's order to pay for the neuropsychological evaluation, as the district has failed to respond to the parents' emails and made no effort to pay for the evaluation. Similarly, in general, the parents claim that the district "refuse[s] to respond to e-mails and any communication with…the parents…or [the parents' advocate]." In addition, the parents claim that the district has failed to communicate with them regarding the provision of the compensatory education awarded by the IHO, and the parents request that an SRO enforce the IHO's order. The parents also make several different requests relating to transportation and mileage reimbursement. The parents request: mileage for "each time [they] went to the school due to the district demanding" the student be removed from school early, totaling 510 miles; mileage for transporting the student from their home to the district elementary school in order to receive speech-language and OT totaling 98.8 miles; and "mileage and meals" for each "trip associated with going to view potential schools" for the student totaling 158 miles. Finally, the parents request "full compensation for all legal fees" that they have incurred during the last two years.[5]

In an answer and cross-appeal, the district responds to the parents' petition by admitting and denying the parents' assertions. In addition, the district argues that the petition should be dismissed for failure to comply with pleading requirements. The district also argues that the parents failed to "demonstrate that the IHO incorrectly decided those portions of the decision appealed from."

In its cross-appeal, the district argues that the IHO incorrectly found that the district waived its right to challenge the parents' neuropsychological evaluation claim as the parents have not submitted an evaluation report to the CSE for consideration. The district also argues that the IHO's

[5] The Individuals with Disabilities Education Act (IDEA) does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; see, e.g., Ivanlee J. v. Wilson Area Sch. Dist. 1997 WL 164272, at *1 [E.D.Pa. 1997] [noting that administrative hearing officers may not award attorney's fees under the fee shifting provisions of the IDEA]. Thus, the parents request for legal fees is premature until the administrative proceeding is complete.

award of compensatory education was not supported by the hearing record; specifically, the district asserts that there was no evidence in the hearing record to support the IHO's award of 50 hours of ABA services, and the evidence in the hearing record did not support an award of compensatory education for the time that the student was placed on home instruction. Finally, the district contends that the IHO went beyond the scope of his authority when he ordered that the student be placed "at a school that is specially designed for students with autism that have severe behavioral problems."

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. 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. Florida 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]). 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 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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 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 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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Form Requirements for Pleadings

The district contends that the petition should be dismissed because it sets forth "virtually no relevant citations to the hearing record" and the petition is single-spaced, rather than double-

spaced, resulting in a petition approximately twice the allowable length, which "circumvent[s] the [20-page] limitation." Although the parents did not strictly comply with State regulations in the drafting of the petition, I exercise my discretion and decline to reject the parents' pleadings.

State regulations provide that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]). Moreover, all pleadings and memoranda shall be "typewritten in black ink, single sided, and text double-spaced" (8 NYCRR 279.8[a][2]). Finally, State regulation provides that "the petition, answer, or memorandum of law shall not exceed 20 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference" (8 NYCRR 279.8[a][5]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 366-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; but see J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [stating that summary dismissal for violation of "formatting requirements" would be improper, noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

Contrary to the district's argument, the parents' petition contains sufficient citations to the hearing record to satisfy the requirements of State regulations (8 NYCRR 279.8[b]). In fact, the majority of the allegations in the parents' petition include specific citations to the hearing record (see generally Pet. ¶¶ 1-39). Regarding the parents' use of single-spaced text, the district is correct that the petition failed to conform to the pleading requirements. However, as the parents are proceeding pro-se in this matter, it is understandable that they may have had difficulty preparing and drafting a petition to fit the specific formatting requirements at issue. Furthermore, much of the parents' petition consists of extensive quotations from the hearing record and legal authority which caused their core arguments to exceed the formal page limit requirements (see Pet. ¶¶ 1-4, 6, 8-10, 12-14, 16, 19-21, 23, 26-28, 32-33, 35-36, 39). Thus, I find that neither of the alleged violations, alone nor cumulatively, are sufficient to warrant dismissal of the petition.[6]

[6] I take time now to address a particularly concerning issue in this case. State regulations require that the board of education shall file with the Office of State Review a copy of the original exhibits accepted into evidence at the hearing and an index to the exhibits (8 NYCRR 279.9[a]). However, the district failed to timely provide this office with a complete and accurate copy of the exhibits admitted during the impartial hearing. Rather, many of the exhibits received by this office were not accepted into evidence, and other exhibits that were accepted into evidence were not received by the office until after a specific request for them was made to complete the hearing record. In addition, some exhibits were missing pages or mislabeled; furthermore, the indices provided did not present an accurate representation of the exhibits admitted into evidence during the hearing. For the future, I

B. Scope of Review

On appeal, the parents contend that the student's speech-language annual goals failed to address his need for "functional communication training and social skills," and that the CSE failed to change those goals for the past two years. The parents also contend that the December 2014, October 2015, and December 2015 BIPs utilized by the district were inappropriate, and that the district failed to conduct a CSE meeting in order to develop a BIP. However, as the parents are not seeking relief related to these specific claims, and the district has not cross-appealed from the IHO's determination that the district did not offer the student a FAPE for the 2015-16 school year, it does not appear that the parents are aggrieved by the IHO's determinations related to the appropriateness of the speech-language goals and the BIPs, and it would not be proper to address them on appeal.

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], reconsideration denied, 2013 WL 1803983 [SDNY Apr. 24, 2013]). Here, the IHO's decision has already resolved some of the disputed issues in the parents' favor. The IHO determined that the December 2015 IEP and December 2015 BIP inappropriately required the parents to pick up the student when he exhibited excessive interfering behaviors during the school day, and in determining that the district failed to provide the student a FAPE for the 2015-16 school year, the IHO further opined that it is "fundamental that a school must keep a student on the premises and continuously teach that student during the entirety of the school day" (IHO Decision at p. 14). The IHO also found that the February 2016 CSE's recommendation of home instruction was inappropriate (id. at p. 15). While the IHO did find both the December 2014 BIP and the July 2015 IEP appropriate, it is unclear as to how the parents were aggrieved by these specific, discrete findings when overall the IHO found that the student was denied a FAPE for the 2015-16 school year, especially without some explanation as to how the IHO's findings should result in additional relief (id. at pp. 11, 13).[7] The parents had an opportunity to raise arguments in the petition that the amount of compensatory relief should be increased based on their claims related to the student's speech language goals and the December 2014 and October 2015 BIPs; however, they failed to do so. Further, the district does not appeal any of the IHO's findings regarding these issues. For those reasons, an analysis of the appropriateness of the student's speech-language goals or the appropriateness of the December 2014 and October 2015 BIPs is not warranted. Accordingly, I find that the parents were not entitled to appeal the IHO's decision with respect to the above-discussed findings as they were not aggrieved by the IHO's determination concerning same (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]). The parents' appeal as it relates to these issues is dismissed. Nonetheless, to the extent the parents request relief in

strongly advise the district to be far more mindful of its regulatory obligation to ensure that a full and accurate copy of the hearing record is provided within the applicable timeline. Furthermore, the IHO is reminded to "attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]).

[7] It should be noted that the parents challenge the December 2014 BIP as being inappropriate for the student to the extent it was implemented during the 2015-16 school year.

addition to what was ordered by the IHO based on a denial of FAPE for the 2015-16 school year, the parents' requests are each addressed below.

C. Relief

1. Prospective Placement

The parents request an order that the student be placed at New Beginnings for the 2016-17 school year in order to rectify the district's failure to provide the student with a FAPE for the 2015-16 school year. The parents contend that the IHO erred in denying their request that the student be placed in New Beginnings and also assert the IHO erred in finding that he cannot order placement in a nonpublic school that has not been approved by the State. Although in certain limited circumstances, an award directing a district to prospectively place a student in an appropriate, but non-approved school may be proper (see Connors v. Mills, 34 F.Supp.2d 795, 802, 805-06 [N.D.N.Y. Sept. 24, 1998]), for the reasons set forth below, the hearing record does not establish that placement of the student at New Beginnings for the 2016-17 school year, would be appropriate to meet his unique special education needs.

Initially, to the extent that the parents request that prospective placement of the student in a nonpublic school for the 2016-17 school year resulting from a denial of FAPE that occurred during the 2015-16 school year, doing so would circumvent the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs. This is especially the case where such placement is made in the absence of adequate evidence regarding the annual review of the student's current needs conducted subsequent to the matters under review in the instant proceeding. In accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2016-17 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In fact, testimony from the student's tutor indicated that the CSE conducted an annual review of the student for the 2016-17 school year on June 13, 2016 (see Tr. pp. 882, 885). Accordingly, the appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parents remain displeased with the CSE's recommendation for the student's program for the 2016-17 school year, they may obtain appropriate relief by challenging that IEP in a separate proceeding (see Eley v. District 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).[8]

[8] The district cross-appeals the IHO's order directing the district to locate a "placement at a school that is specifically designed for students with autism that have severe behavioral problems and require a significant amount of individualized attention," asserting that such an order was beyond the scope of his authority. In addition, the district notes that in fashioning such an award the IHO attempted, on a "pre-emptive basis," to determine what the student's needs would be. I am inclined to agree with the district. As noted above, it would be inappropriate to circumvent the statutory process, under which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs. In effect, that is precisely what the IHO attempted to do by drafting such a specific order. For that reason, I reverse the IHO's order directing the district to place the student at a specific school designed for students with autism. However, I remind the CSE to ensure that the student's behavioral needs are taken into consideration when determining an appropriate placement.

Additionally, while it is true that the remedial authority of administrative hearing officers in fashioning equitable relief is broad, and while under certain circumstances a parent may seek reimbursement or direct funding for a unilateral placement that is not approved by the Commissioner of Education and an IHO or an SRO may direct a district to place a student in an appropriate school that has not been approved by the Commissioner (see Connors, 34 F.Supp.2d at 802, 805-06), it is outside the authority of an IHO or an SRO to direct a district to consider placement of a student in a school that has not been approved by the Commissioner of Education when there has been no finding that the school constitutes an appropriate placement for the student (Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2d Cir. 1988]; Z.H. v. New York City Dept. of Educ., 107 F.Supp.3d 369, 377-378 [S.D.N.Y. May 28, 2015]).

The parents have identified New Beginnings as the specific nonpublic school that they believe would be an appropriate placement for the student. As stated previously, New Beginnings is a nonpublic school located outside the State (Tr. pp. 1033-034, 1065; Parent Exs. 6; 35A; 39 at pp. 1-2; 41 at p. 3). It is approved to provide special education services by the State in which it is located; however, it is not approved to provide special education services in New York (Tr. pp. 797-97; Parent Exs. 35A; 39 at pp. 1-2; 41 at p. 3; see also Pet. ¶¶ 14, 16, 19).

In determining the appropriateness of the parents' preferred prospective placement, an analysis similar to the analysis of the appropriateness of a unilateral placement is adopted and accordingly a determination must be made as to whether the parents' selected nonpublic school placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides educational instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

In this instance, the hearing record lacks sufficient documentary evidence or testimony identifying the type of program New Beginnings would have provided to the student and why such a program would be appropriate to meet the student's needs.

A computer printout from the school's website provides a general overview of what the school offers (Parent Ex. 39). According to the printout, the school utilizes an eclectic approach in consideration of the individual needs of each student and a variety of resources to maximize each student's potential (id. at p. 1). The school also has specialized programs available such as Handwriting Without Tears and the Wilson Reading Program, as well as other programs designed for struggling learners (id.). In addition, the school offers related services, and the services of reading specialists, and a board certified behavior analyst (id. at pp. 5-6).

An email sent from the parents to the district indicated that the parents "truly believe that [New Beginnings] has the most appropriate and least restrictive services" and a "behavioral expert, full time on staff" (Parent Ex. 6 at p. 1). However, the district's assistant superintendent responded to the parents' email indicating that she had spoken with someone at the school "to inquire about

the clinical services that [the parents] described and learned that [they] were misinformed" (id.). The CSE chairperson also testified that she had spoken with someone at New Beginnings because the parents "really [wanted this] program," but later surmised that there was "inconsistency with what the program was and what I think the [parents] thought it was in terms of…a behaviorist on site all the time;" she also learned that the school did not provide related services "on site" every day (Tr. pp. 556-57). Furthermore, while New Beginnings opined to the CSE chairperson that the school "could be appropriate," according to the CSE chairperson, the student had never been accepted to the school (Tr. pp. 460, 557-58). The student's mother testified that New Beginnings had accepted the student and had openings at the school available (Tr. p. 1063); however, she later testified that she never submitted an application to the school and that although she believed New Beginnings had conducted an intake in March 2015, only a "very informal intake" had been completed (Tr. pp. 1093-95, 1097, 1122; Dist. Ex. 29 at p. 21).[9]

Some additional information about the school can be gleaned from a few relatively broad emails between the parents and staff at New Beginnings (Dist. Ex. 29 at pp. 3-26; see Tr. p. 1065). The emails reveal that the parent visited the school, and subsequently requested that New Beginnings complete a questionnaire for the district, which it was unable to accommodate (id. at pp. 3-4). In addition, the emails indicate that the parent requested a "letter of acceptance" from the school, to which New Beginnings replied that it needed an "official letter" from the district to confirm the student's attendance before a contract could be initiated (id. at pp. 21, 24). The emails further indicated that New Beginnings generally offered small classes, a 2:1 student to teacher ratio, a classroom wide behavior modification system, individual behavior improvement plans if necessary, ABA trained staff, a staff social worker, art therapy, a reading specialist, speech therapy, and OT (id. at pp. 18-19). Further, New Beginnings reportedly provided sensory integration activities as part of the daily schedule, and if needed, an individualized sensory diet could be developed (id. at pp. 11-12). At the hearing, the student's mother also testified that the parents wanted New Beginnings for the student because the school has a "variety of clinical and interventional services," including ABA services, "integration opportunities," "BCI training people," counselors," and "trainings and seminars for the parents" (Tr. pp. 1060-061).

Accordingly, while it possible that New Beginnings may have been able to provide the student with an appropriate program, the general description of the school's program provided in the hearing record does not serve as a substitute for evidence of how the school would have provided the student with educational instruction specifically designed to address the student's needs (see Hardison v. Bd. of Educ., 773 F.3d 372, 387-88 [2d Cir. 2014] [upholding an SRO's finding that the parents unilateral placement of the student was not appropriate because the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress"]; Ward v. Bd. of Educ., 568 Fed. App'x 18, 22 [2d Cir. 2014] [upholding SRO's determination that the hearing record did not establish that student made progress in the unilateral placement]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that services met the student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the provider's] qualifications, the focus of her therapy, or the type of services provided" and where "[the provider] did not testify at the hearing and no records were introduced as to the nature of her services or how

[9] During the hearing, the student's mother testified that a formal intake was scheduled for June 16, 2016, two days after the final hearing date (Tr. pp. 1102-03). However, there is no indication in the pleadings as to whether this intake took place or whether the student was subsequently accepted by New Beginnings.

those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met the student's needs where the parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd, 471 Fed. App'x 77 [2d Cir. June 18, 2012]). In addition, as identified by the IHO, the parents did not produce a witness from the proposed school to explain how the general program described in the parents' exhibits would have met the student's individual needs or to allow cross-examination of the statements contained therein (Tr. pp. 1064-65; IHO Decision at p. 18). Thus, even if prospective placement were a viable option, due to the lack of evidence regarding the school's ability to address the student's specific needs, there is no reason to disturb the IHO's ruling that prospective placement at New Beginnings for the 2016-17 school year is not an appropriate form of relief.

2. Compensatory Education

In its cross-appeal, the district argues that the IHO erred in his award of compensatory services to the student. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 Newington, 546 F.3d at 123 [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., 2008 WL 4890440, at * 23 [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. March 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. 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]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also 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"]; Application of the Dep't of Educ., Appeal No. 11-075). 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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 [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 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

a. Compensatory Special Education Services

The district argues that the IHO's award of compensatory education corresponding to the student's time on home instruction is not supported by the hearing record. The district maintains that the student made "meaningful educational gains when he began to receive educational services at home and at his neighborhood school." However, the district does not challenge the 50 hours of 1:1 compensatory special education services the IHO awarded as a result of the expedited hearing, and so, of the IHO's total award of 150 hours of 1:1 compensatory special education services, only 100 hours are in dispute.

On February 4, 2016 the CSE recommended that the student receive "home instruction" until another placement was secured (Dist. Ex. 9 at pp. 1-2, 12).[10] Although the CSE made this recommendation, the CSE chairperson testified that the district had reservations about placing the student on home instruction as there were difficulties with home instruction in the previous school year; the student's special education teacher similarly testified that she was surprised at this recommendation as it had been "unsuccessful" the previous year (Tr. pp. 381, 409, 662; Dist. Ex. 9 at pp 1-2). Beginning in February 2016, the student received home instruction for one hour a day, five days a week at home and OT and speech-language services at the district elementary school (Tr. pp. 383-84, 754-57; Dist. Ex. 28 at pp. 1, 4-5). District staff testified that five hours a week was the amount legally required to be provided to a student on home instruction; additionally, the district typically recommends this amount of tutoring for elementary students on home instruction (Tr. pp. 503, 541-42, 754).[11]

[10] Although the CSE recommended home instruction and the IEP reflected the student's placement as home instruction (Dist. Ex. 9 at pp. 2, 12); the recommended special education services and programs continued to reflect a 6:1+2 special class and a full-time 1:1 aide (id. at pp. 2, 9).

[11] According to State regulation, generally, students with disabilities who are recommended for home instruction shall be provided instruction and appropriate related services as determined by the committee on special education in consideration of the student's unique needs, and such instruction must be provided a minimum of five hours per week at the elementary level, preferably one hour daily (see 8 NYCRR 200.6[i][1]).

From February 5, 2016 for "a few more days," the student continued to attend his then current classroom pending the initiation of home instruction (Tr. pp. 383, 664; Dist. Ex. 28 at pp. 5-6). According to the "tutoring" log provided by the district, the student first received home instruction on February 16, 2016 (Dist. Ex. 28 at pp. 4-5).[12] The student's mother noted that the student's first day of home instruction was supposed to be February 10, 2016, but the tutor did not show up (Tr. pp. 1049, 1083-084). According to the tutoring log, the tutor provided instruction to the student for 29 hours between the dates of February 16, 2016 and April 1, 2016 (Dist. Ex. 28 at pp. 5-6). The hearing record does not include session notes or progress reports for the student from the tutoring provided during this time period, and testimony indicates that it is unknown whether a tutoring progress report exists (Tr. pp. 767-68, 877, 899, 904). The hearing record also refers to letters from the parent to the district which indicate that the student did not receive any academic instruction from the tutor during the period of February 16, 2016 to April 1, 2016 due to the tutor's inability to control the student's inappropriate behaviors (Tr. pp. 779-80; Parent Ex. 41 at p. 1).

On April 4, 2016 the tutor informed the student's parents that she would no longer be instructing their son, and her last day with the student was April 1, 2016 (Dist. Ex. 28 at p. 5; Parent Ex. 41 at p. 1; see also Tr. pp. 755-56). The CSE chairperson and the district's assistant superintendent both testified that the tutor quit because the student was very aggressive and too difficult to "handle on her own" (Tr. pp. 391-92, 755-56). Similarly, the student's mother testified that the tutor was "not able to handle my son" (Tr. pp. 1050-051). The student's mother also testified that she had requested that the district provide an aide when the student received home instruction, but never received a response from the district regarding her request; the assistant superintendent further confirmed that the district never responded to the parents' requests and never sent an aide to assist the tutor during home instruction (Tr. pp. 766-67, 1050-051; see Parent Ex. 41 at pp. 1-2).

In an attempt to find a new tutor for the student, the district suggested the student receive tutoring at the elementary school (where he was already receiving his related services) (Tr. pp. 756-58). The assistant superintendent explained that the district "came up with the idea that" it could provide instruction at the public elementary school so that the student could have a teacher and other supports, including an aide, and because "there would be more support" in the event the student became aggressive (Tr. p. 756; Tr. p. 779-80). The parents accepted this arrangement, and the student's instruction with the new tutor began at the elementary school on April 13, 2016; the tutor provided instruction to the student Tuesday through Friday for a total of six hours per week (Tr. pp. 392, 868, 907-08; Dist. Ex. 28 at pp. 1-4).[13] According to testimony from the assistant superintendent and the student's tutor at the elementary school, the student was also provided with an aide during his tutoring sessions (Tr. p. 761, 771). Testimony from the student's tutor suggests that the aide began working with the student on April 13, 2016 (Tr. pp. 868-69; 910).

[12] In addition, the OT and speech-language therapists both testified that they began providing the student with services on February 19, 2016 (Tr. pp. 949, 997; Dist. Ex. 28 at p. 1).

[13] The hearing record does not specify what, if any, instruction the student received from April 4, 2016 through April 12, 2016 (see Dist. Ex. 28). Testimony from the CSE chairperson and the assistant superintendent indicates that there was not "too much of a time gap," and it was their understanding that any missed tutoring services were being made up (Tr. pp. 393-94, 769-70; see Dist. Ex. 28).

According to the assistant superintendent, instruction for the student was initially very difficult due to the student's "aggressive" behaviors; the tutor who instructed the student at the elementary school also stated that she was unable to work on academics with the student when she started in April 2016 (Tr. pp. 761, 877, 913). Specifically, the tutor testified that "[i]n April there was no way we could [provide academic instruction] because [the student] wouldn't sit at the table or really listen to us;" additionally, she stated that when the student first arrived at the public elementary school they had to work on his behaviors before academics to ensure they didn't "interrupt his learning" (Tr. pp. 909-910, 913). However, the assistant superintendent and the tutor both testified that, over the course of time, the student made tremendous improvements in behavior to the point where he was capable of working on academics (Tr. pp. 761, 911, 913). The student's tutor testified that since the student began receiving services at school he is "able to sit, he's able to ask us if he has to go to the bathroom, he's able to ask us if he wants to get up…or do anything he likes;" in addition to his improved behavior regulation, the student is now capable of working on academics (Tr. pp. 911-913). The tutor also testified that currently the student is "able to control his behaviors himself" and "if something is frustrating him, he'll grab the balloon or grab a bottle and so he's able to be around kids now" (Tr. p. 912). Furthermore, the student's tutor opined that the student has benefited from breathing techniques and the use of sensory bottles to help "calm [him] down," and the district utilizes "manipulatives" to assist the student when necessary (Tr. pp. 912-13, 975-76).[14] Both the assistant superintendent and the tutor stated the importance of an aide during instruction; the tutor further opined that an aide is necessary to control the student's behaviors (Tr. pp. 761, 771, 867-69, 877; see Dist. Ex. 9 at p. 9).

For these reasons, compensatory special education services are an appropriate remedy for the district's failure to provide adequate home instruction during the period from February 10, 2016 through April 12, 2016, namely, its failure to attend to the student's severe behavioral needs with the assistance of an aide. Therefore, I am directing one hour of special education services for each school day from February 10, 2016 through April 12, 2016, or 39 hours of compensatory special education services.[15] Included in this calculation are the time periods from February 10, 2016 through February 15, 2016 and April 4, 2016 through April 12, 2016. The parties dispute whether or not the student was denied services during these periods, and there is little evidence, outside of testimony from the parties, identifying what services were actually received. As the district failed to identify evidence that supported its contention that the student had received services during

[14] It should be noted that the student's June 2016 progress report identifies that he has progressed inconsistently through June 2016 on all goals in his IEP except for a single goal addressing motor skills (Dist. Ex. 27). Nevertheless, this is not surprising given the student's behavioral difficulties encountered by the district when the student first began receiving tutoring services with a 1:1 aide at the elementary school in April 2016.

[15] The IHO determined that the amount of home instruction provided was inappropriate because the student only received one hour per day of instruction from a tutor when "a school day is ordinarily six to seven hours" (IHO Decision at p. 15). In response to the assistant superintendent's testimony that an hour a day is "usual practice," the IHO further opined that the district "should have at least attempted to provide more hours to the student to ensure that he received a FAPE" (see Tr. p. 754; IHO Decision at p. 15). In reaching this conclusion, he noted that a student's educational program is "supposed to be individualized" (IHO Decision at p. 15). While the IHO correctly identified that such programs should be individualized, the IHO does not seem to have considered the benefit the student received from the 1:1 instruction provided at the elementary school with the support of a 1:1 aide to assist in managing the student's behaviors. The IHO also offered no explanation as to why additional hours of special education instruction would or would not have been appropriate for this student. Accordingly, although I agree that the student's home instruction program should be individualized to meet his needs, I do not find an adequate evidentiary basis, or equitable rationale, to adopt the IHO's method for calculating the award of compensatory education.

these time periods, such services are included in the compensatory services calculation. However, as the hearing record reveals that the student was making some progress with the instruction provided at the public elementary school, compensatory educational services are not an appropriate remedy for that period of time, and I am inclined to reverse so much of the IHO's award that applied to the instruction received from April 13, 2016 through the end of the school year.

Therefore, the district is ordered to provide 39 hours of 1:1 compensatory special education services in addition to the 50 hours of 1:1 compensatory special education services awarded by the IHO as a part of the expedited hearing, resulting in a total award of 89 hours of 1:1 compensatory special education services.

b. Compensatory ABA Services

The district also alleges that the IHO erred in awarding the student 50 hours of compensatory ABA services. The district notes that there is no evidence in the hearing record to support such an award.

While the parents only generally requested compensatory education in the amended due process complaint notice and did not specifically request ABA services, at the hearing they suggested that the student should have received ABA services and that "ABA… [services would] help him tremendously" (see Tr. p. 1069; see Dist. Ex. 1 at p. 28). However, except for a single prescription provided by the student's physician, neither the parents' amended due process complaint notice nor the evidence they submitted articulate why the student required instruction using ABA or provide support for the parents' claim that ABA services were necessary to provide the student with educational benefit (Parent Ex. 51 at p. 1; see also Tr. pp. 1126-127). In fact, the prescription appears to be the only evidence relied upon by the IHO in his decision to award ABA services (Parent Ex. 51 at p. 1; IHO Decision at p. 18). However, the prescription only reads "please give intensive ABA therapy, social skills group auditory & visual therapies per IEP for school yr. 2015-16" (Dist. Ex. 51 at p.1). It provides no explanation as to why the prescriber believed ABA services would be necessary or appropriate for the student and should be included in the student's IEP.[16]

Given that 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, the hearing record does support an equitable remedy in the form of ABA services. Therefore, the IHO's award of 50 hours of ABA services is reversed.

[16] The student's mother testified that both the student's psychiatrist and pediatrician recommended ABA and that she had provided the July 2015 CSE with the doctor's prescription (Tr. pp. 1010-012, 1108-109, 1119). The July 2015 IEP and attached meeting notes do not identify that the CSE had access to any prescriptions or notices from the student's doctors (see Tr. pp. 1129-130; Parent Ex. 15; Dist. Exs. 6; 7; 9; 26). Moreover, the assistant superintendent testified that she did not believe the parents had provided any prescriptions during the July 2015 IEP meeting (Tr. p. 795). The only prescription in evidence that recommends ABA services was signed on October 21, 2015, approximately three months after the July 2015 CSE meeting (Parent Ex. 51 at p. 1). The parent explained on cross-examination that there was, in fact, a prescription from the same doctor that was provided to the July 2015 CSE meeting (and presumably signed prior to that meeting), but no such prescription was included in the hearing record (Tr. pp. 1127-129). In any event, as discussed, the prescription itself was conclusory with no evaluative or clinical supporting evidence provided to explain the need for inclusion of the prescribed ABA services in the student's program.

c. Independent Neuropsychological Evaluation

The district contends that the IHO improperly found that the district waived its right to object to the independent neuropsychological evaluation because it did not respond to the parents' request for an evaluation. The district maintains that it, in fact, approved the parents' request for an independent evaluation subject to the district's criteria. Under the circumstances presented, the parents are entitled to an IEE; however, the IHO erred in finding that the district's delay in responding to the parents' request for an IEE meant that the IEE did not have to meet district criteria.

Both 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 disagrees 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 River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

Additionally, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In this instance, the district does not assert that it was unwilling to provide the student with an IEE; on the contrary, the district specifically points to evidence in the hearing record, including a proposed resolution agreement, that it had approved the parents' request for an IEE (see Dist. Ex.

2 at pp. 3, 14; Answer ¶ 58). On November 23, 2015, the parents requested a neuropsychological evaluation at district expense (Parent Ex. 27). On April 23, 2016 the district agreed "to [the parents'] request for an independent educational evaluation consistent with Board [of Education] policy…and its corresponding [r]egulation;" the district also attached copies of the Board of Education policy to their letter (Dist. Ex. 2 at pp. 3, 14-19). When an IEE is obtained at public expense, it must meet "the same criteria the school district uses when it initiates an evaluation" (8 NYCRR 200.1[z]; 200.5[g][1][ii]; see 34 CFR 300.502[b][2][ii]). Additionally, a district must consider an IEE, only "if it meets the school district's criteria" 8 NYCRR 200.5[g][1][ii]). In this instance, the parents had not yet obtained an IEE or notified the district of their chosen provider at the time the district provided the parents with the Board of Education's policies regarding IEEs (see Parent Ex. 27; Dist. Ex. 2 at p. 14). As the parents have not yet obtained an IEE, there is no harm in requiring that the IEE conform to the district's criteria.[17] Therefore, the parents are entitled to reimbursement for an IEE, subject to the district's criteria and the district is directed to provide the parents with a list of evaluators who meet the district's criteria for conducting IEEs, from which the parents can select an evaluator to conduct a neuropsychological evaluation of the student and, in the event the parents wish to obtain an evaluation from an evaluator whose fee is greater than permitted by the district's cost containment criteria, to provide the parents with an opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's cost containment criteria.

d. Mileage Reimbursement

The parents request reimbursement for transportation, including "each time we went to the school due to the district demanding" that the student be removed from school early, mileage for transportation from their home to the public elementary school in order for the student to receive speech-language therapy and OT from February through March 2016, and mileage "and meals" for each trip that the parents took "to see schools for [the student] to attend." The district denied the substance of the parents' allegations regarding their request for reimbursement for transportation expenses (Answer ¶¶35-37). However, in letters dated April 23, 2016 addressed to the IHO and the parents, the district proposed the following as a "partial resolution agreement": (1) mileage reimbursement "at the applicable IRS rate" for the parents' transportation of the student to the elementary school for speech-language therapy and OT "during the period February – March, 2016," (2) mileage reimbursement "at the applicable rate for the 14 days that [the parents] picked up [the student] from the [BOCES] school," and (3) mileage reimbursement "at the appropriate IRS rate, as well as reimbursement for any tolls paid, in connection with [the parents'] travelling to intakes for [the student] during the 2015-16 school year" (Dist. Ex. 2 at pp. 7-9, 14-15). Furthermore, the assistant superintendent testified that the district had agreed to reimburse the parents for having to transport the student to the elementary school for the student to receive his related services during the time he was on home instruction (see Tr. pp. 778-79).[18] Thus, I order the district to reimburse the parents claims for mileage in accordance with the proposed

[17] The district's criteria included a cost-containment provision limiting the cost of a neuropsychological evaluation to $1,200 (Dist. Ex. 2 at pp. 18-19); however, because the parents have not yet chosen an evaluator it would be premature to determine whether unique circumstances justify allowing the parents to select an evaluator that charges a higher rate than allowed by the district's cost-containment criteria.

[18] It should be noted that the student began receiving tutoring at the elementary school on April 13, 2016; at that time the district began transporting the student to the elementary school (see Tr. pp. 760-61, 868, 1076-077).

resolution agreement identified above. In regard to requests for reimbursement for any other expenses related to transportation, such requests are denied.

3. Enforcement Orders

The parents request enforcement of the IHO's orders of 100 hours of compensatory 1:1 special education services, 50 hours of compensatory ABA services, and payment for an independent neuropsychological evaluation. As explained to the parties in Application of a Student with a Disability, Appeal No. 16-041, IHOs and SROs have no authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that the parents continue to experience difficulty in communicating with the district regarding the outcome of this administrative due process hearing; to the extent that the district fails to implement the final decision of an IHO or SRO reached through the impartial due process hearing process the parents may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also, A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

VII. Conclusion

Based on the above, the IHO's determination regarding the amount of compensatory special education services that should be awarded to the student is modified and the district is directed to provide the student with 89 hours of 1:1 instruction to be provided by a certified special education teacher, consisting of 39 hours for the period of time from February 10, 2016 through April 12, 2016 when the student was receiving home instruction, and 50 hours previously awarded as part of the hearing related to the district's failure to conduct a manifestation determination review. In addition, the district is directed to reimburse the parents for mileage and for an independent neuropsychological evaluation.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 9, 2016 is modified, by reversing those portions which directed the district to locate a "placement at a school that is specifically designed for students with autism that have severe behavioral problems and require a significant amount of individualized attention,"

IT IS FURTHER ORDERED that the relief directed by the IHO is modified in accordance with the body of this decision, and that, unless the parties otherwise agree, the district

shall provide the student with 89 hours of 1:1 instruction to be provided by a special education teacher as additional services. These services shall be delivered to the student in the school environment and shall be completed by October 1, 2017;

IT IS FURTHER ORDERED that the district shall provide the parents with a list of evaluators from whom the parents can obtain an independent neuropsychological evaluation for the student at public expense and, in the event the parents wish to obtain an IEE from an evaluator whose fee does not fall within the district's cost criteria, to provide the parents with an opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's cost criteria;

IT IS FURTHER ORDERED that in accordance with the body of this decision the district shall reimburse the parents for the cost of transportation.

Dated: **Albany, New York**
October 6, 2016

CAROL HAUGE
STATE REVIEW OFFICER