The University of the State of New York

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

No. 17-101

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, by Michael K. Lambert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied, in part, their request for compensatory educational services for the 2016-17 school year. Respondent (the district) cross-appeals the IHO's award of compensatory educational services. The appeal must be dismissed. The cross-appeal must be dismissed.[1]

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];

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although most of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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[a]). 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

In this case, the student's educational history has been extensively set forth in three previous appeals; as such, the parties' familiarity is presumed, and the student's educational history will not be repeated herein (see Application of the Bd. of Educ., Appeal No. 17-006; Application of a Student with a Disability, Appeal No. 16-060; Application of a Student with a Disability, Appeal

No. 16-041).[2] Procedurally, the instant proceeding initially arose by due process complaint notices dated June 2, 2016; June 15, 2016; and July 8, 2016, which the IHO consolidated (see Application of the Bd. of Educ., Appeal No. 17-006). Thereafter, the IHO allowed the parents to submit an amended due process complaint notice, dated August 11, 2016, to include all arguments the parents sought to address (id.). Within these four complaints, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year based upon deficiencies in the June 2016 CSE process and in the June 2016 IEP (id.).

On August 10, 2016, the parties proceeded to an impartial hearing, and in a decision dated December 20, 2016 (December 2016 decision), the IHO concluded that the district failed to offer the student a FAPE for the 2016-17 school year (see Application of a Student with a Disability, Appeal No. 17-006).[3] As relief, the IHO directed the student's placement in an out-of-State, nonapproved, nonpublic school (NPS) at district expense (id.). The district appealed the IHO's decision, and alleged that the IHO erred in finding the district failed to offer the student a FAPE; in finding the NPS selected by the parents—as a prospective unilateral placement—was appropriate to meet the student's needs; and by directing the student's placement at the NPS as relief (id.).

In a decision dated March 10, 2017, the undersigned SRO upheld the IHO's finding that the district failed to offer the student a FAPE for the 2016-17 school year (see Application of a Student with a Disability, Appeal No. 17-006). However, consistent with the district's arguments on appeal, the SRO determined that the evidence in the hearing record did not support the IHO's determination that the NPS selected by the parents—as a prospective unilateral placement—was an appropriate remedy; therefore, the SRO overturned the IHO's order directing the student's placement at the NPS as relief (id.). Next, the SRO determined that the student was not without "any available relief," as the IHO failed to address the parents' request for compensatory educational services as a remedy for the district's failure to offer the student a FAPE (id.). Finding that the hearing record did not provide an "adequate basis to determine whether the student require[d] compensatory [educational] services to remedy the district's failures during the 12-month portion of the 2016-17 school year," the SRO remanded the matter to the same IHO to allow

[2] Throughout this decision, the citations to the hearing record refer to the testimonial and documentary evidence submitted at the impartial hearing on remand, unless otherwise noted.

[3] During the previous administrative proceedings, the student attended a district public school from approximately 12:00 p.m. through 3:00 p.m. and received the following as pendency (stay-put) services until January 12, 2017: one 60-minute session per day of ABA services provided by a Board Certified Behavior Analyst (BCBA); four 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT; and three 60-minute sessions per day of tutoring by a district special education teacher (see Tr. pp. 32-39, 116-20, 185-88, 263-65; see generally Dist. Exs. 7-17; 24; 31; 39-40; 42). In addition to the foregoing, the student also received the services of a full-time, 1:1 paraprofessional during the time period he received pendency services, and the district provided the student with an additional one 60-minute session per day of ABA services by a BCBA (for a total of two 60-minute sessions per day of ABA/BCBA services) (see Tr. pp. 32-39, 116-20; see generally Dist. Ex. 13). The IHO did not reduce the student's pendency services into a written decision, and neither party challenged the student's pendency services in either the previous related appeal or in the instant appeal (see Application of a Student with a Disability, Appeal No. 17-006; see generally Amended Req. for Rev.; Answer & Cross-Appeal).

the IHO to make determinations about the parents' remaining requests for relief "in the first instance" (id.). On remand, the SRO instructed the IHO to reach a "determination regarding whether compensatory [educational] services may be available to remedy" the district's failure to offer the student a FAPE for the 2016-17 school year (id.).[4]

A. Impartial Hearing Officer Decision on Remand

On May 2, 2017 the parties returned to an impartial hearing, which concluded on August 8, 2017 after four days of proceedings (see Tr. pp. 1-984). In a decision dated October 23, 2017, the IHO found that the student was entitled to compensatory educational services for the district's failure to offer the student a FAPE (see IHO Decision at pp. 7-8). In fashioning an appropriate remedy, the IHO first determined that any award must coincide with the period of time attributable to the district's failure to offer the student a FAPE and relate to the absence of an updated BIP, which the IHO discerned as the SRO's primary basis for finding that the district failed to offer the student a FAPE (id. at p. 8). Considering these factors, the IHO found that the evidence in the hearing record established that the FAPE deprivation "must include" the following portions of the 2016-17 school year: summer 2016; and from September 2016 through January 27, 2017, the date of the student's updated BIP (January 2017 BIP) (id.). While noting that the January 2017 BIP "did not result in any substantive changes" to the previously created October 2015 BIP, the IHO described the January 2017 BIP as a "thorough, meticulously written document that was based on the [s]tudent's current performance, which did include [the] implementation of sensory interventions," and which, as the IHO noted, satisfied the "SRO's requirement for the [d]istrict to complete a BIP" (id.).

The IHO then reviewed the possible relief the SRO identified as being sought by the parents (see IHO Decision at pp. 6-9). The IHO found that "some of the requested relief c[ould not] be fairly characterized as compensatory education," noting specifically the parents' request for "mileage reimbursement" for round-trip transportation of the student to the summer 2016 program, an assistive technology evaluation, and "new goals" (id.). Moreover, the IHO indicated that the parents had not "explained how these requests 'make up' for services missed" by the student (id.).

Turning to the parents' request for compensatory educational services for summer 2016, as well as their request for a '"behaviorist' for one hour per day," the IHO determined that these forms of relief were "reasonably related to the FAPE deprivation" found by the SRO (IHO Decision at pp. 8-9). As such, the IHO directed the district to provide the student with "150 hours of services, to be provided by both a special education teacher and a well credentialed, professional behavioral support consultant with experience in working with students with autism" (id. at p. 9 [emphasis in original]). According to the IHO, although the parents did not "clearly explain how many total hours" they sought as compensatory educational services, the IHO found it reasonable to award such relief for the district's failure to offer the student a FAPE for the seven-month period described above (id. at pp. 8-9).

[4] As part of the relief ordered in the previous appeal, this SRO directed the district to take the "actions necessary to begin the process of revising the student's BIP to ensure that it [was] appropriate, consistent with the requirements of the June 2016 IEP and the findings within the body of this decision" (Application of a Student with a Disability, Appeal No. 17-006).

With regard to the parents' request for "compensatory occupational therapy [OT] and oral motor therapy," the IHO denied this request (IHO Decision at p. 9). The IHO indicated that this particular relief was not warranted because the "SRO's finding of [a] FAPE denial was not based on insufficient [OT] or an inadequate offer" of speech-language therapy (id.). Furthermore, the IHO noted that the hearing record demonstrated that the student received OT and speech-language therapy "during the time [the student] went to school" and the hearing record did not contain any evidence to "suggest" that the recommendations for OT and speech-language therapy were "inadequate" (id.).

Finally, the IHO addressed the parents' "suggestion" that the IHO order the student's placement at the NPS previously selected by the parents as compensatory educational services on remand (IHO Decision at p. 9). The IHO declined to "revisit that question under the guise of compensatory [educational] services" based upon a lack of authority and the SRO's determination that the student's placement at the NPS was not appropriate (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that had the student attended the NPS ordered by the IHO but then overturned by the SRO, the student would have attended school for six hours per day with qualified staff, as opposed to receiving a three-hour school day and enduring "physical and mental abuse."[5] The parents also argue that the 6:1+2 special class placement recommended for the student in the June 2016 IEP never existed at the district during the 2016-17 school year, and the student did not have a placement for the first day of school in September 2016.

Next, the parents assert that receiving services alone in a room for "67 days" violated the least restrictive environment (LRE) requirement. The parents also allege that the student did not receive any State curriculum, the student was "never . . . with any children," and the student was "physically restrained by untrained" district staff who failed to "document and/or claim they [were] restraining any emergency interventions reporting (sic)" to the State Education Department.

Next, the parents assert that the district violated its child find requirement for "4 years" by failing to find the student eligible for special education programs and related services as a student with autism. Relatedly, the parents contend that the district refuses to recognize that the student has "sensitive hearing issues and is frustrated with his lack of language," which make the "new FBA and BIP not appropriate." The parents also contend that evaluative information—from "February 2016 to September 2016"—does not exist to support the district witnesses' testimony that the student "made improvements in his behaviors so that he c[ould] attend a full day program" in a 6:1+2 special class or "address riding on the bus." The parents argue that the student has "[n]ever mastered any goal" and the "VB-MAPP" was not listed on "any IEP to measure[] goals and/or progress."[6]

[5] Although captioned as a "Request for Review," the parents' pleading, dated November 28, 2017, is more aptly referred to as an "Amended Request for Review," and will be referenced as such throughout this decision.

[6] "VB-MAPP" refers to the "Verbal Behavior Milestones Assessment and Placement Program" (Tr. p. 333).

Next, the parents assert that "[n]o effective" BIP existed when the student attended his summer 2016 program and the district did not provide the summer 2016 program with a BIP for the student. The parents allege that, as a result, the student received suspensions, his behaviors did not improve, and district exhibits demonstrate that "[n]o sensory diet" and "no [BIP]" was implemented with the student. With respect to related services, the parents contend that the services did not address the student's "educational needs and/or behaviors," and the district did not recommend parent counseling and training. In addition, the parents assert that the IEP did not include "ABA therapy" or "breathing and bottles in the [BIP] or IEP." Turning to the present levels of performance, the parents argue that there was "[n]o record until [the] April 2017 evaluation," the student's behaviors remained the same, and the district made no changes to the student's sensory diet and BIP to effectively "change behaviors."

Next, the parents assert that the "procedural safe guards" did not include any notices concerning "changes to the appeal to the [SRO]." The parents also assert that district staff falsely stated that they did not provide the district with consent to conduct an FBA of the student. Additionally, the parents contend that the CSE "staff meet and make decisions before the meeting," and in particular, note the school staff's decision to recommend a 6:1+2 special class placement for the student when he was not ready to attend the class. The parents also contend that, for "over 2 years," the district ignored requests for an independent evaluation.

Finally, as relief, the parents seek compensatory educational services equivalent to "6 hours a day for [a] 180-day school year."[7]

In an answer and cross-appeal, the district initially responds to the parents' allegations. Thereafter, the district argues, in part, to dismiss the parents' amended request for review and memorandum of law for failing to comply with various regulations governing practice before the

[7] To the extent that the parents did not appeal those portions of the IHO's decision denying their request for "mileage reimbursement" for round-trip transportation of the student to the summer 2016 program, an assistive technology evaluation, "new goals," compensatory OT services, oral motor therapy services, and the student's placement at the NPS previously selected by the parents as relief, the IHO's determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Furthermore, the parents submitted a memorandum of law with the amended request for review (see generally Parent Mem. of Law). To the extent that the parents incorporated or argued additional grounds upon which to award further compensatory educational services not otherwise specified or identified in the amended request for review, the parents are reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6), and any additional grounds upon which to award further compensatory educational services—as well as any newly identified forms of relief—set forth solely in the memorandum of law will not be considered. State regulation directs that "[n]o pleading other than the request for review, answer, answer with cross-appeal, or answer to a cross-appeal will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal or answer to a cross-appeal, or to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6). In this instance, the parents' allegations in the amended request for review are not a model of clarity and come close to failing to comply with practice regulations that require the request for review to "clearly specify the reasons for challenging the [IHO's] decision" and to "identify the findings, conclusions and orders to which exceptions are taken" (see 8 NYCRR 279.4[a]). As explained more fully below, the parents are cautioned that filing similarly deficient pleadings in the future may result in a dismissal for failure to comply with practice regulations.

Office of State Review. The district also argues to dismiss the parents' amended request for review for raising claims and seeking relief "well-beyond the scope of the limited issues remanded by the [SRO] to the IHO."

As and for a cross-appeal, the district contends that the IHO erred as a matter of law by extending the period of the FAPE deprivation beyond the date of the November 2016 CSE meeting when the CSE developed a new IEP for the student. Next, the district argues that the IHO erred in fashioning the compensatory educational services relief by ignoring evidence that the district provided the student with two hours per day of BCBA services beginning in August 2016 and continuing for the "entirety of the time that [the student's] parents permitted him to receive educational services" from the district. The district also argues that the IHO ignored evidence in the hearing record that the student made "meaningful progress" during the period in question. Finally, the district asserts that the IHO's decision to award compensatory educational services for the period of time after the summer 2016 program exceeded the scope of the limited issues presented on remand, and the award of 300 hours of compensatory educational services was unsupported by the evidence in the hearing record.[8] As relief, the district seeks to dismiss the parents' request for review in its entirety.

The parents filed responses to the district's aforementioned pleadings, reasserting many of the same issues, facts, and arguments as set forth in the amended request for review and memorandum of law and seeking the same amount of compensatory educational services as relief.[9]

V. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the amended request for review must be dismissed because the parents failed to timely and properly file a notice of intention to seek review (see 8 NYCRR 279.2). The district further asserts that the amended request for review must be dismissed for failing to comply with the form requirements for pleading (8 NYCRR 279.8[c][2]). Finally, the district argues for the SRO to reject the parents' memorandum of law submitted in support of the amended

[8] Although the district characterizes the compensatory education awarded by the IHO as comprised of 300 hours of services, the IHO's decision specifically awarded "150 hours of compensatory education in the form of instruction by a certified special education teacher together with a professional behavior specialist experienced in providing services to students with autism."

[9] In the parents' answer to the district's cross-appeal, the parents seek to enforce an award of compensatory educational services ordered by the undersigned SRO in a previous appeal (see Answer to Cross-Appeal; Application of a Student with a Disability, Appeal No. 16-060). However, neither IHOs nor SROs have 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]).

request for review for failing to comply with the requirements set forth in 8 NYCRR 279.8(b) and (d).

State regulations require that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party, . . . , a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]).[10] Here, other than alleging that the parents failed to timely and properly file a notice of intention to seek review, the district proffers no other argument or explanation describing how the parents did not comply with this requirement (see generally Answer & Cross-Appeal). Moreover, the Office of State Review received a notice of intention to seek review, dated October 31, 2017, from the parents (with an affidavit of personal service), as well as a second notice of intention to seek review and case information statement, dated November 15, 2017, from the parents (with an affidavit of personal service). Based upon these documents, the parents complied with the State regulations and the district's argument must be dismissed.

Next, State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

State regulation further requires that a memorandum of law "shall include a table of contents and set forth" the following:

> (1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and

[10] This is a filing separate and apart from the "Notice of Request for Review" (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

> (2) a statement of the party's arguments, including the party's contentions regarding the decision of the [IHO] and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal.

(8 NYCRR 279.8[d][1]-[2]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

With regard to the district's contentions relative to the form and content of the parents' amended request for review and memorandum of law, I decline to dismiss the amended request for review or reject the memorandum of law on these grounds, given that the district was able to respond to the allegations raised in the amended request for review—albeit the parents' far-ranging allegations were difficult to construe in light of the limited nature of the issues remanded to the IHO for determination—in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).[11] In this instance, although the parents' failure to comply with the practice regulations will not ultimately result in a dismissal of the parents' appeal, the parents are cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a

[11] The parents' amended request for review includes allegations set forth in paragraphs numbered 1 through 16 (see generally Amended Req. for Rev.). Throughout the numbered paragraphs, the parents intertwine quoted testimonial evidence and references to documentary evidence in such a way that makes it unnecessarily difficult to discern the precise nature of the allegation itself, or how the parents allege that the IHO erred in his determinations (id.). The parents' memorandum of law does little to clarify matters (see generally Parent Mem. of Law).

Disability, Appeal No. 16-040).[12] This is especially true where, as here, the parents—having taken advantage of the opportunity provided to them to amend the original request for review and memorandum of law filed with the Office of State Review to comply with the practice regulations applicable to this appeal—filed an amended request for review and memorandum of law, which did not differ in content from their original pleadings, other than conforming to page limitations required by regulation. However, in light of the foregoing, the district's arguments regarding the form of the parents' amended request for review and memorandum of law are dismissed.

2. Scope of Review

Next, the district contends that the parents' amended request for review must be dismissed for raising issues on appeal that exceeded the limited scope of the impartial hearing on remand.

In the amended request for review, the parents raised the following issues in addition to appealing the IHO's award of compensatory educational services: the unilateral placement; the 6:1+2 special class placement at the district pubic school did not exist; the student did not receive services in the LRE, did not receive the State curriculum, was not with any other children, and was "physically restrained by untrained staff;" a four-year child find violation; evaluative information did not exist from February 2016 to September 2016 to support claims that the student's behaviors improved; the student did not master any annual goals; IEP implementation in that the student did not have an effective BIP in place for summer 2016 and no sensory diet or BIP was implemented with the student; the related services did not address the student's needs or behaviors, and there was no parent counseling and training, ABA therapy, or "breaking and bottles" in the BIP or IEP; the procedural safeguards notice did not inform the parents of changes to the appeal process; the district staff falsely stated that the parents did not provide consent to conduct an FBA of the student; the CSE made decisions prior to the meetings; and the district ignored the parents' request for an independent evaluation of the student for two years.

Generally, the additional issues raised in the amended request for review appear to align more readily as grounds upon which to conclude that the district failed to offer the student a FAPE for the 2016-17 school year, an issue already decided in the parents' favor by both an IHO and by an SRO (see Application of a Student with a Disability, Appeal No. 17-006). The district's argument seems to press for something similar to this interpretation, noting that the SRO's decision in Application of a Student with a Disability, Appeal No. 17-006 resolved many issues, leaving both the IHO—and the parents now on appeal—without jurisdiction to revisit the resolved issues. If true, then the doctrine of the law of the case would generally have prohibited the IHO from reconsidering the determination on the merits set forth in the December 2016 decision or in the

[12] The parents are reminded that newly enacted regulations governing the practice before the Office of State Review were amended and became effective for appeals filed on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Instructions about the amended practice regulations—as well as forms consistent with the amended practice regulations—have been provided on the Office of State Review's website under the links titled "Revised 2017 Appeals Process" and "Revised Regulations (effective 1/1/2017)" (see http://sro.nysed.gov).

SRO's decision.[13] On remand, the IHO did not reconsider the earlier determination regarding whether the district offered the student a FAPE for the 2016-17 school year; instead, the IHO correctly acknowledged in the decision the very limited scope of the administrative proceedings on remand: namely, to determine the appropriate compensatory educational services available to the student, if any, as a remedy for the district's failure to offer the student a FAPE (see IHO Decision at pp. 1, 7-8; see also Application of a Student with a Disability, Appeal No. 17-006). Consistent with the SRO's instructions, the IHO confined his analysis to what relief, if any, was warranted (compare IHO Decision at pp. 6-9, with Application of a Student with a Disability, Appeal No. 17-006). Applying this interpretation, the additional issues asserted in the amended request for review must be dismissed as either barred by the doctrine of the law of the case or, as the district contends, outside the limited scope of the impartial hearing on remand.

However, the parents' decision to assert these additional issues could also be generously interpreted as grounds to support the amount of compensatory educational services sought by the parents on appeal—that is, "6 hours a day for [a] 180-day school year"—notwithstanding that such rationale cannot be readily discerned based upon an overall reading of the parents' amended request for review and memorandum of law (see generally Amended Req. for Rev.; Parent Mem. of Law). Nonetheless, to the extent that the parents included these additional issues as support for their request for compensatory educational services in an amount equivalent to "6 hours a day for [a] 180-day school year," a consideration of these factors, as explained more fully below, fails to warrant disturbing the IHO's award of compensatory educational services in this case.

VI. Compensatory Educational Services

A. 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 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz];

[13] This doctrine becomes "'implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.'" (Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013], appeal dismissed [Dec. 10, 2013], citing U.S. v. Quintieri, 306 F.3d 1217, 1226 [2d Cir. 2002]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata"']; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]).

see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). 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 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; 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 111, 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 *23 [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 [S.D.N.Y. July 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 a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]).

B. Relief

Both parties challenge the IHO's award of compensatory educational services in the form of "150 hours of services, to be provided by both a special education teacher and a well credentialed, professional behavioral support consultant with experience in working with students with autism."

However, upon independent review and due consideration of the evidence in the hearing record in this matter, I find that the IHO, in a concise and well-reasoned decision, correctly determined that the student was entitled to an award of compensatory educational services to remedy the district's failure to offer the student a FAPE for that portion of the 2016-17 school year determined by the IHO to include summer 2016 and the added period of time from September 2016 through the development of the January 2017 BIP (January 27, 2017) (see IHO Decision at

pp. 6-8). On this point, the district contends that, contrary to the IHO's finding, the FAPE deprivation ended when the November 2016 CSE convened and developed a new IEP and therefore, the time period for any award of compensatory educational services must not extend beyond this date.[14] However, in light of the SRO's finding that the district's failure to update the student's BIP constituted the primary basis upon which to conclude that the district failed to offer the student a FAPE, the IHO's decision to select January 27, 2017—the date of the updated BIP—as the appropriate date to end the period for calculating an award of compensatory educational services was not unreasonable and fully aligned with the SRO's decision (compare IHO Decision at pp. 6-8, with Application of a Student with a Disability, Appeal No. 17-006).

For similar reasons, the parents' contention that the student was entitled to an award to cover a full school year—or 180 school days—is equally unavailing. This is especially true, where, as here, the parents removed the student from the district public school on or about January 12, 2017, and subsequently filed two due process complaint notices that seek compensatory educational services as relief for a period of time beginning in January 2017 and ending May 2017 (see Tr. pp. 909-10, 913-21). As such, the IHO's determination to choose January 27, 2017 as the appropriate date to end the period for calculating an award of compensatory educational services will not be disturbed.

Next, upon an independent review and due consideration of the evidence in the hearing record, I find that the IHO accurately recounted the relevant facts pertinent to fashioning the amount of compensatory educational services, as well as to effectuate the purpose of this equitable remedy, and he set forth and relied upon the proper legal standard to determine whether the student was entitled to an award of compensatory educational services (see IHO Decision at pp. 4-9). Here, the district contends that in ordering the district to provide the student with 150 hours of services by a "professional behavior specialist experienced in providing services to students with autism," the IHO ignored and failed to consider evidence in the hearing record demonstrating that the district had been providing the student with two hours per day of BCBA services beginning in August 2016 and continuing through January 12, 2017 when the parents removed the student from the district public school. Relatedly, the district contends that the IHO's award ignored evidence in the hearing record demonstrating that the student made meaningful progress.

Contrary to the district's assertions, the IHO's decision reveals that the IHO examined the evidence in the hearing record and found that, during the 2016-17 school year when the student

[14] The district also argues that the IHO—in selecting January 27, 2017 as the end date for compensatory educational services—unfairly faulted the district for not developing an updated BIP until that time when, in fact, the parents failed to provide the district with consent to conduct an updated FBA of the student until April 2017 (see Answer & Cross-Appeal ¶ 24[b]; see also Tr. pp. 58-61; Dist. Exs. 20-21; 27; 33; 36-38). However, it appears that the district developed an updated BIP for the student in January 2017, prior to receiving the parents' consent to conduct the updated FBA—a point that the district implicitly asserts was a necessary predicate to developing an updated BIP (see Dist. Ex. 30). The district's argument is perplexing as the district staff collected data on the student's behaviors from September 2016 through January 2017 (see Dist. Ex. 7; see Tr. pp. 123-24), and the data was used to develop the January 2017 BIP (Dist. Ex. 30 at pp. 2-3; see Tr. p. 54). Accordingly, it is difficult to understand how a request for consent to conduct an FBA dated November 29, 2016 (after the data included in the updated January 2017 BIP had already been collected) might have impacted the district's ability to update the student's BIP (see Dist. 21). Therefore, absent further explanation from the district as to how the parents' failure to provide consent impacted the district's ability to update the student's BIP, the district's argument must fail.

attended the district public school, he made progress in his "academic goals" and improved his behaviors (IHO Decision at pp. 4-6; see Tr. pp. 53-56, 116-20, 123-24, 126-28, 130, 191-92, 266-67, 270, 350-61, 369, 496-505; see generally Dist. Exs. 5; 7-10; 12; 15-16; 24; 30-31). The IHO also accurately recounted the specific nature of the special education program and related services provided to the student during the 2016-17 school year, including the two hours per day of BCBA services (see IHO Decision at p. 4; see also Tr. p. 333; see generally Dist. Exs. 13; 17). While true that, under certain scenarios, a district may not be required to provide compensatory educational services as a remedy if the deficiencies have already been mitigated, this is not that case (see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]; see generally Application of a Student with a Disability, Appeal No. 17-015).

Here, even though the evidence in the hearing record demonstrates that the student made progress—both academically and behaviorally—as a result of his pendency services, the evidence also demonstrates that the student's ability to make progress was inconsistent and vulnerable to absences; thus, it cannot be said that the pendency services provided to the student—even when considering the additional BCBA services provided by the district during pendency—fully compensated the student for the district's failure to offer the student a FAPE. Under the circumstances of this case, even if the IHO had ignored the fact that the district provided the student with two hours per day of BCBA services, the IHO's decision to award "150 hours of compensatory education in the form of instruction by a certified special education teacher together with a professional behavior specialist experienced in providing services to students with autism" was not unreasonable, unwarranted, or lacking support in the hearing record, especially given the student's unique special education needs; his ability to make consistent progress; and, at times, his intense behavioral needs. Moreover, the IHO's decision to award compensatory educational services to be delivered by a special education teacher together with a behaviorist, mirrors the setting within which the student received services during the 2016-17 school year and within which the student made progress. Thus, overall, the decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions and in fashioning the compensatory educational services award (see IHO Decision at pp. 4-9). Consequently, the district's arguments do not warrant disturbing the amount of the compensatory educational services awarded by the IHO.

Finally, to the extent that the parents raised the additional issues in the amended request for review to support an argument that the amount of the IHO's award of compensatory educational services should have been based upon a six-hour school day for the time period in question, such argument fails. Understandably, while the parents believe that the student should receive an hour-for-hour award, the IHO was not obligated to direct such relief and the evidence in the hearing record did not otherwise support this formulation of, or amount of, relief (see Bd. of Educ. of Fayette County, KY 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"]; 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" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). The additional issues asserted in the

amended request for review—when broadly construed to raise the strongest arguments that could be suggested, other than attempting to relitigate whether the district failed to offer the student a FAPE—largely appear to be an attempt by the parents to establish that the FAPE deprivation at issue was severe enough to warrant punitive measures against the district in the form of an otherwise unsupported increase in the amount of compensatory educational services awarded in this case (see generally Amended Req. for Rev.; Parent Mem. of Law).

To increase the award, the parents' additional issues in the amended request for review needed to focus on the purpose of an award of compensatory educational services or additional services, which is to provide an appropriate remedy for a denial of a FAPE (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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"]; Puyallup, 31 F.3d at 1497). 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"]; Fayette County, KY, 478 F.3d at 316; 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). Simply stating that the student should receive compensatory educational services equivalent to an hour-for-hour, day-for-day computation because the student—had he attended the NPS previously selected by the parents—would have received the same amount of services is not sufficient, by itself, to explain how such an award effectuates the purpose of compensatory educational services or warrants disturbing the IHO's award.

While I am sympathetic to the parents' frustration with the district, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). In addition, the purpose of any award of compensatory educational services is not to maximize the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need. Thus, it would, for certain, be a pyrrhic victory if the delivery of an award of compensatory educational services only served to overwhelm the student or outpace the student's ability to make progress. Based upon the evidence in the hearing record, the IHO's

decision to award the amount of "150 hours of compensatory education in the form of instruction by a certified special education teacher together with a professional behavior specialist experienced in providing services to students with autism" serves to place the student in the position he would have been in had the district complied with its obligations under the IDEA while affording the student with the opportunity to meaningfully derive benefits from these services.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations, I hereby adopt the findings of fact and conclusions of law of the IHO (see 34 CFR 300.514[b][2]; Educ. Law § 4404[2]). Finally, as a reminder to both parties, federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]). Therefore, I strongly encourage the parties to work collaboratively and cooperatively in this effort.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 29, 2017

_____
CAROL H. HAUGE
STATE REVIEW OFFICER