



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-112

Application of the BOARD OF EDUCATION OF THE Cornwall Central School District for review of a determination of a hearing officer relating to the provision of educational services to a student with a suspected disability

Appearances:

Honeywell Law Firm, PLLC, attorneys for petitioner, by Michael W. Gadowski, Esq.

Gina DeCrescenzo, P.C., attorneys for respondents, by Gina DeCrescenzo, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that the district denied the student a free appropriate public education (FAPE) for failing to find that respondents' (the parents') son was eligible for special education services and awarding compensatory education. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Since third grade, the student in this case has received accommodations and supplementary aids and services through a plan pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (Dist. Exs. 1 at p. 1; 26 at p. 2). Initially, the student received physical therapy (PT) for balance deficits and "significant gross motor delays," and counseling services for "his confidence and relationships with his peers" (Dist. Ex. 1 at pp. 1-2). These same related services continued for fourth grade (Dist. Ex. 2 at p. 2).

As the student transitioned to fifth grade, the section 504 Committee (504 Committee) recommended to modify the student's PT services to a one 15-minute quarterly direct/indirect consult, and continue counseling services "to work on social skills with peers" (Dist. Ex. 3 at pp.

1-2). On January 6, 2015, the 504 Committee met to discuss the student's recent diagnosis of attention deficit hyperactivity disorder (ADHD), primarily inattentive type (id. at p. 1; see Dist. Ex. 15 at p. 1). At the meeting, teachers expressed concern "with [the student's] ability to maintain focus and follow along with directions, schoolwork, as well as needing more time" (Dist. Ex. 3 at p. 1). As a result, in addition to PT consult and counseling services, program modifications/accommodations were recommended for refocusing and redirection, check for understanding, preferential seating, copy of class notes, as well as testing accommodations (id. at pp. 2-3). The student attained the following grades in fifth grade: math 71, science 78, English 69, and social studies 72 (Dist. Ex. 13 at p. 2).

At the October 15, 2015 504 Committee meeting there was a discussion that the student required additional time to complete work and lacked organization skills (Dist. Ex. 4 at p. 1). The 504 Committee was informed of the student's recent diagnosis of anxiety, and that he may "shut down" in class if he felt uncomfortable (id. at pp. 1-2). Additionally, the student had difficulty putting "his thoughts down on paper, even though he seem[ed] to have the information in his head" and "completing independent work without prompting" (id. at p. 1). The district's social worker reported that the student "seem[ed] more relaxed, confident and self-aware" (id.). The 504 Committee discontinued the student's PT services, and the group counseling was reduced to two sessions per month (id. at pp. 1-2). As of February 2016, the student had a grade of 67 in math and a grade of 65 in English language arts (ELA) (Parent Ex. E). In spring of sixth grade, as a result of a bullying/harassment complaint made by the student, teaching assistant services were recommended throughout the school day "to provide support during classes and during the time between periods" (see Parent Exs. F; G; H at p. 2; Dist. Ex. 4 at p. 2).¹ The student's final grades in sixth grade were: math 69, science 79, English 71, and social studies 76 (Dist. Ex. 13 at p. 2).

Each 504 plan developed after the student's anxiety diagnosis identified the "impairment that substantially limit[ed] a major life activity" as anxiety and indicated that his learning was affected by the anxiety (Dist. Exs. 5 at p. 2; 6 at p. 2; 7 at p. 2; 8 at p. 2). In addition, each 504 plan since the 2016-17 school year (seventh grade), stated that the student's "anxiety leads to difficulty in school, specifically staying focused and organized. His confidence and relationships with peers is also impacted" (Dist. Exs. 5 at p. 2; 6 at p. 2; 7 at p. 2; 8 at pp. 2-3).

In seventh grade teachers reported that the student was off task and needed refocusing (Dist. Ex. 5 at p. 1). Teachers also reported that managing multiple tests and quizzes and assignments all due on the same day was challenging for him (id.). The teaching assistant helped to keep him on task and organized (id.). The student's recommended program modifications/accommodations, supports and testing accommodations remained unchanged on his 504 plan (id. at pp. 1-2). His final grades in seventh grade were: math 70, science 75, English 80, social studies 77, and Spanish 85 (Dist. Ex. 13 at p. 2).

At the October 2017 section 504 meeting, the parents reported that the student's coping mechanism for anxiety was "to shut down" (Dist. Ex. 6 at p. 1). His teachers continued to report

¹ The nature of the complaint was a Dignity for All Students Act (DASA) individual incident complaint (see Dist. Ex. 9). New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18).

that he needed to stay on task and be refocused (id.). The student needed simple reminders to take his "materials out" (id.). The social worker observed that the student was showing growth in his understanding of social situations and therefore, the counseling was reduced to one time a month (id. at pp. 1-2). Generally, the student's program modifications/accommodations, supports and testing accommodations remained unchanged except that preferential seating was changed to a location with minimal distractions (id.). The student earned the following final grades in eighth grade: math 68, science 66, English 73, social studies 67, and Spanish 75 (Dist. Exs. 13 at p. 2; 20).

In spring of eighth grade (June 2018), the parents referred the student to the CSE because of his anxiety (Parent Ex. B at p. 1; Dist. Ex. 10 at p. 1). The school psychologist conducted a psychoeducational evaluation which revealed the student had "average cognitive abilities" (Parent Ex. B at pp. 4-5; Dist. Ex. 10 at p. 1). During the psychological evaluation, the student reported that the teaching assistant with helpful to refocus him and explain material and "was most helpful in math class" (Parent Ex. B at p. 1). The school psychologist reported that during testing there were several instances where the student became distracted and "phased out" (id. at pp. 2-3). Additionally, the student stated that he "learned more slowly" than his peers and had "trouble understanding what he reads" (id. at p. 3). He further reported that he is often distracted and had difficulty finishing tasks (id.).

The school psychologist administered the Conners-3 (self-report of behavior) to assess the student's emotional and behavioral functioning (Parent Ex. B at pp. 3, 6). His scores were "very elevated" for learning problems and "elevated" in inattention, hyperactivity/impulsivity, and defiance/aggression (id.). The student's score of "very elevated" in learning problems was a result of the student reporting problems in math (id. at p. 3). Five of his teachers completed the Conners-3 (behavior rating scale) (Parent Ex. B at pp. 3, 6). The teachers rated him as "very elevated" for inattention, hyperactivity/impulsivity, and peer relations (id.). The very elevated scores in peer relations pertained to "friendships, social skills, and social connections" (id. at p. 4). The teachers also rated the student as "elevated" in the areas of learning problems/executive functioning and defiance/aggression (id. at pp. 3, 6). Teacher comments included that he "often blurt[ed] out in class and interrupt[ed]," "seem[ed] lost in thought," and that he had "trouble completing independent work on time, and might interpret situations differently than others might" (id. at p. 4).

The initial eligibility determination CSE meeting was held on July 23, 2018 (Parent Ex. C at p. 1). The CSE concluded that based upon "evaluation results, parent input, staff input, review of grades/report cards as well as observations" the student did not meet the eligibility criteria to be classified as a student with a disability (Parent Ex. C at p. 1; Dist. Ex. 10 at pp. 1-2).

For the 2018-19 school year, the student entered ninth grade at the district's high school (Dist. Ex. 7 at p. 1). The student's first quarter progress report noted he was failing both algebra and earth science (Dist. Ex. 18 at p. 1). As of November 1, 2018, the student was failing two classes, his grades in other "core classes" ranged from 77-90, and his homework completion in social studies, earth science and Spanish was inconsistent (Dist. Ex. 7 at p. 1). During the ninth grade 504 Committee meeting his teachers noted the student was "often distracted and often need[ed] to be refocused in class" (id.). The parents reported at the meeting that the student was still shutting down when anxious (id.). One of his teacher's reported that the student was not

"shutting down in his class" (id.). Since the student was not utilizing the teaching assistant in all classes, the 504 Committee agreed to have the teaching assistant only in his "core subjects" for purposes of refocusing and "during times of transition to help him get settled or organized" (id.). In addition, the social worker recommended to modify his counseling to two 15-minute sessions per month as the student preferred to use his study hall for academics (id. at pp. 1-2). As the student's anxiety continued to affect his learning, the 504 Committee added refocusing and redirection to his 504 plan testing accommodations (id. at pp. 2-3).

In fall 2018, the student made a DASA complaint regarding a comment made by his earth science teacher (see Dist. Ex. 9). According to the complaint, the teacher said to the student: "[i]f you were my kid, I would beat you too" (id. at p. 1). This comment was made after it was revealed to the teacher that the student had been abused (id.). Another complaint was made against the same teacher in December 2018 with respect to incomplete classwork (Parent Ex. K; Dist. Ex. 9 at pp. 3-4). After investigation of the complaint, the student was given credit for the assignments and a meeting was held with the teaching assistant to check that the student understood and completed all assignments (Parent Ex. K; Dist. Ex. 9 at p. 4).

In the second quarter, the student was continuing to fail algebra and his average in English was in the 60s (Dist. Ex. 18 at p. 2). The third quarter again revealed failing grades in both algebra and earth science (id. at p. 3). In April 2019, the student's mathematics teacher emailed the parent regarding concerns of the student "zoning out frequently during class even when prompted to refocus" (Parent Ex. A).

In April and May 2019, the parents obtained a private psychoeducational evaluation (see Dist. Ex. 15). Test results revealed that the student was of "above average intellect" (id. at p. 19). The student was able to read fluently but slowly (id.). Mathematics was a weak skill and the student demonstrated little confidence (id. at pp. 20, 25). The private psychologist diagnosed the student as having a mathematics disorder and disorder of written expression (id. at p. 27). Although during the testing the student was observed to be cooperative and polite, he "was never relaxed" and his "attention and concentration" varied each session with tangential comments and distractibility (id. at p. 10).

The private psychologist concluded that the student's functioning in all areas was "being negatively impacted, and in many cases significantly compromised, by an overlay of adolescent emotional interference and deeper emotional injury stemming from years of abuse" (Dist. Ex. 15 at p. 19). The student's "ability to demonstrate his skills in the classroom, execute academic tasks, and engage in meaningful discourse [were] all severely jeopardized by emotional injury and concomitant anxiety, pervasive defensive stance" (id.). Further, the student's "anxiety compromise[d] his ability to consume and absorb information, infer and problem solve, and convey his thoughts and conclusions" (id.). When the student felt "vulnerable or anxious" he would "shut down or check out" (id.). The private psychologist shared that "over the past few years" the student expressed to his parents thoughts of "wanting to harm himself" (id. at p. 29). It was further reported that there were a "few occasions" when the student became "upset and despondent" and ran away from home only to return after a few hours (id.). According to the private psychologist, the student was "at risk for doing physical harm to himself" (id. at p. 30).

The private psychologist opined that the high school failed "to acknowledge and

appropriately address [the student's] longstanding emotional needs – and by association, his academic needs" and therefore, "perpetuating and exacerbating the long term effects of abuse" (Dist. Ex. 15 at p. 26). Among other diagnoses, the private psychologist concluded the student met diagnostic criteria for a post traumatic stress disorder (PTSD), generalized anxiety disorder, and major depressive disorder, recurrent (*id.* at p. 27). The student's depression and anxiety combined with "PTSD and very poor self-esteem" are the cause "of his poor and inconsistent academic achievement" (*id.* at p. 29). Ultimately, the private psychologist concluded that the student should be eligible for special education as either a student with an other health impairment (OHI) or an emotional disturbance for the purpose of generating an IEP and recommending a specific, residential therapeutic boarding school with co-taught classes (*id.* at pp. 27, 30).

On June 11, 2019, the 504 Committee held a periodic/annual review (Dist. Ex. 8 at p. 1). At that time, the student's grades were in the 70s in both English and social studies and he was failing both mathematics and science (*id.*). Although teacher reports stated that the student was "confident in class," he continued to struggle to "remain on task" (*id.*). Teacher reports described the student "shutting down when he becomes anxious", "zoning out" and "needing to be refocused" (*id.* at p. 2). Additionally, the student was reportedly "hesitant to start the writing process" and his mathematics teacher reported that the student's effort declined over the school year and he stopped attending after-school help sessions (*id.* at p. 1).

The private psychologist participated in the June 2019 504 Committee meeting and "expressed concern for [the student's] mood, demeanor, and self-esteem, describing [him] as very depressed and anxious, with a poor self-image" (Dist. Ex. 8 at p. 1). The private psychologist further noted that the student was "trying to keep it together to get through the day in school, and then [went] home and deal[t] with all the depression and anxiety" (*id.*). Further, the private psychologist noted that the writing samples produced by the student during the evaluation were "a window into his sullen mood, persecuted self-image and esteem, and pervasive melancholy perspective" (*id.*).

The June 2019 504 Committee recommended the addition of a "word processor for lengthy written assignments" and the use of a calculator in math (Dist. Ex. 8 at pp. 3-4). Further, regarding the student's need for refocusing and redirection, the 504 Committee clarified on the 504 plan that he "may appear to zone out when feeling overwhelmed or anxious," and that "he may need reassurance in these moments in order to re-engage in the learning" (*id.* at p. 3). With respect to check for understanding, the 504 plan noted that the student "tend[ed] to claim he underst[ood] things in order to remain compliant" and that "[c]are should be taken to ensure he really underst[ood] what [was] being presented" (*id.*).

By the fourth quarter, report card comments indicated that the student needed to pass the algebra Regents and that his grade was between 65-69, he was failing earth science, his average in English was less than 50, his global studies average was in the 60s and he had missing/incomplete assignments in Spanish (Dist. Ex. 18 at p. 4). His final grades in ninth grade were: English 75, global studies 74, algebra 65, earth science 61, Spanish 70, studio art 81, and physical education 97 (Dist. Ex. 19 at p. 4). The student failed the Regents examinations in both algebra and earth science (*id.*). The student was required to attend summer school for earth science and earned a final grade of 85 (Dist. Ex. 20). The student

passed his algebra and earth science Regents exams during summer 2019 (id.).

Based upon results of the May 30, 2019 private psychoeducational evaluation, the parents again referred the student to the CSE to determine eligibility (Dist. Exs. 8 at p. 2; 26 at p. 2). In connection with the CSE referral, the district's social worker conducted a social history interview with the student's father (see Dist. Ex. 14). The student's father reported to the district's social worker that he saw a negative change in both the student's personality and school performance during ninth grade, and expressed his concern that the school environment perpetuated and exacerbated the "long term effects" of the student's PTSD diagnosis (id. at pp. 1, 3).

On July 24, 2019, a different school psychologist conducted a psychoeducational evaluation of the student (see Dist. Ex. 13).² The student achieved scores in the average range on the academic achievement testing administered (applied problems in mathematics and passage comprehension) (id. at p. 3). During the district's evaluation the student shared that he believed "school staff d[id] not like him and he look[ed] for evidence to support th[at] belief" (id. at p. 6). He reported that he had problems with his teachers and that they did not follow his 504 plan (id. at p. 5). In connection with the evaluation, the teachers reported that the student "lack[ed] some social awareness and his behavior [was] immature and/or his comments [were] often off topic" (id.). The teachers reported that he "struggle[d] to focus in class, [was] disorganized and lack[ed] follow through" (id.). The teachers reported that the student interacted positively with peer and adults, but also that he was "overly dependent" on his teaching assistant in science class (id.).

The school psychologist administered the Beck Youth Inventories – Second Edition to the student, which revealed that his "self-concept [was] much lower than average" (Dist. Ex. 13 at p. 4). His scores on the scales for anxiety, depression, anger, and disruptive behavior were in the average range (id.). However, according to the school psychologist, other testing showed that the student viewed himself as having "issues" with "anger, anxiety and depression" (id.). On the Conners-3 "Teacher Short," scores for both inattention and peer relations fell within the "very elevated range" and suggested that the student was "likely to have poor concentration/attention when faced with academic work" and he "may give up easily" or "avoid academic tasks" (id.). The results further suggested that he may have "poor social connections" (id.). Teacher scores were also in the "elevated range" on measures of hyperactivity/impulsivity, learning problems/executive functioning, and defiance/aggression (id.). The school psychologist stated that the scores suggested that the student "may struggle academically and may have difficulty learning or remembering concepts which may necessitate additional explanations or prompts and encouragement to begin and/or complete assignments" (id.).

The student underwent a private psychiatric evaluation on July 29, 2019 and received a diagnosis of major depressive disorder (Parent Ex. J). Additionally, prior to the August 2019 CSE meeting, the district requested and obtained a psychiatric assessment of the student (see Dist. Ex. 16). During the evaluation, the student was observed to be anxious and sad (id. at p. 3). He reported to the district's psychiatrist that he had a persistent "sad mood," anxiety and feelings of depression for "over a year now" (id. at pp. 3-4). Based upon a review of educational documents

² According to the July 2019 psychoeducational evaluation report, a "classroom observation was not possible because classes were no longer in session" (Dist. Ex. 13 at p. 5).

and an interview of the student, the district's psychiatrist's diagnostic impressions included major depression, single moderate; dysthymia; PTSD, chronic moderate; and social anxiety disorder (*id.* at p. 4).³ Ultimately, the district's psychiatrist opined that the CSE should consider an emotional disturbance classification based upon the student's "complex psychiatric issues" (*id.* at p. 5). The district's psychiatrist further stated that "[g]iven [the student's] emotional fragility and how it ha[d] impacted his learning a therapeutic support day program in a local school building," "with the opportunity to mainstream," was the student's LRE (*id.*).⁴ According to the district's psychiatrist, the therapeutic day program would "allow [the student] to remain home and obtain needed professional support" (*id.*).

On August 26, 2019, a CSE meeting was held to determine the student's eligibility for special education services (*see* Dist. Ex. 26). Specifically, the CSE focused on three classifications at the August 2019 CSE meeting: learning disability, other health impairment, or emotional disturbance (Dist. Exs. 12 at p. 1; 26 at p. 3). The CSE determined that the student was not eligible as a student with a learning disability based upon "previous and current psycho-educational testing, course grades, and assessment grades" in that the CSE "did not find sufficient evidence to demonstrate a disorder" that affected the student's writing or math calculation skills (Dist. Ex. 26 at p. 3). The CSE also determined that the student did not meet the qualifications of a student with an OHI as his diagnosis of ADHD was no longer impacting his education (*id.*). Finally, the CSE recognized the student's mental health diagnoses but concluded that he did not exhibit "the characteristics of an emotional disturbance within the school setting to a marked degree that would adversely impact his educational performance" (Dist. Exs. 12 at pp. 1-2; 26 at p. 3).

At the meeting, the parent "reported that [the student] ha[d] extreme anxiety about walking into [the district's high school] as a direct result of the comment that was made to him by his teacher during the 2018-19 school year and he insist[ed] that [his son] c[ould not] attend [the district's high school] in the fall" (Dist. Exs. 26 at p. 2). Ultimately, the CSE concluded that the student was making educational progress with his 504 accommodations for anxiety (Dist. Ex. 26 at p. 3). The CSE, except for the parents, agreed that the student was ineligible for special education services (*id.*).

The student did not attend the district's high school at the start of the 2019-20 school year (*see* Dist. Ex. 24 at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated September 27, 2019, the parents alleged generally that the district violated its "child find" obligations and denied the student a FAPE, entitling the student to compensatory education as well as an appropriate placement prospectively (*see* Dist. Ex. 24). Specifically, the parents alleged that since at least the 2014-15 school year, the district failed to refer and evaluate the student in all areas of suspected disability. The parents also argued

³ According to the district's psychiatrist, a diagnosis of dyscalculia needed to be ruled out (Dist. Ex. 16 at p 4).

⁴ The district's psychiatrist also recommended for the student a "social skills group" to help with "social stress" and "different coping mechanisms" (Dist. Ex. 16 at p. 5).

that the district denied the student a FAPE from September 2017 through the 2019-20 school year.⁵ Although the remainder of the parents' arguments are general, they appear to focus on the August 26, 2019 CSE ineligibility determination. Among the numerous claims, the parents contended that the August 2019 CSE failed to consider available evaluative information, predetermined ineligibility, failed to determine the student's need for special education services, failed conduct a functional behavioral assessment, and failed to develop an appropriate IEP for the student. The parents asserted that the August 2019 CSE's ineligibility determination deprived the student of special education supports and services, all of which constituted a denial of FAPE.

B. Impartial Hearing Officer Decisions

A pre-hearing telephone conference was held on November 4, 2019 (November 4, 2019 Pre-Hearing Conference Transcript at pp. 1-27). An impartial hearing convened on December 20, 2019 and concluded on February 26, 2020 after three days of proceedings (Tr. pp. 1-721). It is significant to note that there were several interim decisions issued by the IHO in this proceeding all of which will be briefly described below.

On November 13, 2019, the IHO issued an interim decision selecting dates for the hearing, setting forth the rules for evidence and witness disclosure, and designating the exhibit format and general rules for presentation of the case by the parties (November 13, 2019 IHO Interim Decision at pp. 1-5). Thereafter, on December 20, 2019, the IHO issued an interim decision regarding the provision of education services to the student (December 20, 2019 IHO Interim Decision at pp. 1-3). The IHO held that the student's pendency was general education with 504 accommodations (*id.* at p. 1). Pursuant to the parents' request for interim relief, the IHO issued an interim decision that ordered the district to provide ten hours per week of education services to the student at a neutral location designated by the district after consultation with the parents (*id.* at p. 2). Additionally, the IHO directed the parents to sign all necessary releases to speak with the student's treatment team or professionals to determine how to deliver academic instruction to him (*id.* at p. 3).

On February 14, 2020, the IHO issued another interim decision extending the compliance date for a period of 30 days (February 14, 2020 IHO Interim Decision at pp. 1-2). After a post-hearing conference on March 12, 2020, the IHO issued an interim decision on March 13, 2020 regarding academic services for the student (March 13, 2020 IHO Interim Decision at pp. 1-2). The district was "directed to locate and identify certified providers to implement the previous order dated December 20, 2019" (*id.* at p. 2). The IHO further directed that the parents could identify their own certified and properly credentialed provider for any academic area not identified by the district, at a cost to the district not to exceed \$150.00 per hour (*id.*). Lastly, the IHO directed that until the providers were identified, the student "shall have access to the online distance education program" (*id.*). Finally, on April 16, 2020 the IHO issued an interim decision granting an extension of the compliance date for a period of 30 days (April 16, 2020 IHO Interim Decision at pp. 1-2).

⁵ Although the parents alleged in their due process complaint that the district denied the student a FAPE from September 2017 through the 2019-20 school year, there were no IHO findings pertaining to any school year other than the 2019-20 school year, and the parties do not advance any further arguments aside from those involving the 2019-20 school year.

In a final decision dated May 8, 2020, the IHO determined that the district denied the student a FAPE for the 2019-20 school year by failing to find the student eligible for special education services (IHO Decision at pp. 26-27). Initially, the IHO recognized that despite the considerable quantity of evidence and testimony regarding the student's section 504 plans, the IHO did not have jurisdiction to determine their appropriateness (id. at p. 17).

Next, the IHO determined that the hearing record supported the district's compliance with its child find obligations (IHO Decision at p. 18). Although finding that the district complied with its child find obligations because it followed procedures to monitor the student and timely evaluate him, the IHO recognized that it was the outcome of the CSE's eligibility determination that was the primary basis of the dispute between the parties (id. at pp. 18-19). The IHO determined that the district's determination that the student was not eligible for special education as a student with an OHI was appropriate because the hearing record did not support a finding that the student's ADHD was the reason for his academic difficulties (id. at p. 22). The IHO considered the evidence and testimony pertaining to whether the student was a student with a specific learning disability and concluded that "[t]he weight of the evidence suggest[ed] that the CSE should have determined a learning disability existed or at a minimum, direct[ed] that a math assessment be conducted to either support or refute the findings" by the private psychologist and district's psychiatrist (id. at pp. 24, 26).

The IHO then turned to whether the student met the eligibility criteria as a student with an emotional disturbance as most of the documentary evidence and testimony from the parties focused on this classification category (IHO Decision at pp. 22-25). The IHO noted that the CSE should have considered the fact that the student performed poorly and in fact failed the Regents examinations in both mathematics and earth science in ninth grade (id. at p. 23). The IHO concluded that the weight of the evidence supported the classification of the student under the criteria for emotional disturbance (id. at p. 25). Among the bases for his conclusion was that both the private psychologist and district's psychiatrist recommended classification of the student with an emotional disturbance (IHO Decision at p. 24; see Dist. Exs. 15 at p. 27; 16 at p. 5). The IHO held that "[w]ith two medical professionals offering multiple reasons for classification as emotionally disturbed, any CSE would be remiss to depart from them without a clear and substantial reason to do so" (IHO Decision at p. 24). Ultimately, the IHO held that the CSE erred in finding the student ineligible for classification as emotionally disturbed or learning disabled, and "such an error resulted in a substantive denial of FAPE" (id.).

Since an entire school year elapsed during the course of the proceedings, the IHO directed the student to undergo updated evaluations by a provider(s) selected by the parents and at district expense (IHO Decision at p. 28). Once completed, the IHO directed the CSE to convene to review the "updated information and make a determination as to placement" (id.). The IHO also directed that "[t]he CSE shall place the [s]tudent in an appropriate therapeutic placement that allows the [s]tudent to remain at home consistent with the [s]tudent's needs. This shall constitute the decision of the CSE unless the medical reports contraindicate such a placement based on the [s]tudent's current needs" (id. at pp. 28-29).

Finally, the IHO determined that the district's denial of FAPE warranted an award of compensatory education (IHO Decision at pp. 26-27). The student was "awarded 15 hours per week (3 hours per day) of academic instruction or 540 hours of academic remediation" (id. at p.

27). The parents were provided the opportunity to select their own provider for the academics at the district's expense (id.). According to the decision "[t]he rate for such services shall be the provider's usual and customary rate for such service or if the provider has a business relationship with the [d]istrict, the rate previously accepted by the provider for the same service in the last six (6) months" (id.). The IHO also allowed the district a "credit" or an offset toward the 540 hours of remediation for the number of hours provided consistent with the IHO's December 20, 2019 interim decision directing that the student receive 10 hours per week of instruction (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the issues for review on appeal in the district's request for review, the parent's answer, and the district's reply is presumed and will not be recited here.⁶ Briefly the district has set forth four main issues on appeal:

1. Whether the IHO erred in finding the student eligible for special education under the classification of emotional disturbance.
2. Whether the IHO erred in finding the student eligible for special education under the classification of learning disability.
3. Whether the IHO erred in calculating the award of 540 hours of compensatory education because it failed to take in to account the amount of tutoring the district has already provided.
4. Whether the IHO erred in failing to render a pendency order which the district contends resulted in the student not receiving educational programming pursuant to pendency for the first four months of the 2019-20 school year.

In his answer, the parent argues that the appeal must be dismissed for a failure to properly serve the request for review and amended request for review on the parent. The parent also argues that the district has failed to come forward with sufficient proof to overturn the IHO's decision that the student should be found eligible as a student with an emotional disturbance or a specific learning disability. The parent additionally contends that the district failed to demonstrate how the IHO's calculation of 540 hours of compensatory education was in error.

In reply, the district asserts that the parent was not prejudiced by failing to serve him and that he was able to fully respond to the allegations in the amended request for review.

Finally, I note that neither party appealed the IHO's determination that the student did not meet the qualifications for a student with an OHI, or the IHO's directive that the student be evaluated by a provider(s) of the parent's selection and at district expense. Therefore, the IHO's determinations on these issues have become final and binding on both parties and they will not be

⁶ Only the student's father is named identified in the answer whereas both parents were listed as parties to the due process complaint notice.

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]).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [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 Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County 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"]).

The burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion – Failure to Properly Initiate Appeal

In this proceeding, the district's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review, as the district failed to properly initiate the appeal in accordance with Part 279 of State regulations.

An appeal to the SRO is initiated by service of the notice of request for review and a request for review upon the respondent. 8 NYCRR 279.4(a). Where the district initiates the appeal and the parent is a named respondent, "personal service of the request for review shall be made by delivering a copy thereof to the parent; if delivery of the request for review to the parent cannot be made after diligent attempts, the board of education may serve the request for review upon the parent:

- (1) by delivering and leaving the same at the parent's residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening, and mailing by certified mail the request for review to the parent's last known residence; or
- (2) if the board of education is unable to effectuate service pursuant to paragraph (1) of this subdivision, as directed by a State Review Officer;
- (3) where service is made pursuant to paragraph (1) or (2) of this subdivision, the board of education must complete service within the timeline specified in subdivision (a) of this section and submit to the Office of State Review with its request for review proof of service, setting forth the attempts made to personally

serve the request for review and specifying the dates, addresses, and times of each of its attempts at effectuating service. 8 NYCRR 279.4(c).

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]; see, e.g., Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's counsel who represented her at the impartial hearing by overnight mail]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

Here, according to the affidavit of service, the district served the notice of request for review, request for review, memorandum of law, and a flash drive containing the record on appeal by overnight mail upon the parent's attorney on June 3, 2020 (see Dist. Aff. of Service). By letter dated July 1, 2020, this office sent a letter to the district's counsel returning the request for review for the failure to comply with the practice requirements of Part 279. More specifically, the request for review was overlength, while the practice regulations require that all pleadings be no more than 10 pages in length (see 8 NYCRR 279.8[b]). The district served and filed an amended notice of request for review and amended request for review on July 16, 2020; however, once again the affidavit of service indicated that the papers were served upon counsel for the parent (see Dist. Aff. of Service).

As noted above, the parent challenges the district's service of the appeal and requests dismissal. In a sworn affidavit dated July 27, 2020, the student's father stated that he was never served with the notice of intention to seek review, notice of request for review and request for review or amended notice of request for review and amended request for review. The above referenced documents were neither personally served upon him nor mailed to him by certified mail. Furthermore, the student's father states that he did not waive his right to be served and did not authorize anyone to accept service on his behalf (Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058).

The district argues in its reply that the parent was not prejudiced and had the opportunity to fully respond to the amended request for review. Specifically, the district argues that the verified answer failed to contain any argument that the parent's receipt of the amended request for review through his counsel prejudiced the parent's ability to properly respond to the allegations contained in the amended request for review. However, lack of prejudice to the parent is not a reason why service of the request for review was not made properly (see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 367 [S.D.N.Y. 2013] [indicating that, while an SRO might in his or her discretion "consider whether a party has suffered prejudice, the regulations require a showing of good cause"]).⁷

⁷ As one court put it, the failure to "properly initiate [an] appeal to the SRO 'should be equated with failure to bring an appeal at all'" (B.C. v Pine Plains Cent. School Dist., 971 F Supp 2d 356, 367 [SDNY 2013]).

Significantly, the district does not deny that it failed to serve the notice of request for review and request for review or amended notice of request for review and amended request for review on the parent. And in fact, the district disingenuously argues that the parent's counsel agreed to accept service of the request for review on behalf of the parent although fails to offer any support for this conclusory allegation. The district served the reply on both the parent's counsel and the parent via certified mail return receipt requested. Because the district provides no basis to dispute the allegations of improper service contained in the parent's answer, I find that, contrary to the district's assertion, there was no agreement for the parent's counsel to accept service of the request for review or amended request for review.

The district has not offered any explanation for its failure to serve the request for review upon the parent in this matter. If the district was unable to comply with this requirement, it was incumbent upon the district to explain why it could not do so and, if necessary, pursue alternative service as provided for by State regulations (8 NYCRR 279.4[c][2]). Given the absence of any showing that the district served the parent with the request for review, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than service upon the parent, it is an inescapable conclusion that the district failed to effectuate proper service in this matter either pursuant to Part 279 or in another manner authorized by an SRO (8 NYCRR 279.4[c]; see Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 09-075; Application of the Dep't of Educ., Appeal No. 09-062).⁸ Accordingly, the district's appeal is dismissed.

Even if the district's appeal had not been dismissed on procedural grounds for failure to comply with the service requirements of Part 279, the challenges in its appeal would also have been dismissed on the merits because the IHO's thorough and well-reasoned findings of fact and conclusions of law in his final decision with respect to finding the student eligible for special education and granting compensatory education would have been adopted as my own (IHO Decision at pp. 13-30). 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]). Here, there was sufficient evidence in the hearing record for the IHO to determine that the student was denied a FAPE.

The central issue in the underlying impartial hearing was whether the student met the criteria for eligibility as a student with a disability.⁹ The IHO recognized that the focus of the

⁸ The dispute became apparent when the parent's answer was filed, but the analysis would hold for both the original and the amended request for review as neither was served upon the parent.

⁹ The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; see 34 CFR 300.308[a][1]; 8 NYCRR 200.1[zz]).

August 2019 CSE meeting and evaluative documentation was on whether the student met the qualifications as a student with an emotional disturbance (IHO Decision at p. 22).¹⁰

In his decision, the IHO noted that both the private psychoeducational evaluation report dated May 30, 2019 and the district's psychiatric assessment report dated August 15, 2019 were available to the August 2019 CSE and recommended classification of the student with a disability (IHO Decision at p. 24; see Dist. Exs. 15-16). The district's psychiatrist recommended a classification of emotional disturbance due to the student's "complex psychiatric issues" (Dist. Ex. 16 at p. 5). In addition, the private psychologist recommended that the student be classified as "other health impairment" or "emotionally disturbed" (Dist. Ex. 15 at p. 27). Both "professionals arrived at a similar conclusion, that the [s]tudent's varied and complex psychiatric issues have impeded this [s]tudent's ability to access educational services" (IHO Decision at p. 24). The IHO recognized that the district disagreed with the conclusions of the district's psychiatrist and private psychologist, but the district "did not disagree with the methodology of testing[, or] testing or otherwise questioned the results of the testing" (id.). Furthermore, and significantly, the IHO held that "[t]he [d]istrict departed not only from the recommendation as to services but also as to the threshold issue of classification. With two medical professionals offering multiple reasons for classification as emotionally disturbed, any CSE would be remiss to depart from them without a clear and substantial reason to do so" (id.).

Next, the IHO focused on the results of the district's July 2019 psychoeducational evaluation (see Dist. Ex. 13). Specifically, teacher responses on the Conners-3 revealed "'elevated' or 'very elevated' range in 'Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Defiance/Aggression, Peer Relations'" (IHO Decision at p. 23; Dist. Ex. 13 at p. 4).¹¹ This, the IHO pointed out, is in direct contrast to the teacher interviews by the school psychologist

¹⁰ Under the IDEA, in order to be found eligible for special education as a student with an emotional disturbance, the student must meet one or more of the five characteristics (see 34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

¹¹ The district provides no authority that the student's elevated scores on the Conners-3 teacher rating scales could not be relied upon by the IHO, and the IHO was obviously not convinced by the testimony of the district's school psychologist that the teachers responses should be interpreted differently, and I am inclined to agree especially when the school psychologist's own evaluation report does not hint at the distinctions that she attempted to make later at the impartial hearing (see Dist. Ex. 13 at pp. 4-5). Additionally, in interpreting the Devereaux Behavior Rating Scale portion of the evaluation report, the school psychologist stated that the student's "total scale score indicated behavior ratings within the average range within all main subject areas with standard scores ranging from 88 to 107 (mean score of 100)" but the mean score did not reflect that the total scale scores in three out of five of the student's main subject areas were in the borderline range, and the school psychologist's conclusion that the student's "behavior ratings were in the normal range for all areas assessed suggesting [the student] generally displayed normal behaviors similar to his peers" is questionable, and her testimony that "basically [the teachers] were all saying that he was within an average range" once again devalues the actual testing results when compared to the testing rubric (Tr. p. 314; see also Tr. pp. 418, 422-23). I would hesitate to accept the science teacher's rating scale of the student's emotional state as a reliable measure, or at least note its effect on the remaining scores in the evaluation report, in light of the fact that it was the low score by far especially when viewed in light of the evidence regarding the science teacher's repulsive conduct toward the student (Tr. pp. 423, 470).

wherein the student's "main subject teachers describe him as a friendly student that is personable, polite and courteous" (IHO Decision at p. 23; Dist. Ex. 13 at p. 5). The IHO held that this "disconnect in [the] Psycho-Educational Evaluation [] coupled with the student's poor performance in math and science should have given pause to the CSE when determining the student's eligibility for [e]motional [d]isturbance under" the first two characteristics of the emotional disturbance eligibility criteria (IHO Decision at p. 23).¹² The IHO determined that at the time of the August 2019 CSE meeting the fifth characteristic of emotional disturbance may not have been present to the CSE members; however, the student "at the time of this hearing clearly showed this symptom as evidence by his continued declination to attend school" (IHO Decision at p. 25).¹³

The IHO found that the 2018 psychoeducational evaluation together with the two 2019 psychoeducational evaluations demonstrated that the student was of "average intelligence;" however, he was "struggling" academically such that he failed both ninth grade math and science Regents exams and his science class (IHO Decision at p. 22; see Parent Ex. B; Dist. Exs. 13, 15, 19-20). However, the IHO stated that the student's failures could not "be viewed in isolation" (IHO Decision at p. 23). The student achieved passing scores in math and science during summer school which the August 2019 CSE used to justify the decision that the student did not require special education services (id.; Tr. pp. 191-192). The IHO correctly reasoned that "not every student requiring summer school is a student eligible for an IEP, this fact must not be viewed, again, in isolation but rather as only one part of the entire [s]tudent's profile" (IHO Decision at p. 23).

The IHO also recognized that both the private psychological evaluation and district's psychiatric assessment recommended some type of special education services (IHO Decision at p. 24). The student's passing course grade and exam scores in summer school cannot in and of itself be considered a success since the "reteaching" of the subject areas "is a form of intervention that cannot be ignored when there are multiple reports and test that suggest that this student is struggling because of issues identified in multiple medical reports" (id. at pp. 24-25). The IHO finally held that the "medical reports coupled with the weight of the evidence presented show that [the] [d]istrict erred in concluding that the [s]tudent did not satisfy the criteria" of a student with an emotional disturbance (id. at p. 25). These findings go directly to the issue of whether there was an adverse affect on the student's educational performance and, contrary to the district's allegation on appeal, the IHO did not overlook or fail to make findings regarding the student's educational performance.¹⁴ The student's educational performance was negatively affected in that despite the accommodations offered through his section 504 plan, the student's emotional struggles were contributing to his poor academic performance. In final, the IHO held that the district's

¹² The first two criteria of a student with an emotional disturbance are: "(a) [a]n inability to learn that cannot be explained by intellectual, sensory, or health factors and (b) [a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers" (8 NYCRR 200.1[zz][4]).

¹³ The fifth criteria is "[a] tendency to develop physical symptoms or fears associated with personal or school problems" (8 NYCRR 200.1[zz][4]).

¹⁴ The district's argument splits one too many hairs regarding the IHO's findings insofar as the IHO stated that "[t]his disconnect in Psycho-Educational Evaluation (Exhibit 13) coupled with the student's poor performance in math and science should have given pause to the CSE when determining the student's eligibility for Emotional Disturbance" (IHO Decision at p. 23 [emphasis added]).

failure to classify the student with an emotional disturbance or learning disability, which rendered him ineligible for special education services, "resulted in a substantive denial of FAPE" (IHO Decision at p. 26).

In terms of a remedy, the IHO appropriately acknowledged that the situation worsened after the district's failure to classify the student, noting that "since the denial of FAPE the [s]tudent has not been in school" (IHO Decision at p. 27). To remedy this failure, the IHO awarded a total of 540 hours of compensatory educational services.¹⁵ The evidence in the hearing record does not afford a basis to overturn the IHO's determination that the student should have been classified as a student with an emotional disturbance or the amount of compensatory education relief awarded to the student.¹⁶

VII. Conclusion

Based upon the foregoing, the appeal is dismissed for failure to properly initiate the appeal.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 1, 2020**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹⁵ The IHO explained that "[t]he number of hours for such services are calculated as follows. The mandated 180 day school year, exclusive of holidays equates to 36 weeks of instruction. The student shall be awarded 15 hours per week (3 hours per day) of academic instruction or 540 hours of academic remediation. The [d]istrict is entitled to a credit for the number of hours previously or currently being provided on a 1:1 basis consistent with my December 20, 2019 order. These hours shall serve as a bank of hours" (IHO Decision at p. 27).

¹⁶ With regard to compensatory education, the district's argument that the IHO failed to take pendency services into account are simply not true, and its contention that executive orders in spring 2020 relaxing the 180-day school attendance requirements due to the COVID-19 pandemic come across as after-the-fact, opportunistic efforts to evade its responsibilities to this student, especially when the district acknowledged that schooling continued for students in the district until June 2020 (albeit with "virtual learning" mentioned in the district's memorandum of law etc.). Those executive orders were designed to keep State aid flowing to school districts during the pandemic—they were not intended to cut off student learning or insulate the district from past violations. The fact that the student was eligible for virtual learning "like rest of the student body during the closure period" does not make the district any less responsible to provide compensatory education due to its failure to classify the student.