The University of the State of New York

The State Education Department
State Review Officer
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No. 21-057

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Lisa Gibertoni, Esq. and H. Jeffrey Marcus, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 their request to be reimbursed for expenses associated with their daughter's attendance at the Atlas Autism School (Atlas) for the 2019-20 school year.[1] Respondent (the district) cross-appeals from the IHO's award of prospective compensatory relief. The appeal must be dismissed. The cross-appeal must be sustained.

[1] The parents appeared jointly in the impartial hearing and in prior proceedings. The student's mother appears individually in this appeal (compare Req. for Rev. at p. 1; with Parent Ex. A at p. 1); however, for the purpose of consistency, this decision refers to petitioners as both parents.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative proceedings. The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. As relevant herein, the parties did not contest the student's pendency program which was based on an October 16, 2017 IHO decision that found the district denied the student a free appropriate public education (FAPE) for the 2017-18 school year and awarded the parents tuition reimbursement at Atlas for the 2017-18 school year (Parent Ex. B; see Tr. pp. 1-9; Parent Ex. A at p. 9). The parents also alleged that the student was denied a FAPE for the 2018-19 school year and an impartial hearing was conducted before the same IHO as in this matter.

During the prior impartial hearing on October 18, 2018, an interim order was issued by the IHO in which he directed, among other things, that the district fund the following transportation related services:

> 3d. At the parents' election, the DOE will fund one or two behavioral support staff members for a maximum of 50 hours per week for each provider. If the parent identifies a behavioral support staff person who has training, experience and credentials in Applied Behavioral Analysis ("ABA") (an "ABA Professional") who also has the physical characteristics and ability to work with the student on his or her own during travel times, the parent may select one behavioral support staff person. If the parent is unable to identify a single staff person who meets all of the above criteria, the parent may select two staff members: (a) an ABA professional; and (b) an individual who (i) has the physical abilities necessary to safely manage the student during travel; and (ii) has sufficient training and qualifications necessary to implement a behavior plan directed by the ABA professional. These individuals shall be paid at market rate for such services in the New York City area.
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> 6. The [district] will prospectively fund Uber gift cards in $4,000 intervals every four weeks (which represents the travel funds necessary for four weeks of school) for the parents to use to fund the student's travel to and from school on the days she is unable to travel safely by bus and until such time as she is able to safely travel by bus. The parents may only use this gift card for transportation relating to (a) transporting the student to and from home and the school; (b) or transporting the parents and/or behavioral support staff to and from the student's school where use of public transportation is not feasible.
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> 7. Upon the presentation of receipts and dates of school attendance, the [district] will reimburse the parents for any out-of-pocket costs for Uber, taxi and/or car service that they have incurred or will

incur transporting the student to and from school during the 2018-19 school year

(Parent Ex. C at pp. 3, 4).

On June 5, 2019, the parents advised the district that the student's last IEP had been developed on May 4, 2017 and notified the district of their objections to the IEP and the CSE process; the parents also notified the district of their intent to place the student at Atlas for the 2019-20 school year and to seek funding from the district for the student's placement (Parent Ex. F).

A. Due Process Complaint Notice

Turning to the present matter, by due process complaint notice dated December 20, 2019, the parents alleged that the district had not convened a CSE and had not developed an IEP for the student since May 2017 (Parent Ex. A at p. 7). The parents further alleged that the student was denied a FAPE for the 2019-20 school year due to the district's failure to convene a CSE and failure to develop an IEP for the 2019-20 school year (id.). The parents also asserted that the district had committed a gross violation of the IDEA by failing to develop an IEP for the 2018-19 and 2019-20 school years (id.). The parents claimed that the student would need an award of extended eligibility as a result of the serious nature of the student's deficits across all domains (id.). Next the parents alleged that the district had failed to consistently provide appropriate special transportation for the student causing her to miss school and contributing to the escalation of the student's maladaptive and interfering behaviors "before, during and after transport" (id.). The parents claim that due to the district's failure to provide appropriate transportation, the student had missed instructional time and the parents were required "to incur significant costs securing alternative transportation, and has caused considerable stress on [the student] as well as her family" (id. at p. 8). The parents alleged that they were required to obtain private transportation at their own expense when the car service authorized by the district failed to arrive (id.). The parents further contended that due to the district's failure to provide behavioral support for the student during transportation, the parents have had to act as the student's behavioral support during transportation and during the school day (id.). The parents asserted that on the days in which they have had to provide support to the student, they "have lost wages and suffered financial injury" (id.).

As relief, the parents requested an order directing the district to provide appropriate bus transportation between the student's home and Atlas, including maintaining the student's current bus route with limited travel time of one hour or less in a bus of sufficient size to accommodate the student and the behavior support professionals (Parent Ex. A at p. 9). The parents further requested funding for one or two behavioral support staff members for up to 50 hours per week for each provider with the "physical characteristics and ability to work with the student" during travel times (id. at p. 10). The parents also requested funding for a car service to transport the student and behavior support professionals and/or parents to and from Atlas on all days that the student is unable to be safely transported by bus, prospective funding of "Uber gift/credit cards in an amount not to exceed $1000 per month" for the student, and payment to the parents and/or behavior support professionals to travel to and from Atlas on the days the student was unable to travel safely by bus (id.). Next, the parents requested reimbursement—upon presentation of

receipts and dates of school attendance—for any out-of-pocket costs for Uber, taxi, and/or car service incurred during the 2019-20 school year or payment to any third-party who advanced transportation related funding to the parents during the 2019-20 school year (id. at 10, 11). The parents requested "funding for [the student's] lunch while she attends Atlas… and reimbursement to the Parents for any costs and out of pocket expenses the Parents paid for [the student]'s meals while attending Atlas during the 2019-20 school year" (id. at p. 9). The parents also requested reimbursement "for their time for periods in which [they] [] had to miss work in order to assist with the Student's transport and/or act as [the student]'s behavioral support provider" (id. at p. 10). Lastly, the parents requested an interim order for transportation and behavioral support "to prevent disruption in [the student]'s education while this matter is pending" (id. at p. 11).

B. Procedural History and Impartial Hearing Officer Decision

On January 14, 2020, the IHO rendered a decision in the prior proceeding and determined that the district failed to offer the student a FAPE for the 2016-17, 2017-18,[2] and 2018-19 school years, that Atlas was an appropriate placement for the 2018-2019 school year, and that any tuition for Atlas for the 2018-19 school year must be funded by the district (Parent Ex. D at pp. 7-11). As further relief, the IHO ordered the district to "compensate [the parents] for [their] services as [the student's] 1:1 Travel Aid[e] during the 2017-18 and 2018-19 school years, for up to 2 hours per day during the time [the student] has attended Atlas and up to one hour per day while [the student] attended [a district public school], at a rate of $70 per hour (as per the pendency order), upon [the parents'] submission of an affidavit… setting forth the dates and times that [the parents] traveled with [the student] to and/or from school" (id. at p. 12).[3]

A hearing on pendency, in this proceeding, was conducted on January 15, 2020 and the IHO issued an interim order on pendency on February 5, 2020 (Tr. pp. 1-9; Parent Ex. E). A prehearing conference was held on February 5, 2020, and a second hearing on pendency was held on March 5, 2020, after the parents received the IHO's decision in the prior proceeding (Tr. pp. 10-23). On March 24, 2020, the IHO issued a second interim order on pendency consistent with the IHO's findings in his January 14, 2020 decision and to which the district agreed (Second Interim Order on Pendency at p. 1).

The district appealed from the January 14, 2020 IHO decision directing compensation to the parents for their services as the student's 1:1 travel aide during the 2017-18 and 2018-19 school years (Application of the Dep't of Educ., Appeal No. 20-034). An SRO found that the IHO erred by awarding the parents $70.00 per hour for their time acting as a travel aide for the student (id.). The SRO determined that reimbursement for the costs of transportation was an appropriate compensatory award; however, reimbursement of lost wages was a form of compensatory damages unavailable in an administrative forum under the IDEA (id.).

[2] In a decision dated October 16, 2017, another IHO found that the district did not offer the student a FAPE for the 2017-18 school year and ordered the district to pay the student's tuition and related costs at Atlas for the 2017-18 school year (Parent Ex. B at p. 8).

[3] The rate of $70.00 per hour was not discussed in the IHO's October 18, 2018 Interim Order (Parent Ex. C at pp. 1-4).

Status conferences in this proceeding, were conducted on April 27, 2020 and June 8, 2020, and the parties proceeded to a one-day impartial hearing on August 10, 2020 (Tr. pp. 24-167). By decision dated January 4, 2021, the IHO found that the district did not meet its burden to demonstrate that the student was offered a FAPE for the 2019-20 school year (IHO Decision at p. 8). The IHO further found that the parents' unilateral placement at Atlas was an appropriate "setting" and provided an appropriate program for the student for the 2019-20 school year (id. at pp. 8-9). The IHO also found that equitable considerations did not weigh against an award of tuition reimbursement and direct payment to Atlas for the 2019-20 school year (id. at p. 9). The IHO determined that the parents' request for compensatory reimbursement was beyond his authority to award based on the prior SRO decision issued regarding this student and that case law precluded awards of monetary damages to parents (id. at p. 11). The IHO specifically declined to admit Parent's Exhibit Y, finding it was not relevant based on his determination that he lacked the authority to award the parents' requested relief (id. at pp. 11-12). The IHO also found that the district should have provided transitional and transportation support and ordered the district to pay the parents' private provider for the period of time it was provided, upon proof of services rendered or proof of payment, during the 2019-20 school year (id. at pp. 11, 12). The IHO ordered the district to directly pay for the cost of the student's attendance at Atlas for the 2019-20 school year and to reimburse the parents for any payments made to Atlas upon presentation of proof of payment (id. at p. 12). Next, the IHO ordered reimbursement for the costs of food for the student during school hours upon presentation of proof of payment (id.). The IHO further awarded compensatory services of ten hours per week of 1:1 home-based ABA with a Board Certified Behavior Analyst (BCBA) or otherwise qualified professional, one hour per week of qualified supervision and two hours per week of home-based counseling, communication, and training at a market rate of up to $215 per hour for one 12-month school year (id.).

IV. Appeal for State-Level Review

The parents appeal and request reimbursement for various travel-related expenses and other parental expenditures that the IHO declined to award. Specifically, he parents assert that the IHO's order to reimburse the parents for the cost of food that they incurred for the student "to be fed during the school day" failed to specify that food was not limited to meals or lunch but should also include breakfast, snacks, and food to be used as edible incentives and reinforcers, as well as any and all other food items the student required during the school day (see IHO Decision at p. 10). The parents allege that the IHO also failed to adequately address the parents' request for funding for intensive transition and transportation behavior management from a highly qualified behavior management professional to be provided at market rate by an appropriately trained transportation paraprofessional of the parents' choosing and that the aide have access to the student up to an hour prior to transportation to assist fully with the transition. The parents contend that the IHO failed to order funding for the service going forward as requested and only ordered the district to pay services rendered. The parents next argue that the IHO erred by denying the parents' request for compensatory reimbursement for serving as the student's transportation paraprofessional at a market rate of between $60 to $70 per hour. The parents allege that the IHO erred by determining that the parents' request was beyond the IHO's authority and should not have characterized the request as one for monetary damages. In addition, the parents contend that the IHO erred by declining to admit a post-hearing exhibit, which the parents have submitted with their request for review for consideration as additional

evidence. For relief, the parents request reimbursement for out-of-pocket travel expenses, reimbursement for the cost of all food items during the 12-month school year, including the time period of remote instruction, funding for intensive transition and transportation behavior management at a market rate with access to the student for up to an hour prior to transportation, compensatory reimbursement for the parents' time as the student's transportation paraprofessional at a market rate of $60 to $70 per hour, and admission of the post-hearing exhibit into the hearing record.

In an answer with cross-appeal the district alleges that the parents' request for review fails to comply with the practice regulations and should be dismissed. The district also argues that the IHO properly denied the parents' request for reimbursement for the time the student's mother spent transporting the student to and from school, properly declined to order transition and transportation behavior management services, properly declined to admit the parents' post-hearing exhibit, and properly addressed the parents' request for reimbursement of meals, food, snacks, edible reinforcers, and other food items supplied during school hours. For a cross-appeal, the district asserts that the IHO erred by ordering the district to fund home-based ABA services as compensatory education that was not requested by the parents in their due process complaint notice and was for the purpose of enforcing a prior IHO order.

The parents submit a reply and answer to the district's cross-appeal. In response to the cross-appeal, the parents contend that they did not have to raise a request for relief in the due process complaint notice and raised the underlying issues upon which the relief was based. The parents further assert that the district's "failure to implement pendency gives rise to the right to compensatory services in the amount that the school district failed to provide."

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).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR

200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

Tuning first to the answer with cross-appeal, the district asserts that the parents' request for review fails to conform with the practice regulations by stating their disagreement with the IHO's findings and conclusions but failing to specify their reasons for challenging the IHO's decision. The district also contends that the parents' arguments set forth in their memorandum of law should not be considered because a memorandum of law cannot substitute for a pleading. As such, the district argues that the parents' appeal should be dismissed.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

(1) the specific relief sought in the underlying action or proceeding;

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

> (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

(8 NYCRR 279.8 [c][1]-[3]). The regulation further states that "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][4]).

Generally, 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]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; 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]).

Although, I generally agree with the district's characterization that much of the parents' argument is contained in their memorandum of law, the parents' request for review, although not particularly well-pled, does allege specific errors committed by the IHO. As such, I decline to dismiss the parents' request for review because it adequately complies with the practice requirements of Part 279 and, given that the district was able to respond to the parents' allegations that are contained within the request for review, the district has not suffered undue prejudice to the extent that outright dismissal is warranted and I will consider the parents' claims as further discussed below.

2. Scope of Impartial Hearing and Review

The district cross-appeals the IHO's order directing the district to fund home-based ABA services as compensatory education. The district first asserts that the parents did not request this relief in their due process complaint notice.[5]

[5] The district also alleges that the parents did not request transition and transportation behavior management "moving forward" (Answer with cross-appeal ¶12). The due process complaint notice includes a request for funding for one or two behavioral support staff members for the purpose of safely transporting the student (Parent Ex. A at p. 10).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Although the district correctly alleges that the parents' due process complaint notice does not request home-based ABA services or compensatory educational services as relief for a denial of a FAPE for the 2019-20 school year, the parents' due process complaint notice in this matter was filed on December 20, 2019, approximately 25 days before the IHO rendered his decision in the prior proceeding ordering the district to provide the student with home-based ABA services (compare Parent Ex. A at p. 1; with Parent Ex. D at p. 13). In addition, the parents' counsel in her opening statement specifically requested at least ten hours per week of home-based behavior support, two hours per week of parent counseling and training and that "[t]his order would be compensatory in nature since the school year has ended and the [p]arent submits to demonstrate the hourly cost of those one-to-one ABA services" (Tr. p. 54). When given the opportunity to object to the parents' requested relief, the district merely opposed the parents' entitlement to relief, and never asserted that the parents' requested relief was beyond the scope of the impartial hearing (Tr. p. 58). The district did not object to the parents' requested relief at the time, therefore, this issue was not raised for the first time on appeal and is within the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]).

Next, the district alleges that the IHO's order was for the improper purpose of enforcing his own January 14, 2020 decision. In his decision in this matter, the IHO stated that, "I

previously ordered home based ABA in my decision of January, 2020 Exhibit D. This was not appealed. Parent counsel advised that these ABA services were never provided. I am therefore now ordering, as compensatory services, that they be provided" (IHO Decision at p. 10).

The IHO's rationale for ordering the parents' requested relief appears to be based on his determination that the district failed to implement his prior decision. To the extent that the IHO ordered compensatory educational services as a remedy for the district's failure to implement unappealed portions of his January 14, 2020 decision, this was error. It is well settled that an IHO does not have the authority to enforce or stand in review of another IHO's decision (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Nevertheless, this does not end the inquiry. As noted above, the parents requested compensatory educational services consisting of ten hours per week of home-based ABA and two hours per week of parent counseling and training as relief for a denial of a FAPE for the 2019-20 school year. The district failed to object to the parents' request during the impartial hearing. Accordingly, while the IHO may have applied flawed reasoning when addressing the parents' claim, the parents nonetheless properly raised the claim in their due process complaint notice and it was properly within the scope of the impartial hearing. As a result, the merits of the parents' requested relief of home-based ABA services as compensatory education for the district's denial of a FAPE to the student for the 2019-20 school year will be addressed below.

Turning to which claims are properly before me on appeal, in the opening of the answer with cross-appeal, the district indicated its intention to cross-appeal the IHO's finding that the parents' unilateral enrollment of the student at Atlas was appropriate and to cross-appeal the IHO's award of tuition reimbursement. However, the district failed to interpose claims challenging the IHO's findings regarding the appropriateness of Atlas or the award of tuition reimbursement in the body of the answer with cross-appeal. The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "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 further specify that "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][2], [4]). Accordingly, those claims which the district failed to set forth in its cross-appeal have been abandoned and will not be further discussed.

As a result, neither party has appealed from the IHO's determination that Atlas was an appropriate unilateral placement or from the IHO's award of tuition reimbursement for the 2019-

20 school year. Therefore, the IHO's determinations on these issues have become final and binding on both parties and they 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]).

Additionally, in this matter, the IHO ordered reimbursement "for the costs of food for [the student] during school hours, upon presentation of proof of payments made" (IHO Decision at p. 12). The IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012];see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In the due process complaint notice, the parents requested "funding for [the student's] lunch while she attends Atlas… and reimbursement to the Parents for any costs and out of pocket expenses the Parents paid for [the student]'s meals while attending Atlas during the 2019-20 school year" (Parent Ex. A at p. 9). In their post-hearing brief, the parents requested reimbursement for their out-of-pocket expenditures for the student's "meals and snacks over the entirety of school year 2019-2020, irrespective of the shutdown, upon submission of reasonable proof thereof" (Parent Ex. Z at p. 29). In their request for review, the parents argue that the IHO's order to reimburse the parents for the cost of food that they incurred for the student "to be fed during the school day" failed to specify that food was not limited to meals or lunch but should also include breakfast, snacks, edible incentives and reinforcers, and any and all other food items the student required during the school day (Req. for Rev. ¶2). However, because the IHO ordered reimbursement for the costs of food during school hours (IHO Decision at p. 12), this issue was decided in the parents' favor. Therefore, the parents do not have a colorable basis on which to base their appeal of this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore her cross-appeal of any portion of the IHO's decision, including unaddressed issues, was not subject to review through the administrative appeal process]). While the parents on appeal seek to parse the specific food items and categories that are reimbursable pursuant to the IHO's order, the IHO's award of reimbursement generally included the costs of food for the student during school hours and did not exclude any category of food-related expenses the parents sought in their due process complaint notice. As a result, the parents were not aggrieved by the reimbursement of food-related expenses ordered by the IHO and the parents' requested relief on appeal regarding this award will not be further considered herein.

As noted above, the IHO's decision resolved the issue of reimbursement for the cost of food provided to the student during the school day entirely in the parents' favor awarding all of the relief requested in the due process complaint notice and post-hearing brief (IHO Decision at p. 12). As such, the parents are not entitled to appeal the IHO's finding on the issue of reimbursement for the cost of food (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l])

3. Additional Evidence

After the conclusion of the impartial hearing, the parents offered an affidavit setting forth the hourly rate charged by a specific agency for transportation paraprofessional services. The

district objected to the document at the time as irrelevant and untimely; and the IHO excluded the proposed exhibit from evidence as irrelevant (IHO Decision at pp. 11-12). The parents contend that the IHO erred by declining to admit their post-hearing exhibit, which the parents have submitted with their request for review for consideration as additional evidence.

State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). At the outset, I note that the IHO determined that he did not have the authority to award the parents' request for compensation for their time serving as the student's transportation paraprofessional in accordance with Application of the Dep't of Educ., Appeal No. 20-034. Based on this determination, he found that the parents' proposed exhibit was not relevant. Review of the hearing record does not support a finding that the IHO abused his discretion by declining to admit the parents' post-hearing exhibit.

Turning to the parents' request that this same post-hearing exhibit be admitted as additional evidence in this appeal, in general, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Initially, I note that the district correctly asserts that the parents obtained the affidavit from a paraprofessional provider after the end of the 2019-20 school year, which is the one at issue. Further, the proposed exhibit was unavailable at the impartial hearing because the parents' delayed obtaining an affidavit, not because one could not have been obtained and offered at the time of the impartial hearing. In any event, as discussed below, the prospective relief requested by the parents is not properly available in this proceeding and, similar to the IHO's finding that the affidavit was therefore irrelevant, the parents' proposed exhibit is likewise not necessary to render a decision in this matter. Accordingly, I decline to consider the parents' proposed exhibit as additional evidence.

B. Relief

1. Reimbursement of Transportation and Travel Expenses

In their due process complaint notice, the parents sought (1) prospective funding of Uber gift/credit cards in an amount not to exceed $1000 per month for the student's travel to and from school on the days she was unable to travel safely by bus, (2) reimbursement for out-of-pocket expenses for Uber, taxi, or car service, and (3) reimbursement of any third-party payor who advanced transportation related costs to the parents (Parent Ex. A at p. 10). In their request for review, the parents allege that the IHO failed to address their claims related to reimbursement of their travel-related expenses and continue to seek reimbursement of such expenses. The district

argues that the IHO correctly declined to award reimbursement because the parents did not present any evidence of travel-related expenses or use of car services and that the district funded the student's travel for all of the 2019-20 school year. The IHO did not make any findings related to the parents' request for reimbursement of travel expenses.

As an initial matter, it is unclear as to whether the parents would be entitled to reimbursement for the transportation expenses they requested in the due process complaint notice as part of the reimbursement of costs and expenses related to the student's attendance at Atlas. The IDEA includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). In addition, the State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

Here, the student's mother testified generally about transportation expenses within the context of the parents' need for direct payment of tuition to Atlas (Tr. p. 139). Accordingly, it appears that the parents seek reimbursement for travel expenses as a related service as part of the student's unilateral placement. The district concedes that it is obligated to provide transportation to the student pursuant to the March 24, 2020 second interim order on pendency but also asserts that the parents have not demonstrated that it has failed to implement pendency with respect to the student's transportation or provided any proof that they have incurred transportation expenses related to the students travel to and from Atlas.[6] The special transportation previously recommended by the district in the May 4, 2017 IEP was limited to provision to the student of a transportation paraprofessional. Otherwise, the hearing record is scant with respect to evidence

[6] The March 24, 2020 second interim pendency order provides that the district is obligated to fund "transportation services, reimbursement for out of pocket transportation costs" as part of the student's pendency.

of the student's special transportation needs other than her need for adult supervision during transportation to be provided by a paraprofessional. Moreover, the student's mother did not testify as to specific expenses incurred for transportation of the student to and from Atlas, no documentary evidence was submitted at the hearing concerning transportation costs or expenditures, and the parents' counsel did not question the student's mother during the impartial hearing about reimbursement of transportation related expenses.

As a result, the hearing record does not contain any evidence of travel expenses for the student's attendance at Atlas. Accordingly, whether the parent was entitled to such reimbursement either as a related service that was part of the unilateral placement of the student at Atlas or pursuant to pendency, the IHO did not err by declining to award reimbursement of travel expenses given the lack of evidence of any parental expenditures for the student's transportation.

2. Prospective Relief

The parents allege that the IHO erroneously failed to adequately address their request for funding for intensive transition and transportation behavior management from a highly qualified behavior management professional to be provided at a market rate by an appropriately trained transportation paraprofessional of the parents' choosing and that the aide have access to the student up to an hour prior to transportation to assist fully with the transition. The parents further contend that the IHO failed to order funding for the service going forward as requested and only ordered the district to pay for services rendered. The district argues that the IHO properly declined to order prospective transition and transportation behavior management services for the student. The district also cross-appeals the IHO's award of prospective funding for home-based ABA services as compensatory education that was not requested by the parents in their due process complaint notice and was for the purpose of enforcing a prior IHO order. As discussed above, the parents' request was within the scope of the impartial hearing and the IHO awarded prospective funding for ten hours per week of 1:1 home-based ABA, one hour per week of qualified supervision, two hours per week of home-based counseling, communication, and training provided by a BCBA or otherwise qualified professional at a rate of up to $215 per hour for a 12-month school year.

Initially, as the parents chose to unilaterally place the student at Atlas and received tuition reimbursement for that placement for the 2019-20 school year, they may not also seek compensatory education for the same time frame (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; Application of a Student with a Disability, Appeal No. 20-151; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]).

Additionally, an award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE

is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Accordingly, the IHO's award of compensatory education consisting of funding for ten hours per week of 1:1 home-based ABA, one hour per week of qualified supervision, two hours per week of home-based counseling, communication, and training provided by a BCBA or otherwise qualified professional for one 12-month school year, must be overturned. However, the parents also argue that the parents are entitled to these services as make-up services for pendency services that the district failed to provide. Indeed, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

However, this is not a case in which a district was required to provide pendency services to the student and, having failed to have done so, an order of reimbursement for services the parent obtained or for compensatory make-up services from private providers (as opposed to district providers) may have been warranted (see E. Lyme, 790 F.3d at 456). Rather, the pendency orders which the parent alleges were not implemented required the district to fund the student's placement and services (see Parent Ex. B; Sept. 2019 Interim IHO Decision) and, as such, the compensatory relief sought by the parent appears to be identical to the district's existing obligation. As such, the IHO is correct that the parent's request is more akin to a request for enforcement (see IHO Decision at pp. 5, 7-8), and 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]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). However, to the extent the district has not appealed the IHOs' orders in the 2018-19 matter or the present matter, the district's "only lawful course of action is to implement those Orders, full stop" and, having failed to do so, the parent will likely succeed in her efforts to compel enforcement (LV v. New York City Dep't of Educ., 2021 WL 663718, at *8 [S.D.N.Y. Feb. 18, 2021]).

Further with regard to the parents' request for transition and transportation behavior management services to assist the student, the IHO addressed this request by awarding funding for services provided during the 2019-20 school year upon proof of services or proof of payment. The IHO did not fail to address the parents' request, the IHO declined to award funding for future services.

At this point, the 2019-20 school year is over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2020-21 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record and the resulting award of reimbursement by the IHO. Accordingly, there is no reason to grant the parents' request for prospective funding.

3. Reimbursement of Parent as Paraprofessional

The parents allege that the IHO erred by determining that the parents' request for compensatory reimbursement for serving as the student's transportation paraprofessional was beyond the IHO's authority and should not have characterized the request as one for monetary damages. The parents seek reimbursement at a market rate of between $60 to $70 per hour.

Following the SRO's determination in Application of the Dep't of Educ., Appeal No. 20-034, the IHO found that he lacked the authority to award the parents' requested relief.

As in the prior proceeding, the parents' request for payment of $60.00 to $70.00 per hour to function in the role of a 1:1 travel aide or paraprofessional for the student is not a compensatory service that makes up for a payment that the district was supposed to provide to the parents in the first place.[7] In fact, it is quite the opposite, because as further described below, districts should not be employing or contracting with parents for their time as service providers for their own children. That would be the hallmark of a damages claim. Compensatory services are an available remedy to make up for a denial of FAPE (see Application of the Dep't of Educ., Appeal No. 20-034).

[7] 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 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; 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]).

It is well settled that monetary damages or reimbursement of lost wages as a result of the district's alleged failure to provide the student with transportation services is a form of compensatory damages which are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; R.B. v. Bd. of Educ., 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]).

In the prior proceeding, when the parents traveled to and from school with the student and were reimbursed for the costs of the transportation, the student was able to attend school and access a FAPE. In this matter, the parents were entitled to reimbursement for the costs of transportation but for the lack of evidence of any unreimbursed expenses. For these reasons, an award of $60.00 to $70.00 per hour for the parents' time acting as a travel paraprofessional is not a compensatory service, and the IHO correctly declined to award payment to the parents for the time they expended.[8]

The parents assert that a Third Circuit case supports the proposition that parents are entitled to compensation for providing a service to their child that the child required and the County was unable to provide (Bucks County Department of Mental Health/Mental Retardation v. Pennsylvania, 379 F.3d 61 [3d Cir. 2004]). In Bucks County, the school district refused to provide ABA therapy, the parent privately obtained ABA therapy—which was determined to be appropriate within the context of a Burlington/Carter unilateral placement analysis—and the parent later became trained in ABA therapy in order to provide more hours of therapy when no other providers were available (379 F.3d at 63, 67). The Third Circuit noted that reimbursing parents for the time and services necessary for their child (as part of a unilateral placement) was "not unheard of" when there has been a violation of the IDEA and there was "ample evidence in the record to support the conclusion that [the mother] stepped into the shoes of a therapist" (Bucks County, 379 F.3d at 69, 73).

The Second Circuit recently affirmed the district court's decision in Dervishi v. Stamford Bd. of Educ., finding that Bucks County did not apply because the parent in Bucks County had demonstrated that the district refused to provide services to which the student was entitled and the parent had shown that a trained service provider was not available (2018 WL 8967297 *10-*11 [D. Conn. Apr. 19, 2018, aff'd Dervishi v. Dep't of Special Educ., 2021 WL 485725 *2 [2d Cir. Mar. 1, 2021]). As in Dervishi, the facts in this matter are also distinguishable from Bucks County. According to the parent, she has acted as the student's travel paraprofessional for the last three years (Tr. p. 151). The district avers in its answer with cross-appeal that it has fully funded the student's transportation in accordance with interim orders that were in place for the entirety of the 2019-20 school year (Answer with Cross-Appeal ¶10). Those interim orders also required the provision of behavioral support staff to travel with the student, which would seem to eliminate the need for the parent to act as a transportation paraprofessional (Parent Ex. C at 3; March 24, 2020 Interim Order at p. 1). As such, this matter is wholly distinguishable from the case relied upon by the parents.

[8] It is possible that a claim for damages could be pursued under other statutory schemes, but this forum only addresses claims brought pursuant to Article 89 and the IDEA, neither of which authorizes claims for damages.

The IDEA does not expressly provide an IHO or SRO the authority to award parents a monetary amount for them to act as a service provider. Therefore, I find that the IHO correctly denied the parents' request for compensation.

VII. Conclusion

In summary, the evidence in the hearing record demonstrates that the IHO correctly declined to award the parents reimbursement for travel expenses, correctly denied the parents' request for prospective funding of transition and transportation behavior management services and correctly denied the parents' request for compensation for acting as the student's transportation paraprofessional. The hearing record also demonstrates that the IHO erred by awarding prospective funding of home-based ABA and supervision services.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the IHO's decision dated January 4, 2021 which awarded the parents prospective funding for ten hours per week of 1:1 home-based ABA, one hour per week of qualified supervision, two hours per week of home-based counseling, communication and training provided by a BCBA or otherwise qualified professional at a rate of up to $215 per hour for a 12-month school year is vacated.

Dated: **Albany, New York**
April 29, 2021

STEVEN KROLAK
STATE REVIEW OFFICER