The University of the State of New York

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

No. 21-180

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 Bonnie Spiro Schinagle, attorneys for petitioners, by Bonnie Spiro Schinagle, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 for respondent (the district) to provide compensatory education services to their daughter for the 2019-20 and 2020-21 school years and to provide transportation to and from the student's unilateral placement at Academics West. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The 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 in detail. The student was determined to be eligible for special education and related services in the middle of first grade (Tr. p. 131). The CSE convened on October 22, 2019 to develop the student's IEP that covered a large portion of the 2019-20 school year (fourth grade), which recommended that the student receive integrated coteaching (ICT) services in ELA and math as well as counseling services in a separate location (see generally IHO Ex. I). According to the parents, the student was hospitalized during summer

2020 through September 2020 (Parent Ex. A at p. 3). The CSE convened on October 14, 2020 for an annual review of the student's IEP, and the October 2020 IEP continued the services listed on the previous IEP (see generally IHO Ex. II).[1] According to the parents, another CSE meeting subsequently took place on or about February 24, 2021 during which an additional IEP was discussed (Parent Ex. A at ¶17).[2] In a 10-day notice to the district dated March 19, 2021, the parents disagreed with the recommendations contained in "the IEP that you just sent" and, as a result, notified the district of their intent to unilaterally place the student at Academics West (see Parent Ex. B).

According to the parents, the student was experiencing severe emotional issues that were interfering with her ability to progress in an ICT setting in a community school and, therefore, the student needed both an environment that could address her weaknesses in literacy skills and therapeutic support to address her emotional issues (id.). In a due process complaint notice, dated May 12, 2021, the parents also contended that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years, specifically alleging that the student's IEPs were inappropriate due to, among other things, a lack of appropriate goals, inadequate counseling services, and the failure to provide a placement in a therapeutic school (see Parent Ex. A).

An impartial hearing convened on June 14, 2021 and concluded on July 8, 2021 after five days of proceedings (Tr. pp. 1-204). Although the district participated in prehearing conferences, during the evidentiary phase of the hearing, the district failed to appear or present evidence (see Tr. pp. 9, 53, 72). In a decision dated July 29, 2021, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years, that Academics West was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 8-15). The IHO denied the parents' request for compensatory education services and transportation to Academic West (IHO Decision at p. 16). As relief, the IHO ordered the district to directly fund the cost of the student's tuition at Academics West in the amount of

[1] The October 2020 IEP noted the student's eligibility for special education and related services as a student with a learning disability (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] The hearing record contains references to an IEP dated March 1, 2021, however a copy of this IEP it is not included in the hearing record (see Parent Exs. K; L at 15). Also, in an Amended Certification dated September 22, 2021, it is noted that "Failure to admit Exhibit L was an apparent oversight and, although Exhibit L contains similar information to Exhibit K, Exhibit L is an affidavit of a witness who was cross-examined at hearing. Therefore, the DOE does not object to Exhibit L also being included in the record." Alternatively, I note that generally, documentary evidence not presented at an impartial hearing is 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]). While Parent Ex. L was available at the time of the impartial hearing, I will also accept it for the purposes of identifying the correct date of the IEP in question in order to render a decision containing the most accurate facts.

$37,143.30 for the 2021-22 school year, and to reimburse the parents for the amount of $4,100 paid by the parents upon receipt of appropriate documentation (id.).

IV. Appeal for State-Level Review

The following issues presented in the request for review must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred in failing to order compensatory education services in literacy and math.
2. Whether the IHO erred in failing to order transportation to Academics West.

In an answer (which is not framed as a cross-appeal challenging the IHO's order), the district requests clarification as to whether the IHO "mistakenly" awarded tuition for the 2021-22 school year, as that "school year was not at issue in this case and this is clearly a typographical error;" the district states that "the SRO should clarify that the DOE is ordered to fund tuition for the [s]tudent's partial-year attendance at Academics West during the 2020-2021 school year."

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]).[3]

[3] 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).

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. Scope of Review

State regulation governing practice before the Office of State Review requires that the 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]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party challenged the IHO's findings that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years, that Academics West was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for tuition relief. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Relief

Before addressing the disputed issues on appeal, I will address the district's request to clarify the IHO's award of tuition for the 2021-22 school year.

Although termed a "clarification" the district's approach is nothing less than a challenge to the IHO's decision as written without following the procedures for interposing a cross-appeal. The record indicates that, as the parents correctly state, the CSE met in October of each year to develop the student's IEPs for the 2018-19, 2019-20 and 2020-21 school years (Parent Ex. A at ¶4, 5, 11; see IHO Exs. I, II). While it may be convenient to meet and revise a student's IEP during the spring for the following school year, a school district does not offend the IDEA's procedural

requirements if the CSE meets at a different point during the school year so long as it conducts a review of a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Thus, the mere fact that CSE meetings were conducted in the fall of a given school year is of no particular significance. In a slightly different context involving the timing of when IEPs must be provided to teachers (and using a December meeting example), the United States Department of Education recently reemphasized that "[t]he statute and regulations also make clear that an IEP Team meeting may be convened at any time throughout the year" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]), and this case represents but one example of how that can occur for a variety of reasons.

With respect to the district's argument that the IHO meant a different "school year," the district overlooks the fact that the parents included claims relating to the February 24, 2021 CSE meeting and March 1, 2021 IEP in the due process complaint notice, which effectively extended the issues to be resolved well into the later portion of the 2021-22 school year in this proceeding due to the requirement that an IEP be reviewed at least annually (i.e. by February or March 2022),[4] and I find that the IHO did not err in her ruling on the award of tuition for the 2021-22 school year.

I also note that the district failed to cross-appeal the IHO's finding with respect to this issue, and the district's confusion on this point is likely attributable to the fact that the district failed to present a case on the merits at the hearing or even appear during two of the prehearing conferences as well as the evidentiary phase of the hearing (Tr. pp. 2, 39, 72). In fact, I take this opportunity to commend the IHO for entering into evidence documents that the district produced as part of disclosures for the hearing which aided the adequate development of the record with respect to the basic underlying facts of the proceeding, particularly for the crucial purpose of identifying the correct dates of the IEPs in question (Tr. pp. 188-203; see IHO Exs. I, II, III).

One final matter arose during the impartial hearing that bears mentioning. The IHO appropriately took an active role during the prehearing conference phase of the impartial hearing for the purpose of developing a prehearing order (see IHO Ex. V), despite several attempts by the parents' attorney to evade or rebuff the IHO's prehearing procedures and practices as "very unusual" or "irregular" (Tr. pp. 11-12, 20, 26, 28, 40). It was the protests of the parents' counsel that were patently inappropriate as State regulations governing IDEA due process hearings explicitly provide that IHOs may conduct prehearing conferences to simplify the issues which must proceed to an evidentiary hearing (8 NYCRR 200.5[j][3][xi][a]). The IHO was correct to conduct these prehearing conferences and explained to the parties that

> I, as an IHO, want in a status conference, even if it unusual and no other IHO has done so -- I'm asking that both sides inform me of the key facts which will be litigated on trial. And as a status conference, that is what an IHO is expected to do.

* * *

[4] The CSE meeting resulted in a March 1, 2021 IEP that the district failed to produce as evidence but was mentioned by the parents' witness during the impartial hearing (Tr. p. 171; see Parent Exs. A at p. 5, L at p. 2).

> It always helps if each party culls out the facts of the case to present to the IHO so that at the pre-hearing conference we can construct the relevant issues of law and fact that will be litigated in our hearing and cull out those issues which can be settled and don't need to be tried

(Tr. p. 28-29). [5] The IHO's attempts to rein in the proceeding and issue a prehearing order that limited the hearing to fact issues that were actually in dispute were among the best prehearing practices encountered by the undersigned thus far during the impartial hearings conducted within this district. Such practices are essential to reducing the current dysfunction and inefficiency present in the impartial hearing system within the district.[6] The assertions of the parents' counsel regarding the statutory burden of proof to produce evidence of a FAPE in no way whatsoever exempt the parties from complying with the IHO's directives about identifying the specific disputed fact issues that require an evidentiary hearing (Tr. p. 26).[7] Among other things, the parties should be using the time during the IDEA's 30-day resolution period to identify the specific facts that are in dispute. If they had done so during this case, or fully engaged in the IHO's prehearing procedures, it is unlikely that this matter would have necessitated an evidentiary hearing at all, much less a further administrative appeal. At the very least, the district certainly would have been aware that the March 1, 2021 IEP had been challenged as inappropriate and that the IHO was not mistaken regarding the particular school years affected by this proceeding.

1. Compensatory Education Services

The parents argue that the IHO erred in denying compensatory education to account for the two-year denial of a FAPE to the student and failed to consider the totality of the record, and request that the IHO's denial be reversed to award the 600 hours of compensatory instruction supported by the uncontested testimony of the parents' witness. The district argues that the IHO's denial of the parents' compensatory education request should be affirmed.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125

[5] Contrary to the suggestion of the parents' counsel, the IHO's practices are not "pigeon-holing" and the IHO also explained to the parties that they should "just assume that you are having a discussion between now and the next hearing, which is the hearing conference, pre- hearing conference, where I would like to know what your position is and what it is based on because that's the only way we can structure the issues that will go to trial" (Tr. p. 19).

[6] The district representative was unprepared for the prehearing conferences and knew little about the proceeding beyond what could be ascertained from a first glance at any one of the student's IEPs in dispute (Tr. pp. 15-16). Despite the IHO's attempts to get the parties to consult with one another, the district did not appear for half of the hearing dates leading inexorably to an inefficient, time-consuming, and expensive hearing process.

[7] The statements by the parents' counsel that the task was to identify whether the district "failed to afford a FAPE" is a legal conclusion, not a specific fact issue in dispute (Tr. p. 26), and when asked by the IHO to explain her claims during a prehearing conference, it does not suffice to try to tell the IHO to go read it in the due process complaint notice (Tr. pp. 11-13). Fortunately for the parents, the attorney eventually complied with the IHO's reasonable directives.

[2d Cir. [2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [N.D.N.Y. 1997]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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"]).

Initially, the parents submitted both documentary and testimonial evidence of the student's need for compensatory services (Tr. pp. 168-180; see Parent Exs. C; E; Parent Exs. K; L). As noted previously the district did not offer any proof related to the request for compensatory education, or in any way challenge the evidence presented by the parents as to the student's need for compensatory services (Tr. at pp. 69-203). Instead, the district argues that that "although the DOE did not appear at the hearing let alone present a FAPE case, [p]etitioner is still not automatically entitled to their requested relief." However, as noted herein, the parents proffered evidence of the student's need for compensatory services at the hearing, the IHO admitted district documents into evidence as IHO exhibits to develop the hearing record, and the district had adequate notice and an opportunity to defend the claim for compensatory education during the impartial hearing.

The district was required under the due process procedures set forth in New York State law to address the issue by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. Once again, during the impartial hearing, the district failed to offer contrary evidence regarding an appropriate compensatory education award, failed to offer any documentary evidence and called no witnesses (Tr. pp. 69-203). [21-169]

In failing to award compensatory services, although the student was denied a FAPE for two school years, the IHO held that the parents "failed to lay a foundation for requesting 600 hours of Orton Gillingham coaching by [E]BL Coaching" (IHO Decision at p. 13). The IHO further found that the parents' witness, the Director of EBL Coaching (director), "did not provide any specificity on the tests she gave the [s]tudent, or the rubric she applied to interpret those results into number of hours," and although the director testified that she "reviewed the [s]peech and [l]anguage [e]valuation of January 2021, the IEP of March 2021, and the [n]europsychological of September 2020," she "did not provide any explanation of what in these three documents she in her professional opinion found instructive to her decision" but rather described her decision as "personal" (IHO Decision at p. 13). The IHO further found the director's recommendation that the student be provided with 600 hours of coaching from her business "a conflict of interest" (id.).[8] Finally, the IHO found that the parents' evidence was insufficient to prove a claim for compensatory education, there was no testimony that Academics West's educational curriculum wouldn't address the student's needs in literacy and math, and that EBL Coaching's evidence was insufficient to establish the basis for its advice, the hours it recommended, the market rate for coaches, or computation behind EBL Coaching's own rate.

However, contrary to the IHO's findings, in addition to her in-person testimony and a letter summarizing her recommendations for the student, the director of EBL offered further direct testimony by affidavit which provided answers to many of the IHO's questions (Tr. 168-180; Parent Exs. K; L). As noted above, the district certification noted that the failure to admit Exhibit L (the direct testimony by affidavit) was an apparent oversight and, although Exhibit L contains similar information to Exhibit K, Exhibit L is direct testimony by affidavit of a witness who was available for cross-examination at hearing and thus was admissible for use during the hearing and, in the alternative, I accept Exhibit L as additional testimony by affidavit evidence that should have been entered into the hearing record (8 NYCRR 279.10[b]). In her direct testimony, the director stated that as part of a June 2021 EBL Coaching evaluation, the director of EBL administered the Wide Range Achievement Test (WRAT) to the student "to assess [her] reading, spelling, and

[8] I am satisfied on this point that the record supports an award of compensatory education services and, as the parents contend, once ordered the IHO could have stated that the compensatory education services "could be provided by a qualified provider, including but not limited to EBL Coaching" if she was concerned about a conflict of interest.

mathematics skills," had the student "complete a writing sample using the Test of Written Language," and "ended with the Qualitative Reading Inventory to assess her reading comprehension skills (Tr. 170-711; Parent Exs. K; L at ¶14). The director also testified that she "had the opportunity to review additional documents describing [the student]" including her IEP dated March 1, 2021, her neuropsychological evaluation dated September 16, 2020, and her speech and language evaluation dated January 9, 2021 (Tr. p. 171; Parent Exs. K; L at ¶15). Based on her assessment of the student, her "thorough review of the documents," and her "extensive experience" working with similar students who were also functioning below grade level, the director testified that "it was clear to [her] that [the student] was in critical need of one-on-one tutoring in decoding and spelling, particularly using the Orton-Gillingham methodology, as well as similar researched-based multi-sensory instruction to develop her reading comprehension, writing, and mathematics skills" (Tr. pp. 171, 179; Parent Exs. K; L at ¶16). The director testified that based on her "personal evaluation of [the student]" as well as her review of documents and the student's overall profile based on working with a "tremendous number of students like her" she strongly recommended 600 hours of 1:1 instruction using Orton-Gillingham techniques to develop the student's reading and spelling skills and similar researched-based multi-sensory techniques to develop her reading comprehension, writing, and mathematics skills (Tr. pp. 172, 178; Parent Exs. K; L at ¶17). She testified that the student should "receive an average of six to eight hours per week over a two-year school time span" (Tr. p. 172). The director also recommended that the 600 hours should not have an expiration date for flexibility and that services could be provided at the EBL learning center, the student's home, virtually or at another agreed upon location; and that EBL would provide the instruction at a rate of $125 per hour which is below the "typical market rate for these services in New York City" as some organizations charge $150 per hour or more, and some individuals charge up to $250 per hour (Tr. pp. 174-75; Parent Exs. K; L at ¶¶18-20).

Accordingly and contrary to the IHO's findings, I find that there was sufficient evidence in the record to support an award of compensatory education for the denial of a FAPE to the student for the 2019-20 and 2020-21 school years and that the student is entitled to compensatory education for the period of October 2019 through the point in time that the March 1, 2021 IEP was created, in the amount of 6 hours per week, for 17 months (a total of 68 weeks) for a total of 408 hours[9] of compensatory education in literacy and math. I do not accept the director's opinion of setting no timeframe whatsoever within which the compensatory education relief should be used and find that based upon the two-year time span recommended by the director (Tr. p. 172), it is appropriate that the compensatory education be used by the end of the 2023-24 school year, which will give the student and providers sufficient flexibility in using the hours awarded in this decision.

2. Transportation

The parents argue that the IHO erred in denying the student transportation because she "improperly assigned the obligation to select a school as proximate to the student's home to the parent[s]" in citing to 8 NYCRR 200.1(cc), and erred in stating that "transportation costs have not been proven" even though the parents contend that they do not request reimbursement for past

[9] The calculation is based on the EBL recommendation of 600 hours: 300 hours per year, divided by 52 weeks per year, which equals approximately 6 hours per week; times 17 months (or 68 weeks) which equals a total of 408 hours (6 x 68 = 408).

transportation costs but request the provision of transportation for the student prospectively. The district argues that the IHO's denial of the parents' transportation request should be affirmed.

The IDEA specifically 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]).

School districts in this jurisdiction are already required to comply with the minimum transportation requirements of nonpublic school students set forth in state law regardless of whether a student is disabled or not (see, e.g., Educ. Law § 3635), and local school officials often further extend transportation to all students in a manner that exceed the State requirements through locally promulgated policies (see Pupil Transportation: General Information For Parents and Others, available at http://www.p12.nysed.gov/schoolbus/Parents/htm/general_info_intro.htm). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Tatro, 468 U.S. at 891, 894; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the 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 the 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., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

In this case, the parents argued in their post-hearing brief before the IHO that the student would not be able get to her unilateral placement at Academic West on her own and that the district should therefore be ordered to provide transportation to the student as a related service under IDEA and State law (IHO Ex. IV at p. 13) Initially, the IHO used the incorrect legal standard in denying

transportation for the student when referencing 8 NYCRR 200.1(cc), which addresses a least restrictive environment requirement that school districts must adhere to.[10] However, the IHO's error was of little consequence to the student because as further described below the district had already voluntarily begun to provide the transportation that the student require to attend Academic West even before the due process proceedings were initiated. Further, a review of the record shows no request(s) from the parents for specialized forms of transportation based on the student's unique needs (nor is specialized transportation included on the student's IEPs in the evidentiary record), or parental reimbursement for past transportation costs.

The evidence in the hearing record shows that the student started attending Academics West on April 5, 2021 (Tr. p. 147). In addition, the parent signed the contract for enrollment at Academics West on April 15, 2021 (Parent Ex. F). As the parent testified, in order for the student to get to Academics West, "she has to take a bus. A bus has to pick her up and bring her over there and back. It's in Manhattan" (Tr. 153). The parent further testified, "[s]o the first ten days, she didn't have a bus, and I had to let her stay at my mom's because my mom lives in Manhattan, because there was no way of me getting her there. So my mom would take her by bus and bring her there, and she stayed with my mom for the ten days until we had busing" (Tr. pp. 152-53). The parent also testified that "it [was] a public bus" and the busing was provided by "New York City public schools" (Tr. 153). The district also explains on appeal that "the [s]tudent received DOE busing services to and from Academics West" for the 2020-21 school year.

Thus, the evidence shows that with the exception of the brief period from April 5, 2021 through April 16, 2021, the district has already been providing busing for the student to and from Academics West, apparently under the district's general transportation polices and the litigation on this issue is just a solution looking for a problem. There is no evidence that the student has deficits or needs that require transportation as a related service that is tailored to the student's unique needs and thus no directive regarding transportation is warranted in this matter. As the IHO made a technical error in the basis for refusing transportation and the order could be construed as discouraging the district from providing transportation, the best course is to vacate that aspect of the IHO's decision as unnecessary.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination denying compensatory education and it was unnecessary to further address transportation because the issue had been resolved very shortly after the student began attending Academics West and before the due process proceeding had even been initiated, the IHO's decision will be modified with respect to those issues only and the necessary inquiry is at an end. Although her efforts were frustrated in part by the district's repeated failure to appear and participate in the proceedings, the IHO is strongly encouraged to continue with the prehearing procedures that she used to proactively manage the hearing process. Both parties are reminded of their obligation to

[10] It appears that the IHO was referencing 8 NYCRR 200.1 (cc)(3) as follows: "Least restrictive environment means that placement of students with disabilities in special classes, separate schools or other removal from the regular educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved. The placement of an individual student with a disability in the least restrictive environment shall: … (3) be as close as possible to the student's home.

comply with the IHO's prehearing directives especially in light of the IHO's considerable discretionary authority to address non-compliance with such orders.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 29, 2021is modified by reversing that portion which denied compensatory education relief to address a denial of a FAPE to the student from October 2019 through March 1, 2021 and, unless the parties shall otherwise agree, the district shall fund 400 hours of 1:1 compensatory academic tutoring in literacy and math by EBL coaching; and

IT IS FURTHER ORDERED that the 408 hours of compensatory education awarded herein shall be available until June 30, 2024; and

IT IS FURTHER ORDERED that the portion of the IHO's decision dated July 29, 2021 that denied the parents' request for district transportation to Academics West is vacated.

Dated: **Albany, New York**
October 22, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER