The University of the State of New York

The State Education Department
State Review Officer
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No. 21-210

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel R. 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied his request for compensatory education services and for a prospective change to his son's educational program and services to remedy respondent's (the district's) failure to provide an appropriate program and services to his son for the period of March through August 2020. The district cross-appeals from that portion of the IHO's decision which found that it failed to provide the student an appropriate program and services for the period of March through June 2020. The appeal must be dismissed. The cross-appeal must be sustained.

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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible. The parent's allegations in this matter surround the school building closures that took place in March 2020 as a result of efforts to combat the spread of the COVID-19 pandemic. According to the parent, prior to the school closure, the student had been attending a district specialized school (Tr. p. 31). The parent indicated that, for at least two weeks after Governor Cuomo ordered schools to close, the parent

did not hear from the district (Tr. p. 32). Thereafter, the parent indicated that the district began implementing remote learning (id.). However, the parent testified that "for long periods of time," totaling "multiple weeks," the student did not receive related services (Tr. pp. 32-34). At some point, the parent "hire[d] a private teacher" to work with the student during remote delivery of instruction and services (Tr. p. 36).

A. Due Process Complaint Notice

In a due process complaint notice dated August 18, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) by "failing to implement the Student's educational program as established in the Student's last agreed upon [IEP]" (Parent Ex. A at p. 1). In addition, the parent alleged that the district failed to offer the student a FAPE pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), by "unilaterally modifying the Student's IEP" (id.). More specifically, the parent asserted that, in or around "mid-March 2020," the district "unilaterally, substantially, and materially altered" the student's "'status quo' educational program as it relate[d]" to his pendency rights when the district: "substantially and materially altered the location" for the student's receipt of services from a "school classroom" to the student's home, "substantially and materially altered the delivery of these services" from in-person instruction by a special education teacher or related service provider, and provided the student's services remotely as opposed to through direct instruction required by his IEP and without proper notice to the parent (id. at pp. 1-2). The parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id. at p. 2).

After noting that the district's federal and State obligations to continue to provide students with a FAPE during the COVID-19 pandemic—while allowing for flexibility during this transition of services—had not been waived or absolved, the parent alleged that the district violated the student's pendency rights and, as a result, he sought "immediate relief" (Parent Ex. A at p. 2). Additionally, the parent requested an "extensive independent evaluation" of the student to "determine the need for compensatory services as well as any appropriate changes" to the student's "educational program and placement" to remedy the district's failure to offer the student a FAPE "since mid-March 2020" (id. at pp. 2-3). The parent also requested to convene a CSE upon the completion of the IEE to "review the updated evaluation and make any appropriate changes" to the student's IEP (id. at p. 3).

As relief, the parent requested that the IHO: issue an "interim order" directing the district to implement the student's last-agreed upon IEP by "reopening" the student's school, or, alternatively, allowing the parent to "self-cure the unilateral change" in the student's pendency services "to the best of their abilities"; issue an "interim order" directing the district to "conduct an extensive [IEE]" of the student to "evaluate what, if any, changes need[ed] to be made" to the student's IEP; and issue an "interim order" finding that the district failed to offer the student a FAPE and "determine the appropriate compensatory services" (Parent Ex. A at p. 3).

B. Events Post-Dating the Due Process Complaint Notice

A CSE convened on March 18, 2021 to conduct the student's annual review and develop an IEP with an implementation date of April 1, 2021 (see Parent Ex. B). The March 2021 CSE

recommended that the student attend a 12-month school year program in a 6:1+1 special class placement in a district specialized school and receive related services of counseling, occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent counseling and training, as well as home-based special education teacher support services (SETSS) to deliver applied behavior analysis (ABA) therapy (id. at pp. 21-23, 27). According to the March 2021 IEP, the parent expressed that in his opinion the student regressed during remote learning and that remote learning was not appropriate for the student (id. at p. 6).

C. Impartial Hearing Officer Decision

An impartial hearing convened on July 19, 2021 and concluded on August 24, 2021, after three days of proceedings (Tr. pp. 1-42). At the July 19, 2021 hearing date, the parent's attorney indicated that the student had been evaluated by his then-current "ABA SETSS provider" and that, therefore, the parent "would be willing to forego" the IEE requested as relief (Tr. pp. 5-6). The parent's attorney indicated that the remaining relief sought included "an increase in the home SETSS ABA hours and a modification of the student's current IEP to reflect that, as well as a bank of compensatory hours to compensate [the student] for regression due to the changing circumstances" (Tr. pp. 4-5). During the impartial hearing, the district's representatives indicated that the district would not be presenting evidence to defend its provision of a FAPE to the student (Tr. pp. 13, 23).[1]

In a decision dated September 9, 2021, the IHO first indicated that the time frame at issue for the denial of FAPE alleged by the parent was mid-March through June 2020 (IHO Decision at p. 4). Based on the district's failure to present any evidence during the impartial hearing, the IHO found that the district failed to meet its burden to prove that it provided the student with a FAPE from mid-March 2020 through June 2020 (id. at pp. 4-5).

As for relief, the IHO noted that the "three and a half month FAPE deprivation" experienced by the student "coincide[d] with the international pandemic" (IHO Decision at p. 6). Without diminishing the seriousness of the allegations in the due process complaint notice, the IHO found that the parent was not entitled to a default judgement awarding all of the compensatory education sought (id. at pp. 6-7). The IHO determined that, on the hearing record before her, there was insufficient evidence to determine an appropriate award of compensatory education services (id. at p. 7). As for the parent's request for an increase in the number of hours of home-based SETSS on the student's IEP, the IHO "decline[d] to usurp" the CSE's role (id.). However, the IHO ordered the CSE to reconvene to "consider all of the evaluations which the Student has had," along with all available information, and to prepare a new IEP (id. at pp. 7-8).

[1] At the July 30, 2021 hearing date, the district representative stated her intent to present an opening statement in the matter but expressed her preference to wait until the next hearing date to do so (Tr. p. 13). At the August 24, 2021 hearing date, a different district representative appeared on the district's behalf and did not present an opening statement (compare Tr. p. 11, with Tr. p. 20; see Tr. pp. 20-42). In addition, the district did not cross-examine the parent or present a closing statement or post-hearing brief (see Tr. p. 40).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO correctly found that the district denied the student a FAPE but erred by "failing to consider the appropriate time period during which [the district] denied [the student] a FAPE" and by failing to order compensatory education services. With respect to the period of time at issue, the parent argues that, because the student was eligible for 12-month school years services, the IHO should have found that, in addition to the period of March 2020 through June 2020, the district failed to provide the student a FAPE for July and August 2020. Regarding compensatory education, the parent argues that the evidence in the hearing record regarding the student's regression during the period of March through August 2020 was unrebutted. The parent describes that the basis for his request for 500 hours of compensatory education was that the student was mandated to receive five hours per week of in-school related services (which over 20 weeks totaled 100 hours), seven hours per week of home-based ABA (which over 20 weeks totally 140 hours), and classroom instruction (which over 20 weeks the parent estimated to add up to more than 260 hours). For relief, the parent requests that the district be required to fund a bank of 500 hours of compensatory education to be used by the parent as deemed appropriate, including for ABA SETSS or related services to be delivered by independent providers. In addition, the parent requests that the district be required to reconvene and increase the student's mandate for home-based SETSS using ABA from seven to ten hours per week.

In an answer and cross-appeal, the district responds to the parent's allegations with admissions and denials and argues that the IHO erred in finding that the district denied the student a FAPE for the period of March through June 2020. The district argues that the IHO did not have jurisdiction over the claims contained in the parent's due process complaint notice and, therefore, erred in finding a denial of a FAPE based on the allegations in the complaint. That is, the district argues that, since the allegations were directed at the policies of the Governor of the State and/or the district, the IHO did not have authority to consider them. Further, the district contends that it has been held that the district's provision of remote instruction to students during a nationwide pandemic is not a per se breach of a right to education. To the extent the parent's claims in the due process complaint notice alleged violations of the student's pendency placement, the district argues that the claims were premature. Further, the district argues that any argument that the student did not receive remote instruction during the pandemic was outside the scope of the impartial hearing as it was not alleged in the due process complaint notice. In answer to the parent's appeal, the district argues that the IHO correctly denied the parent's requested relief.

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]).[2]

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. Jurisdiction and Scope of the Impartial Hearing

I turn first to the district's argument that the IHO should not have found a denial of a FAPE based on the parent's claims as set forth in the due process complaint notice. As the district notes, the parent's allegations in the due process complaint notice were very similar to those alleged in a matter involving a different student, which were discussed in Application of the Department of Education, Appeal No. 21-188. In both matters, the parents' allegations surrounded the school closures that took place as a result of the COVID-19 pandemic. Relevant to such circumstances is the decision of the District Court of the Southern District of New York in J.T. v. de Blasio, which, as it happens involved plaintiffs represented by the same attorneys in the present matters (500 F. Supp. 2d at 145). The Court in J.T. described in detail the March 13, 2020 closure of schools in New York City, as well as the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery consistent with federal and State guidance (id. at 181-84).

Here, to the extent that the parent took issue with the executive decision to close schools or the district's actions to deliver instruction and services to students with disabilities remotely during the closure, those allegations are systemic in nature, and no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a

[2] 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).

Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the Governor's or district policies affecting all students. Even if I possessed such authority, courts have held that certain summary administrative actions that have the effect of limiting the availability of protections otherwise afforded by law under ordinary circumstances may be justified as part of the government's response to emergency situations (see, e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 979 [D.N.M. 2020]), so it is far from clear that the parents' would prevail with that argument in the appropriate forum anyway.

In addition, in describing his allegations, the parent referenced concepts such as "status quo" and pendency rights (Parent Ex. A at pp. 1-3). To the extent the due process complaint notice alleged a violation of the student's pendency placement, such an allegation was premature insofar as the student was not entitled to a pendency placement prior to the parent's filing of the due process complaint notice in August 2020 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the Governor's March 2020 executive order closing schools in the State is not the event that would trigger the student's right to a pendency placement under the IDEA, and it was only the parent's filing of a due process complaint notice that gave rise to the student's rights under stay-put. The parent also requested that an IHO issue an order requiring the district to implement the student's last-agreed upon IEP by reopening the student's school or allowing the parent to "self-cure the unilateral change in the Student's status quo" (Parent Ex. A at p. 3). However, an IHO would not have sufficient authority to countermand Governor Cuomo's executive orders addressing the COVID-19 pandemic response or to direct the district to open an entire school and, in any event, district schools have since re-opened and such request is now moot (see J.T., 500 F. Supp. 3d at 190).[3]

Moreover, the district is correct that the August 2020 due process complaint notice did not allege that the student did not receive instruction and/or services remotely during the school closure, instead taking issue with the remote delivery itself (see Parent Ex. A). Nor did the parent allege that a CSE considered whether the student may need additional services to make up for lost skills due to the closure of schools and the change in the delivery of services as a result of the pandemic, which as discussed further below, is the process contemplated by the United States Department of Education (USDOE) and the State Education Department's (SED's) Office of Special Education. 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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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

[3] Further, the Court in J.T. held that the switch to remote learning in light of the pandemic in and of itself did not constitute a change of placement that would trigger a student's right to pendency (500 F. Sup. 3d at 187-90). The Court left open the possibility that an individual parent could assert "that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in [a student's] pendency" (id. at 194); however, the parent has made no such allegation here.

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]).

During the impartial hearing, the parent's attorney indicated that the parent attempted to amend his due process complaint notice on September 30, 2020, but that the district would not agree to the amendment (see Tr. p. 4). A copy of the September 2020 due process complaint notice was included with the hearing record on appeal but was not entered into evidence as an exhibit. There is no indication in the hearing record that the parent requested the IHO's permission to amend the complaint. The parent did not make further reference to the proposed amendment during the impartial hearing and cited only to the original August 2020 due process complaint notice in his post-hearing brief (see Parent Post-Hr'g Brief at pp. 1-4). Consistent with this, the IHO only referred to the original August 2020 due process complaint notice in her decision (see IHO Decision at pp. 2, 4). While the parent's proposed amended due process complaint notice includes factual allegations about the district's delivery of services to the student, as the amendment was not effectuated, it cannot be relied upon to define the scope of the impartial hearing. Accordingly, the issue of the actual delivery of services to the student after March 2020 was outside the scope of the impartial hearing and could not form the basis of the IHO's determination that the district denied the student a FAPE.

While the IHO understandably found that the district failed to meet its burden in this matter given its complete failure to engage in the impartial hearing process and defend its provision of a FAPE to the student or at the very least raise its arguments regarding the scope of the impartial hearing or the justiciability of the parent's claims before the IHO, under the circumstances of this matter, the IHO's determination that the district failed to offer the student a FAPE may not stand given the allegations that were raised in the due process complaint.

B. Compensatory Education

Although I find that the IHO erred in deciding the issue of the FAPE in the parent's favor given the allegations in the due process complaint notice, further discussion of compensatory education is warranted. That is, even if the IHO's determination that the district failed to offer the student a FAPE stood, compensatory education would not be warranted at this juncture.

Both the USDOE and SED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet

[each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(*l*), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

Here, there is no indication that a CSE has conducted such a review. According to the March 2021 IEP, the parent expressed that, in his opinion, the student regressed during remote learning and that remote learning was not appropriate for the student (Parent Ex. B at p. 6); however, it does not appear that the CSE discussed whether the evaluative information supported the parent's position or considered if compensatory education would be appropriate to make-up for any loss of skill attendant to the school closure. In any event, the March 2021 CSE and IEP post-date the due process complaint notice in this matter and the appropriateness thereof was not at issue in this proceeding. Indeed, the due process complaint notice does not include any allegations relating to a CSE's consideration of compensatory education or lack thereof as a result of responsive measures by the government to mitigate the public health threat from COVID-19.

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student.

Under these circumstances, the IHO did not err in declining to order compensatory education at this juncture. However, the parties, if they have not already done so, should conduct a review of the student's present levels of academic achievement and functional performance as envisioned by federal and state education authorities and convene a CSE to engage in educational planning for the student, which should include a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely. Once a CSE conducts such a review, if the parent disagrees with the recommendations thereof, he may pursue dispute resolution through one of the mechanisms described above.

C. Prospective IEP Amendments

As a final matter, even if the IHO's determination that the district denied the student a FAPE stood, the parent would not be entitled to an order requiring the CSE to convene and amend the student's IEP to increase the mandate for home-based SETSS. As the IHO observed, directing the CSE to amend the IEP for the 2021-22 school year would tend to undermine the district's continuing obligations to the student and the procedural process of the IDEA. That is, an award of a specific program for the 2021-22 school year and beyond would tend to circumvent the very statutory process that Congress envisioned, under which the CSE is the entity tasked with meeting every year at the very least to review information about the student's progress under current educational programming and periodically assess any changes in the student's continuing 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"]; 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]).

This is especially the case since, as noted above, the CSE convened in March 2021 and developed an IEP for the student and there is no evidence in the hearing record regarding the appropriateness of that CSE's recommendations for the student, which appear to have been based in part on new evaluative information and with the agreement of the parent. However, when the CSE convenes as directed here, it should consider whether an increase in the number of home-based ABA SETSS for the student is warranted. As noted above, if the parent disagrees with the recommendations of the March 2021 CSE or the recommendations of any CSE that convenes in compliance with this decision, he may use one of the IDEA's dispute resolution mechanisms described above to resolve the issue.

VII. Conclusion

In summary, given the allegations in the parent's August 2020 due process complaint notice, the IHO erred in finding that the district failed to meet its burden to prove that it provided the student a FAPE from the period of March 2020 through June 2020. However, even if the district had failed to meet its burden, the student would not be entitled to relief in the form of compensatory services or prospective IEP amendments at this juncture.

In light of these determinations, I need not address the parties' remaining arguments.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that, the IHO's decision dated September 9, 2021, is modified by reversing that portion which found that the district failed to meet its burden to prove that it provided the student a FAPE from March 2020 through June 2020.

Dated: **Albany, New York**
December 8, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER