The University of the State of New York

The State Education Department
State Review Officer
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No. 21-218

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:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Kevin M. Mendillo, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 determined that respondent (the district) failed to offer her son a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years but declined to order all of the relief requested, namely compensatory academic services. The district cross-appeals from the portion of the IHO's decision which denied the parent's request for compensatory academic services, asserting that further evidence was needed to determine the amount necessary to remedy the denial of a FAPE. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

At the time of the impartial hearing, the student was 15 years of age and enrolled in ninth grade at a district public school (Tr. pp. 49, 51). Although the hearing record is not fully developed as to the student's educational history, a review of the hearing record shows the student has

received diagnoses of attention deficit hyperactivity disorder (ADHD) and an auditory processing disorder (see Tr. pp. 50, 60-61).

As of the date of the hearing, the student had been receiving psychological services since 2012 and, according to the parent, the student had received special education services since approximately 2016 (Tr. p. 51; Parent Ex. M at p. 2).

On December 6, 2018, when the student was 12 years of age and in seventh grade, a school psychologist conducted a psychological and educational evaluation of the student (see Parent Ex. E). Administration of the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) to the student yielded composite index scores in the low average range in the areas of verbal comprehension, visual spatial, fluid reasoning, and working memory, and the student's full-scale IQ of 83 was also in the low average range (id. at pp. 2-3). The student's processing speed composite index score of 95 was in the average range (id. at pp. 2, 4). As for academic achievement, the student was administered the Wechsler Individual Achievement Test – Third Edition (WIAT-III), which assessed his current level of functioning in three areas: reading, mathematics, and written language (id. at p. 4). For subtests associated with reading, the student achieved scores in the average range for reading comprehension and fluency, as well as in the above average range for word reasoning and pseudoword decoding (id.). With regard to mathematics the student's math problem solving subtest score was in the below average range and he achieved subtest scores in the average range for numerical operations, addition fluency, subtraction fluency, and multiplication fluency (id.). In the area of writing, the student's score was in the below average range on the spelling subtest and review of an essay the student wrote as part of the assessment showed a lack of substance and delays in grammar, spelling, and sentence structure; the school psychologist estimated that the student's written expression skills were below standards (id. at pp. 4, 6).

A CSE convened on December 13, 2018 and found the student eligible for special education and related services as a student with a learning disability and developed an IEP for the student with an implementation date of February 1, 2019 (Parent Ex. C at pp. 1, 18, 23).[1] At the time of the CSE meeting the student was in the seventh grade and the December 2018 IEP reflected the student's instructional and functional levels for reading and math to be at the sixth-grade level (Parent Ex. C at p. 23; see Parent Ex. E at p. 1). The December 2018 CSE recommended that the student receive two periods per day of integrated co-teaching (ICT) services in both English language arts (ELA) and mathematics in the general education classroom, along with one 40-minute session per week of speech-language therapy in a group and one 30-minute session per week of counseling in a group (Parent Ex. C at pp. 1, 18). The CSE further included a recommendation for assistive technology devices and services, identifying the use of an FM unit in the classroom and a laptop with word prediction programming, auditory feedback, and earphones to be used for all written assignments (id. at p. 18).

[1] The student's eligibility for special education services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

On December 10, 2019, when the student was in the eighth grade, a CSE convened to develop an IEP for the student and recommended the same special education programs and services that had been recommended in the December 2018 IEP (compare Parent Ex. B at pp. 10, 15, with Parent Ex. C at p. 18).

On or about February 12, 2021, the student's parent sent a letter via facsimile to the district, dated February 9, 2021, indicating that she did not believe the student had been comprehensively evaluated and disagreeing with the December 2018 psychoeducational evaluation; the parent requested that the district authorize and fund an independent neuropsychological evaluation at a rate not to exceed $5,500 by a provider of her choosing (Parent Ex. I at pp. 1, 3). In her letter, the parent asserted that an updated evaluation of the student was necessary as she believed that the previous report contained inaccuracies and therefore the student was not receiving appropriate special education services (id. at p. 1). Additionally, the parent expressed disagreement with the previous psychoeducational evaluation asserting that it failed to make any recommendations regarding the student's special education program (id.). The parent also disagreed with the psychoeducational report because it acknowledged that the student's attentional deficits negatively impacted his education, but failed to appropriately evaluate the student's attention span (id.).

On March 3, 2021, the district issued a prior written notice advising that the district agreed to grant the parent's request for an independent neuropsychological evaluation, but at a rate not to exceed $2,500 (Parent Ex. D at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice, dated March 9, 2021, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. A at p. 1). The parent alleged that the student's learning disability and attentional issues coupled with the district failing to ensure that the student's needs were adequately and appropriately addressed, caused the student to struggle to make progress in several academic areas including reading, writing, and math (id.).

More specifically, the parent asserted that, as of the December 2019 CSE meeting, a speech-language evaluation of the student had not been conducted in over three years (Parent Ex. A at pp. 3, 4-5). Additionally, an auditory processing evaluation had not been conducted in approximately three years (id. at 3, 5). The parent alleged that the December 2019 IEP was inappropriate because it failed to recommend evidence-based methodologies in reading and math or academic remediation to address the student's academic deficits and failed to contain appropriate supports and services to address the student's attention issues despite the district acknowledging that the student's difficulty with focusing negatively impacted his academic development (id. at pp. 2, 5).

The parent asserted that the student struggled during the 2019-20 school year with paying attention, staying on task, and completing work at the eighth-grade level in all subjects (Parent Ex. A at p. 3). The parent stated that the student did make some academic progress during the 2019-20 school year (id.). However, the parent argued that any academic progress made during the 2019-20 school year was not due to the student's special education programming, but rather

because of compensatory academic instruction that was provided by way of a prior impartial hearing (id.).

For the 2020-21 school year, the parent argued that the district never reconvened the CSE or developed an IEP for the 2020-21 school year, leaving the December 10, 2019 IEP in effect (Parent Ex. A at pp. 3-4). The parent asserted that it was critical for the CSE to convene because it was the student's first year in high school, he was enrolled in a new school, and transition activities needed to be developed because the student was turning 15 years old (id. at pp. 3, 4, 6). The parent also alleged that because the CSE did not reconvene, the student did not have updated annual goals to work on during the 2020-21 school year (id. at p. 6). Additionally, the parent argued that the district again failed to complete updated speech-language and auditory processing evaluations despite acknowledging that the student had speech-language deficits and "suffer[ed] from an auditory processing delay, particularly with his auditory decoding and tolerance fading memory" (id. at pp. 3-5). Related to her claims regarding the evaluations, the parent asserted that the district's failure to respond to her request for an independent neuropsychological evaluation impeded her right to participate in the decision-making process regarding the student's special education program (id. at p. 5). The parent also expressed concern with the student's stagnant academic development and continued difficulties to sustain attention and stay on task (id. at p. 4).

In addition to the above arguments regarding the appropriateness of the December 2019 IEP for the 2019-20 and 2020-21 school years, the parent alleged that the recommended services that were to be provided to the student under the December 2019 IEP were not rendered in full (Parent Ex. A at pp. 4-7). Specifically, the parent asserted that, during both school years, the district failed to regularly provide speech-language therapy and counseling services (id. at pp. 5-6). The parent further alleged that the district failed to provide the student with a laptop, forcing the parent to obtain a laptop from a family member (id. at pp. 3, 7). However, the laptop obtained for the student by the parent allegedly lacked the recommended software and programming (id. at p. 7).

With regard to relief, the parent requested that the IHO order the district to complete a speech-language evaluation and an auditory processing evaluation of the student within 15 days (Parent Ex. A at p. 7). The parent sought for the IHO order to contain a provision providing that if the speech-language and auditory processing evaluations were not timely completed, the parent be allowed to choose an independent evaluator at a specified cost (id.). Additionally, the parent requested that the IHO order an independent neuropsychological evaluation and that it be conducted by an evaluator of her choosing at a cost not to exceed $5,500 plus transportation expenses (id. at p. 8). The parent requested for the CSE to convene to consider the results of the evaluations that had been ordered, develop a set of transition activities, determine necessary services, and provide updated measurable annual goals in all of the student's areas of need (id.). The parent also requested that the district immediately provide the student with a laptop computer with word prediction, auditory feedback, and earphones (id.).

For additional relief, the parent sought compensatory education services to remedy the district's failure to provide a FAPE during the 2019-20 and 2020-21 school years (Parent Ex. A at p. 8). The parent's request included academic services, speech-language therapy services, and counseling services, along with transportation costs if the services were not going to be provided

in the home setting (id. at pp. 8-9). With regard to compensatory academic services, the parent specifically requested that they be provided to the student outside of the academic school day, in a home setting, and by a certified special education teacher (id. at p. 8). The parent asserted that in the event the district was unable to locate a provider to deliver the compensatory services, the parent should be afforded the opportunity to locate independent providers (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 29, 2021 and concluded on August 26, 2021 after two days of proceedings (Tr. pp. 23-65).[2] During its opening statement, the district indicated it was "not disputing or defending against the allegations, but [was] not in agreement with the relief" (Tr. p. 27). In its post-hearing brief, the district confirmed that it "did not defend FAPE" and that the parent was entitled to a neuropsychological IEE at the requested rate; however, the district disputed the request for compensatory education (Dist. Post H'rg Br. at pp. 2-3).

In a decision dated September 20, 2021, the IHO found that the district failed to meet its burden of proving that it offered the student a FAPE for either the 2019-20 or 2020-21 school years, as the district did not present any evidence or testimony (IHO Decision at pp. 2, 4).

Turning to the requested relief, the IHO noted that the parent requested compensatory education consisting of 20 30-minute sessions of counseling services, 20 40-minute sessions of speech-language therapy services, and 600 hours of tutoring to be provided by EBL Coaching (IHO Decision at p. 6). In making an award of compensatory services, the IHO decided to conduct a quantitative analysis so that the resulting award would be calculated based upon the amount of time the student was deprived of a FAPE (id. at p. 7). The IHO determined that a bank of 20 30-minute compensatory counseling sessions and a bank of 20 40-minute speech-language therapy sessions were appropriate awards, and therefore granted the same (id. at pp. 7, 16-17).

However, with regard to the parent's request for 600 hours of compensatory tutoring, the IHO determined that an award was not appropriate based on the hearing record (IHO Decision at p. 8). Initially, the IHO rejected the district's objection to the parent's request for compensatory education on the grounds that there was the possibility for bias because the provider was in a position to benefit from delivery of the services (id. at p. 7). However, the IHO decided not to grant the parent's request; the IHO noted that the parent's witness testified as to how the tutoring services would help the student and bring him to grade level, however, the IHO found that there was no evidence in the record to support finding that the compensatory tutoring services would have compensated the student for services the district failed to provide (id. at p. 8).

With respect to the parent's allegations regarding the evaluations of the student, the IHO found that the district had multiple opportunities to evaluate the student appropriately but failed to do so (IHO Decision at p. 16). The IHO found that the district agreed to fund a neuropsychological evaluation at the rate of $5,500, and therefore ordered that such evaluation be conducted by an evaluator of the parent's choosing (id. at pp. 8, 17). The IHO also determined that the parent was

[2] The parties appeared for prehearing conferences on May 7, 2021, June 3, 2021, and July 1, 2021 (Tr. pp. 1-22).

entitled to a district-conducted auditory processing evaluation (id. at pp. 8, 16, 17).[3] The IHO ordered that the CSE reconvene within 20 days of receipt of the evaluation reports and consider all of the information in developing an IEP for the student that comprehensively described the student and included appropriate related services and annual goals (id. at p. 17).

IV. Appeal for State-Level Review

The sole issue presented on appeal is whether the IHO was correct to completely deny the parent's request for 600 hours of compensatory tutoring services. The parent asserts that the IHO improperly made this finding despite determining that the district failed to provide the student with a FAPE during the school years at issue and despite the district's failure to present any evidence to refute the parent's request. According to the parent the evidence in the hearing record establishes that, as of April 2021, the student had regressed to a low sixth grade level in math, and a sixth-grade level in reading. The parent further alleges that the only evidence in the hearing record relating to the issue of compensatory academic services was submitted by the parent. More specifically, the parent asserts that the founder and director of EBL Coaching testified that the student was functioning below grade level in reading, writing, spelling, and math and needed 600 hours of remediation in order to develop the student's reading comprehension, writing, and math skills.

In its answer and cross appeal, the district does not contest that it failed to provide the student with a FAPE for the 2019-20 and 2020-21 school years. Additionally, the district does not assert that the relief ordered by the IHO was inappropriate. Rather, the district sets forth arguments associated with the relief that was denied by the IHO. Specifically, the district asserts that the IHO properly denied the parent's request for 600 hours of compensatory academic services because the hearing record did not support it as being an appropriate remedy for a denial of a FAPE. The district notes that an award of compensatory education should place the student in the position that he would have been in had the district acted properly, not maximize the student's potential or guarantee that the student achieves a particular grade level in the student's areas of needs.

The district asserts that the requested 600 hours of compensatory tutoring was not calculated by considering the student's needs, the district's failure to provide an appropriate program, the student's then-current educational programming, or input from the student's teachers at the time. According to the district, the EBL Coaching director's proposed calculation for 600 hours of tutoring was based solely on results set forth in an outdated psychological evaluation and a one-hour assessment.

Despite the above arguments, the district cross-appeals from the IHO's decision not to award academic compensatory education and argues that remand is appropriate. In making this argument the district admits that it did not present any witnesses or documentary evidence at the hearing and "does not contest the Petitioner's request for compensatory academic education

[3] The attorney for the district indicated in her opening statement that the parent's request for a speech-language evaluation was resolved between the parties (Tr. pp. 27, 28). The parent's post hearing brief did not include a request for a speech-language evaluation and the IHO did not make a finding on this issue (see IHO Decision at pp. 8-16; Parent Post Hr'g Br.).

services." The district requests that this matter be remanded so that the IHO can consider additional evidence, including the results of the evaluations that were ordered by the IHO during the impartial hearing.

The parent answers the district's cross-appeal and again asserts that the only evidence provided during the hearing which related to the issue of compensatory academic services was submitted by the parent. Furthermore, the parent asserts that "the evidence submitted during the course of the hearing was sufficient to support [the] 600 hours of compensatory academic instruction sought, and that a remand for additional fact-finding would only serve to prolong a final resolution of this matter."

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]

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).

[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).

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 FAPE for the 2019-20 and 2020-21 school years. Additionally, neither party asserted any arguments on appeal relating to the IHO ordering the district to conduct an auditory processing evaluation and to pay for an independent neuropsychological evaluation, which had previously been at issue. Both parties were silent on appeal with regard to the requests the parent made for a speech-language evaluation and for the student to receive a laptop with word prediction, auditory feedback, and earphones. In addition, neither party has appealed from the IHO's order directing the CSE to convene a meeting to consider results of the ordered evaluations and develop an IEP for the student. Moreover, the parties are not contesting the IHO's orders with regard to compensatory speech-language services and compensatory counseling services. 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]). Therefore, the issue remaining to be addressed on appeal is whether the IHO was correct to deny the parent's request for compensatory academic services in its entirety.

B. Compensatory Education Services

The parent argues that the IHO erred by failing to consider the totality of the evidence in the hearing record before denying compensatory education services to account for the two-year denial of a FAPE. The parent requests that the IHO's decision be reversed to the extent that it failed to award the requested 600 hours of compensatory tutoring, as the parent contends that the request was supported by the uncontested testimony of the director of EBL Coaching. The district argues that the IHO's denial of the parent's request for 600 hours of compensatory education should be affirmed, but the district also cross-appeals from the IHO's denial of compensatory academic services and requests that the matter be remanded for the IHO to consider additional evidence to determine an appropriate remedy for the district's denial of a FAPE, including consideration of the evaluations that were ordered by the IHO.

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

[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 [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]). 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"]).

The parent submitted both documentary and testimonial evidence relating to the student's educational history and need for compensatory services (see Tr. pp. 47-63; Parent Exs. A-M). Conversely, the district did not submit any evidence as to what an appropriate compensatory remedy would consist of and did not challenge the evidence presented by the parent during the 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.

As stated above, during the hearing, the district failed to offer evidence regarding an appropriate compensatory education award despite having adequate notice and an opportunity to defend the claim for compensatory education during the impartial hearing (see generally Tr. pp. 1-65). The district also failed to cross-examine each witness, or in any way challenge the evidence presented by the parent as to the student's need for compensatory services (Tr. pp. 38-39, 63; Answer and Cross Appeal ¶ 5). Rather, the district simply presented an opening statement at the time of the hearing, briefly cross-examined the director of EBL Coaching, and submitted a closing statement that did not present an argument as to why the specific type of compensatory services and number of hours sought by the parent should not be awarded (Tr. pp. 26-29, 46-47; see District Post Hr'g Br.).

While the district failed to present evidence or its view of an appropriate compensatory education award, the IHO was not required to award all of the relief that the parent sought. Such an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]).

The source of the parent's request for 600 hours of compensatory education services, was an April 21, 2021 letter and direct testimony by affidavit, which summarized an April 19, 2021 assessment that had been conducted by the director of EBL Coaching (Parent Exs. J at p. 1; K ¶¶ 13-17). The director stated that she personally met with the student, as she does with all students (Parent Exs. J at p. 1; K ¶ ¶ 7, 13). The director testified that she assesses each student, examines IEPs, and reviews evaluations that had been conducted in order to measure the student's strengths, weaknesses, and academic functional levels (Parent Ex. K ¶¶ 7-8). The director stated that she then utilizes such information to determine which research-based techniques would be best for that individual student (id. ¶ 7). On April 19, 2021 the director administered the Wide Range Achievement Test (WRAT) to the student "to assess [his] reading, spelling, and mathematics skills," had the student "complete a writing sample using the Test of Written Language," and "ended with the Qualitative Reading Inventory to assess his reading comprehension skills" (id. ¶¶ 13-14). Based on this assessment of the student, the director determined that the student "tested at a low sixth grade level for mathematics, a low fifth grade level for spelling, and an upper sixth grade level for decoding" (Parent Exs. J at p. 1; K ¶ 14). The student also tested at a low sixth grade level for writing and a sixth-grade level for reading comprehension, which the director characterized as being "all *well* below the expected levels for his grade" (Parent Exs. J at p. 1; K ¶ 14 [emphasis in original]). The director testified that she had the opportunity to review additional

documents relating to the student which included IEPs and a psychological/educational evaluation report dated December 11, 2018 (Parent Ex. K ¶ 15).[5]

As a result of the above referenced assessment of the student, the EBL Coaching director's "review of the documents," and her experience working with similar students, "it was clear to [her] that [the student] [wa]s 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 his reading comprehension, writing, and mathematics skills" (id. ¶ 16 [emphasis in original]). The director also testified that based on her "personal evaluation of [the student]," her review of documents, the student's "overall profile," and her work with a "tremendous number of students like him" she "*strongly* recommend[ed] that he receive 600 hours of one-to-one instruction using the Orton Gillingham technique to develop his reading and spelling skills and similar researched-based, multi-sensory techniques to develop his reading comprehension, writing, and mathematics skills" (id. ¶ 16 [emphasis in original]). The director indicated that she felt confident that this type of instruction would "help him tremendously" (Parent Ex. J at p. 1). The director also recommended that the 600 hours should not have an expiration date for the purpose of providing flexibility to the student's family and that services could be provided at the EBL Coaching learning center, the student's home, virtually, or at another mutually agreed upon location (Parent Ex. K ¶¶ 18, 20).

The director of EBL Coaching testified on cross-examination that she was recommending 600 hours of compensatory tutoring because she felt that after being provided with that number of hours the student would have "the potential to come close to grade level, if not achieve grade level" (Tr. pp. 46-47). The director stated that this conclusion was supported by the student's "overall profile" and her "extensive work with students like him" (Tr. p. 47). However, the director admitted that her assessment of the student took approximately one hour (id.). Additionally, the director acknowledged that she did not speak with any of the staff at the student's school when formulating her opinion (id.).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, as the district correctly asserts in its answer and cross appeal, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (Answer and Cross Appeal ¶¶ 8, 10; see also Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

[5] The director testified that two of the student's IEPs she reviewed were dated February 1, 2019, and December 20, 2019; however, these are the projected dates of implementation associated with the December 13, 2018 and December 10, 2019 IEPs respectively, both of which were submitted into the record (Parent Exs. B at pp. 1, 15; C at pp. 1, 23). Additionally, the director referenced an October 5, 2018 IEP in her affidavit and April 21, 2021 letter, but a copy of the October 5, 2018 IEP was not admitted into the hearing record (Parent Exs. J at p. 1; K ¶ 15).

On appeal, the district argues that the requested hours were not calculated by considering the student's needs, the district's failure to provide the student with an appropriate educational program, the student's then-current educational programming, or input from the student's teachers (Answer and Cross-Appeal at ¶¶ 9-10). Rather, the district contends that the calculation was based solely on results from an outdated psychological evaluation and a one-hour assessment conducted by the EBL Coaching director (id. ¶ 9). The district requests for this matter to be remanded so that an IHO can consider additional evidence, including the evaluations that were ordered as part of the IHO's decision, to determine an appropriate remedy (id. ¶ 12). However, review of the hearing record shows that there is sufficient information to support an award of compensatory education to the student without need for a remand.

The parent testified that the student's primary difficulties were with sitting down and staying focused (Tr. p. 50). Additionally, the student was described as being easily distracted and requiring redirection due to lack of focus or because he fell asleep (Parent Exs. B at p. 3; C at p. 6). Yet, the student was also described as being respectful, highly motivated, a hard worker, cooperative, well-mannered, energetic, personable, sociable, friendly, eager to participate, and eager to learn (Parent Exs. B at pp. 3-4, 6; C at pp. 6, 8-9).

Although a review of the evidence in the hearing record at times paints an incomplete image of the student's academic abilities, there is information showing that the student has experienced difficulties with academics. Specifically, on the spring 2018 New York State ELA and math exams the student achieved scores of 2.92 and 2.08, respectively (Level 2, approaching standards), which indicated that the student was "partially proficient in standards for [his] grade," and he "demonstrate[d] knowledge, skills, and practices embodied by the New York State P-12 Common Core Learning Standards" that were "considered insufficient for the expectations at this grade" (Parent Exs. B at p. 2; E at p. 1). Review of the December 2018 psychological and educational evaluation report reflected that on an administration of the Wechsler Individual Achievement Test – Third Edition (WIAT-III), the student's scores on the math problem solving and spelling subtests were below average, and his score was below grade level on the written expression subtest (Parent Ex. E at p. 4).

Additionally, teacher reports summarized in the December 2018 and December 2019 IEPs indicated that the student was performing at grade level, but had "a slight difficulty with decoding," sometimes needed assistance with the pronunciation of grade level words, and had difficulty making inferences (Parent Exs. B at p. 3; C at p. 6).

Review of the student's progress report shows that for the second marking period of the 2019-20 school year student received the following grades: 77.25 percent in ELA, 84.69 percent in social studies, 80.69 percent in mathematics, and 53.06 percent in living environment (Parent Ex. G at p. 1). A mathematics progress report dated December 7, 2020, for the second marking period of the 2020-21 school year, indicated that the student had an average in math of 56.25 percent (Parent Ex. F at p. 2). Lastly, an undated document that the IHO identified as the student's report card, contained comments with regard to the student's performance in various classes, which in addition to indicating difficulties with homework completion and submission of class work, indicated the student was receiving low scores on assessments in some classes and needed additional academic assistance in another class (see Parent Ex. H at p. 1; IHO Decision at p. 18).

In contrast, the December 2018 psychological and educational evaluation report reflected that the student achieved WIAT-III scores in the above average range for the word reasoning and pseudoword decoding subtests and in the average range for the reading comprehension, oral reading fluency, numerical operations, and math fluency (addition, subtraction, multiplication) subtests (Parent Ex. E at p. 4). While the student's private psychologist expressed concern with the student's scores as represented in this report, she testified that the student possessed the cognitive ability to learn with appropriate special education supports in place and further testified that a review of the student's educational records indicated that he was not making appropriate academic progress in light of his disability (Parent Ex. M ¶¶ 13, 14). The district decided not to cross-examine the private psychologist, leaving her testimony regarding the student's abilities unrebutted (Tr. pp. 38-39, 63).

At the time of the hearing, the student's parent did not believe that the student was functioning on grade level despite having worked with him at home (Tr. pp. 61-62). However, the hearing record provides some evidence that, at least in 2018, the student might have been able to perform at grade level academically (Parent Ex. E at p. 1). Specifically, at the time of the December 2018 psychological and educational evaluation report, the student's teachers reported that the student could perform at grade level academically although his work did not always reflect it (id.). Additionally, the student's parent testified that the student's difficulties were primarily with staying focused and that he could meet his academic goals if he could stay focused and remain on task (Tr. p. 50).

Based on the above, I find that the totality of the evidence in the hearing record, including the district's decision not to submit any evidence to the contrary during the hearing, supports a finding that the requested 600 hours of instruction as compensatory education is sufficient to remedy the district's denial of a FAPE during the school years at issue. However, I do not accept the EBL Coaching director's opinion that there should not be a timeframe within which the compensatory education relief should be used by the student. I find that it would be appropriate for the awarded compensatory education to be used within a two-year period from the date of this decision, which will give the student and providers sufficient flexibility. Finally, while the EBL Coaching director testified that her organization could provide the student with the recommended 600 hours of 1:1 instruction, there is nothing in the director's testimony or the hearing record indicating that the district cannot provide the instruction, especially considering the instruction should support the student's in-school academics, which is a core function of the district.

VII. Conclusion

Based upon the foregoing, the evidence in the hearing record does not support the IHO's outright denial of compensatory education services. I have considered the parties' arguments and find that the hearing record supports an award of 600 hours of 1:1 instruction for the student to be provided by a special education teacher arranged for by the district as compensatory education services to be utilized within two years.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 20, 2021, is modified by reversing that portion which denied compensatory education to address a denial of a FAPE to the student for the 2019-20 and 2020-21 school years; and

IT IS FURTHER ORDERED that the district is directed to provide the student with 600 hours of 1:1 instruction by a certified special education teacher, unless the parties shall otherwise agree; and

IT IS FURTHER ORDERED that the 600 hours of 1:1 instruction awarded herein shall expire two years from the date of this decision if the student has not used them by such date.

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

CAROL H. HAUGE
STATE REVIEW OFFICER