The University of the State of New York

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

No. 22-011

Application of a STUDENT WITH A DISABILITY, by her 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:
Lincoln Square Legal Services, Inc., attorneys for petitioner, by Leah A. Hill, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 did not order all of the relief sought by the parent to remedy respondent's (the district's) failure to provide her daughter with an appropriate educational program for the 2017-18, 2018-19, and 2019-20 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Given the district's concessions and the parent's requested relief, a complete recitation of the student's educational history is not necessary. Briefly and as relevant herein, a CSE convened on November 13, 2017 to develop an IEP for the student for the 2017-18 school year, when the student was in fifth grade (Parent Ex. C at pp. 3, 11). The November 2017 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at pp. 1, 11). The November 2017 CSE recommended integrated co-teaching (ICT) services and the related services of group occupational therapy (OT) two times per month for 30 minutes per session and group speech-language therapy two times per week for 30 minutes per session (id. at p. 8). The November 2017 IEP indicated that the CSE had considered and rejected a recommendation of related services only as well as a 12:1 special class in a community

school (id. at p. 12). The IEP reflected that the student needed more intensive specialized instruction to address her educational needs and would benefit from the academic support of both the general education teacher and the special education teacher in a program that included ICT services (id.).

For the 2018-19 school year, when the student was in sixth grade, a CSE convened on June 13, 2018 and continued to find the student eligible for special education and related services as a student with a speech or language impairment (Parent Ex. D at pp. 1, 15). The June 2018 CSE recommended a special education program for the student, including ICT services, special education teacher support services (SETSS) in a group for three periods per week, and the related services of group OT two times per month for 30 minutes per session and group speech-language therapy two times per week for 45 minutes per session (id. at p. 11).

A CSE convened on May 31, 2019 and continuing to find the student eligible for special education and related services as a student with a speech or language impairment and developed a program for the student for the 2019-20 school year (seventh grade) (Parent Ex. E at pp. 1, 12). The May 2019 CSE recommended ICT services, group SETSS for three periods per week, and the related services of group OT two times per month for 45 minutes per session and group speech-language therapy two times per week for 45 minutes per session (id. at p. 8).

In a notice dated October 15, 2019, the CSE notified the parent of a proposed amendment to the student's October 8, 2019 IEP to remove three periods per week of SETSS and to reduce the number of academic periods of ICT services in math, English language arts and social studies, and to add three periods of ICT services in science to the student's IEP (Parent Ex. V at p. 1).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated May 20, 2020, the parent claimed that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19 and 2019-20 school years (Parent Ex. A at pp. 2, 6-10). The parent reviewed the student's educational history going back to the 2012-13 school year (kindergarten) and asserted that, for the school years at issue, the district improperly continued to recommend the student for ICT services without significant changes to the student's speech-language services (id. at pp. 2-6). The parent also asserted that although the district added SETSS to the student's program for the 2018-19 school year, the district failed to implement the recommended SETSS, and the district improperly removed SETSS in October 2019 (id. at pp. 5-6, 10). Generally, the parent alleged that the district failed to properly evaluate the student, failed to develop appropriate programs, failed to recommend and provide services at the appropriate frequency and duration, and "failed to recommend an educational placement that could provide [the student] with the requisite individualized instruction and teacher support, and, at times, failed to fully implement her IEP" (id. at p. 2). The parent included more specific allegations asserting that the district denied the

[1] Although an October 8, 2019 IEP is not part of the hearing record, the services identified as being part of the October 8, 2019 IEP are the same services as were recommended in the student's May 2019 IEP (compare Parent Ex. V at p. 1, with Parent Ex. E at p. 8). In the parent's May 20, 2020 due process complaint notice, she alleges that this CSE meeting convened without prior written notice to the parent and that the notice of amendment was the first time she was made aware of the October 2019 IEP (Parent Ex. A at p. 6).

parent the opportunity to participate in the decision making progress regarding the October 2019 CSE and a February 2020 request for educational records, failed to sufficiently evaluate the student in all areas of suspected disability, failed to use appropriate assessments to track the student's progress, failed to formulate goals to address the student's needs and abilities, failed to take appropriate action when the student failed to make progress, failed to provide the student with sufficient speech-language services, improperly placed the student in an "ICT classroom," and failed to consider 12-month services (id. at pp. 6-10).

As relief, the parent requested an independent neuropsychological evaluation, an independent speech-language evaluation, and an independent OT evaluation (id. at p. 11). The parent further requested that the CSE be directed to reconvene to review the results of the independent educational evaluations (IEEs) and develop an IEP which included the specific recommendations of the IEEs such as: a change in classification, comprehensive present levels of educational performance, all evaluative information from the IEEs considered in the development of the IEP, specific, meaningful and measurable annual goals, recommendations of individual OT, assistive technology, speech-language therapy, counseling, reading, and any other services consistent with the recommendations of the IEEs, a 12:1 special class and 12-month services (id.). Next the parent requested 700 hours of compensatory 1:1 tutoring in math and English by a provider chosen by the parent at a rate not to exceed $150 per session, "a set number of hours" of compensatory individual speech-language therapy, compensatory individual OT, and compensatory individual assistive technology—each by a provider chosen by the parent at a rate not to exceed $200 per session, along with direct payment of "tuition at a non-public school" of the parent's choosing and door-to-door transportation to and from the compensatory educational services (id. at pp. 11-12).

B. Impartial Hearing Officer Decision

The parties convened for multiple status conferences between November 12, 2020 and April 7, 2021, during which time the parties attempted settlement and to reach an agreement on terms related to the parent's request for IEEs (Tr. pp. 1-55). In an interim order dated April 16, 2021, the IHO directed the district to fund an independent neuropsychological evaluation at a cost not to exceed $5,000, an assistive technology evaluation at a cost not to exceed $2,500, an OT evaluation at a cost not to exceed $2,500, and a speech-language evaluation at a cost not to exceed $2,500 (Interim IHO Decision at p. 3). The parties reconvened on May 27, 2021, and four additional status conferences were held before witness testimony began on September 14, 2021 and concluded on October 26, 2021 (Tr. pp. 56-178). During the impartial hearing, the parties indicated that agreement had been reached in partial settlement of the parent's claims; however, the terms were not discussed on the record (Tr. pp. 14, 34-35, 42-46, 50-52).[2] The district also

[2] The district submitted a closing brief asserting that in January 2021, the district offered the parent an independent neuropsychological evaluation at a cost not to exceed $5,000, an independent assistive technology evaluation at a cost not to exceed $2,500, an independent OT evaluation at a cost not to exceed $2,500, an independent speech-language therapy evaluation at a cost not to exceed $2,500, 450 hours of compensatory 1:1 tutoring at a rate not to exceed $125 per hour, 108 hours of compensatory speech-language therapy at the district rate, 25 hours of compensatory OT at the district rate, and "transportation costs to these services" (Dist. Post-Hr'g Br. at p. 1). The district further argued that the resolution agreement was executed on January 21, 2021, and that the parent had caused an unnecessary delay in obtaining the IEEs that was harmful to the student (id.).

indicated that it would not be defending the alleged failure to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Tr. pp. 63, 65, 67, 74).

By decision dated November 12, 2021, the IHO found that the district failed to meet its burden of demonstrating that the student had been offered a FAPE for the 2017-18, 2018-19, and 2019-20 school years (IHO Decision at p. 4). The IHO ordered compensatory related services as consistent with testimony of the parent's experts; however, the IHO found that the parent's request for compensatory tutoring was not supported by the evidence in the hearing record and the IHO instead ordered the amount of tutoring that the parties had agreed to during the resolution period (id. at p. 7). The IHO ordered that the student receive a bank of 40 hours of compensatory OT, 120 hours of compensatory speech-language therapy, and 450 hours of tutoring, each by a provider chosen by the parent to be paid the lowest rates previously paid to the providers by the district or at rates similar to those paid to other providers of comparable services (id. at p. 8). The IHO further ordered the district to provide the student with a Metrocard for transportation to and from the awarded compensatory services (id. at p. 9).

With respect to the parent's request for prospective placement at a State-approved nonpublic school (NPS), assistive technology devices and assistive technology training, the IHO declined to award the parent's requested relief (IHO Decision at pp. 7-8). The IHO noted that an award of prospective placement may "ha[ve] the effect of circumventing the statutory process pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs." In conclusion, the IHO directed the district's CSE to reconvene a review meeting within two weeks of the IHO's decision to consider the[independent evaluations and prepare a new IEP that comprehensively described the student, included appropriate related services and goals, and considered deferral to the Central Based Support Team (CBST) for placement in a State-approved NPS (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in denying her requests for prospective placement in an NPS and for assistive technology devices, services, and training. The parent asserts that the IHO's decision was not made in accordance with appropriate legal practice, that it was not well-reasoned or based on the hearing record, and that it contained misstatements of facts, contradictions, and insufficient citations to the hearing record. According to the parent, the IHO's decision to deny prospective relief violated State regulation because it did not reference evidence in the hearing record, the IHO failed to consider overwhelming evidence in support of prospective relief, and the IHO failed to consider granting the parent's request to have the CSE reconvene and make specific recommendations in accordance with the IEEs. The parent also alleges that the IHO erred in failing to order door-to-door transportation for the student to receive compensatory educational services and that the IHO's award of a Metrocard was not appropriate. As relief, the parent requests that the district be directed to fund placement of the student at a State-approved NPS of the parent's choosing, to reconvene the CSE to develop an IEP and make the recommendations set forth in the IEEs including a change in the student's classification, new present levels of educational performance, a list of evaluative information considered, new annual goals, related services consisting of OT, assistive technology, speech-language therapy, counseling, and reading services, 12-month services, and a 12:1 special class. The parent also requests prospective relief in the form of assistive technology devices and training for the student.

Lastly, the parent has included three pages from a proposed IEP for consideration as additional evidence.

In an answer, the district responds with admissions and denials and argues that the IHO correctly denied the parent's requests for prospective relief. The district further asserts that the IHO correctly declined to order specific changes to the student's IEP for a school year that was not at issue before her. With regard to the parent's requests for assistive technology devices and training, the district alleges that the hearing record does not indicate whether the parent shared the assistive technology IEE with the student's school and further asserts that the assigned public school placement should be given the first opportunity to review the IEE and determine what devices and services should be recommended. The district next concedes that the student is unable to travel independently and in response to the parent's request for door-to-door transportation to and from compensatory educational services has offered a second Metrocard for an adult to escort the student. With respect to the parent's remaining claims and allegations, the district contends that the claims are improperly raised in the parent's memorandum of law or do not provide a basis to overturn the IHO's decision. Lastly, concerning the parent's submission of proposed additional evidence, the district asserts that the exhibit was available at the time of the hearing and is unnecessary to resolve the appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of

Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

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

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

VI. Discussion - Relief

A. Preliminary Matters

1. Compliance with Practice Regulations

In its answer, the district asserts that the parent's request for review does not include arguments challenging the IHO's findings and conclusions related to her determination that an award of prospective placement would have the effect of circumventing the statutory process and that the parent's arguments set forth in her memorandum of law should not be considered because a memorandum of law cannot substitute for a pleading. As such, the district argues that the parent's arguments related to her request for a prospective placement should not be considered.

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

> (1) the specific relief sought in the underlying action or proceeding;
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> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

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chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

(8 NYCRR 279.8 [c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8 [c][4]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Review of the parent's request for review and memorandum of law is consistent with the district's position, as all of the parent's arguments related to challenging the IHO's finding that an award of prospective placement would have the effect of circumventing the statutory process is contained within the memorandum of law (Parent Mem. of Law at pp. 6-10; see Req. for Rev.).

Although, I generally agree with the district's characterization, the parent's request for review, although not particularly well-pled, does allege specific errors committed by the IHO related to the parent's request for prospective relief. As such, I decline to dismiss the parent's request for review because it adequately complies with the practice requirements of Part 279 and, given that the district was able to respond to the parent's allegations that are contained within the request for review, the district has not suffered undue prejudice to the extent that outright dismissal is warranted and I will consider the parent's claims. Nevertheless, to the extent that the parent argues additional grounds for reversal of the IHO's decision solely within the memorandum of law, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080).

2. Additional Evidence

In her request for review the parent requests acceptance of "proposed exhibit KK… a proposed recommended program issued following the CSE reconvene held pursuant to the" IHO's decision and order (Req. for Rev. at p. 9). In her memorandum of law, the parent argues that the proposed recommended program demonstrates that the district will continue to fail to offer the student a FAPE and "[t]he SRO should interrupt this cycle of failure and direct the [district] to fund prospective placement in [an NPS] for [the student]" (Parent Mem. of Law at pp. 9, 10).

In its answer, the district asserts that the parent's proposed exhibit KK should be disregarded "as this exhibit was available at the time of the hearing and is unnecessary to resolve this appeal" (Answer ¶12).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered

at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

According to the parent's memorandum of law, the CSE reconvened on December 15, 2021, in response to the IHO's directive and provided the parent with "a three page document titled 'Recommended Program & Services' that included zero changes to [the student]'s program" shortly after the CSE meeting (Parent Mem. of Law at p. 8). As such, the district's assertion that the parent's proposed exhibit KK was available during the impartial hearing is factually false given that the impartial hearing concluded on October 26, 2021. Parent's proposed exhibit KK appeared to the undersigned to be an excerpt from an IEP with an implementation date of December 16, 2021, and indicative of little else. On that basis, the undersigned requested that the parent submit a complete copy of the IEP, if she wished the document to be considered as additional evidence. The parent submitted a complete copy of a December 15, 2021 IEP along with a December 22, 2021 prior written notice. While the IEP and prior written notice were not available at the time of the impartial hearing, they are not necessary to render a decision and I decline to accept them as additional evidence in this matter.

3. Scope of Review

State regulations governing practice before the Office of State Review require 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]).

Since neither party has appealed the IHO's awards of compensatory OT, speech-language therapy, and tutoring, those determinations have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Upon review of the award, the parent was awarded all of the compensatory OT and speech-language therapy she requested during the hearing and was awarded 450 hours of the 1,044 hours of 1:1 academic tutoring she sought during the hearing (Parent Post-Hr'g Br. at p. 22; IHO Decision at pp. 5, 7, 8). The parent has not sought an award of the difference of 594 hours of 1:1 tutoring in this appeal. As such, it would not be prudent to review the student's progress under the prior IEPs for the 2017-18, 2018-19 and 2019-20 school years as well as the student's current programming under a qualitative measure for determining whether an additional award of compensatory education is warranted.

The remaining claims before me are whether the IHO correctly denied the parent's request for door-to-door transportation for compensatory educational services, assistive technology, and assistive technology training, and for prospective placement in a State-approved NPS.

B. Transportation

The parent argues that the IHO erred by awarding a MetroCard to the student to travel to and from compensatory educational services, as the student is unable to travel independently. In its answer, the district conceded that the student is unable to travel independently and offered a second MetroCard for an adult to escort the student to and from her compensatory educational services.

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. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O., 822 F.3d at 125 [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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). 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 IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

The hearing record reflects that for the 2018-19 and 2019-20 school years, the student was recommended to receive special transportation as a related service (Parent Exs. D at p. 15; E at p. 12). As such, the IHO's award of a MetroCard and the district's offer of a second MetroCard are

not appropriate. The district is directed to provide door-to-door transportation for the student to attend compensatory educational services that is consistent with the special transportation that was recommended to address the student's needs in the first instance.

C. Prospective Relief

On appeal, the parent seeks prospective relief in the form of assistive technology, program recommendations consistent with IEEs obtained as a part of this proceeding, and placement in a State-approved NPS.

Relief in the form of specific IEP recommendations and the prospective placement of a student in a particular type of program and placement, such as the order sought by the parent in this matter directing the specific contents of a future IEP and nonpublic school placement, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

At this point, the school years at issue—2017-18, 2018-19, and 2019-20—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce IEPs for the 2020-21 and 2021-22 school years (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). In fact, the IHO directed the CSE to convene to consider the IEE's awarded as a part of this proceeding and the CSE convened to review those evaluations in December 2021 (see Req. for Rev. at p. 9). At that time, the district had the first opportunity to review the evaluations and make educational program and placement recommendations for the student, and those recommendations are now susceptible to challenge by the parent in a future proceeding if she continues to disagree with the district. Accordingly, the more appropriate course in this proceeding—given that it relates exclusively to the 2017-18 through 2019-20 school years, and those years are now at least two school years removed from the student's current educational programming—is to limit my present review to the remediation of past harms through compensatory means as opposed to ordering the district to adopt a specific future program or placement for the student.

While I sympathize with the parent's disappointment in what appears to be the continuation of a program recommendation that the district has conceded denied the student a FAPE during the 2017-18, 2018-19, and 2019-20 school years, considering the time that has passed from the filing of the due process complaint notice in this matter and that the CSE has convened to review the student's programming on multiple occasions fully cognizant of the allegations contained in the due process complaint notice in this matter, prospective relief would not be appropriate. It should be noted that in this matter, the parent chose to file a due process complaint notice late in the 2019-

20 school year to challenge the 2017-18, 2018-19, and 2019-20 school years. At that time, the CSE had convened on May 15, 2020 to develop an IEP for the 2020-21 school year; however, the parent did not allege a denial of a FAPE for the 2020-21 school year in the May 20, 2020 due process complaint notice (see Parent Exs. A at pp. 6, 11; F at p. 20). The parent chose not to include the 2020-21 school year in this proceeding and instead challenged three prior school years and sought prospective relief (see Parent Ex. A). In addition, the parent agreed to extensions of the IHO's time to render a decision while the four requested IEEs were conducted. All of these pleading and litigation choices have unfortunately inured to the benefit of the district. Nevertheless, the parent can challenge the student's subsequently developed IEPs and seek compensatory relief, as was awarded by the IHO in this matter. The parent may also object to the student's current educational programming and unilaterally place the student at an NPS of her choosing and receive reimbursement for the cost of the private school tuition if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents are appropriate, and equitable considerations weigh in favor of reimbursement (see Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). Although it appears that the district may have not considered all of the IEEs and did not fully comply with the parameters of the IHO's order, the 2021-22 school year is not before me. If the parent continues to disagree with the district's recommendations, her recourse is to challenge the December 2021 IEP in a future due process proceeding and/or seek judicial enforcement of the IHO's order (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]).

Having generally addressed the parent's request for prospective relief, it is not necessary to address the parent's overall arguments in support of the grant of such relief in more detail; however, a review of the parent's more specific requests for assistive technology devices and training and for placement in a State-approved nonpublic school merits some additional discussion to clarify why such items are unavailable as relief to the parent under the particular facts of this matter.

1. Assistive Technology and Training

The IHO denied the parent's request for prospective relief in the form of assistive technology devices and training recommended in the May 27, 2021 assistive technology IEE (IHO Decision at p. 8; see Parent Ex. II at pp. 13-14). The parent asserts that she is entitled to prospective assistive technology devices, services, and training as recommended in the May 2021 assistive technology evaluation. The district argues that there is no evidence in the hearing record that the May 2021 assistive technology evaluation was provided to the student's school. The district further asserts that the student's assigned public school site "performs the same functions as the CSE" and should be permitted to review the assistive technology evaluation and provide the student with "any devices and services that generally satisfy the recommendations made therein" (Answer ¶ 13). The district requests it "be permitted flexibility to provide devices and services that meet the same needs as the recommended devices and services" (id.).

The May 2021 assistive technology evaluation included a recommendation for the use of assistive technology "as the assistive technology supports used during the evaluation improved the student's ability to access text materials and produce writing of improved quality and quantity" (Parent Ex. II at p. 13). Recommendations included use of a Galaxy Chromebook 2, a carrying

case, a stylus pen, noise cancelling headphones, a list of specific programs directed at reading, writing, and mathematics, and two supplemental applications (id. at pp. 13-14). The evaluation indicated the device should be available to the student throughout the school day, to complete reading and writing tasks, and in the home, to complete written homework assignments (id. at p. 14). In addition, the evaluation included a recommendation for 20 hours of assistive technology training (id.).

The speech-language pathologist who conducted both the independent speech-language evaluation and independent assistive technology evaluation testified that the student was "significantly below in academic and social skills" and that it would have been very evident in a classroom (Tr. pp. 141, 156-57; see Parent Exs. HH; II). The speech-language pathologist also testified that the student would have struggled with all literacy tasks and her writing would have been unintelligible or difficult to figure out (Tr. p. 169). The speech-language pathologist noted that the student could have been evaluated earlier, received therapy earlier, and received specialized reading instruction (Tr. pp. 159, 176). Although the speech-language pathologist made specific recommendations to address the student's academic delays going forward and testified that the student performed significantly higher in reading given a text reader and could have "qualified earlier and could have received… more support in the classroom," the parent's request is for prospective relief and is not framed as a remedy for the district's three-year denial of a FAPE (Tr. pp. 170-75, 176).

Generally speaking, the IHO was not required to adopt the speech-language pathologist's recommendation and also correctly declined to supplant the role of the CSE. A review of the May 2021 assistive technology evaluation report shows that the recommendations made by the evaluator were very specific; however, the evaluation report does not explain why each particular device, program, or service were required to be itemized in the student's IEP (see Parent Exs. II). Consequently, the CSE should have the opportunity to consider the evaluation report in the first instance as the recommendations are not truly compensatory education services designed to "make up" for the district's failure to provide the student with a FAPE in the first instance, but instead are very particularized opinions as to what devices and services should be placed on the student's IEP going forward. Accordingly, the CSE should review the evaluator's recommendations, if it has not already done so. However, now that a trial assessment has been conducted, the CSE should not act in a dilatory manner with respect to the student's need for assistive technology. Although it is similarly inappropriate for me to order specific assistive technology services or devices be placed on a current or future IEP for the student, I do remind the CSE that if it does not adopt the assistive technology services as recommended by the speech-language therapist, it should, consistent with regulation, provide a prior written notice that explains in detail the reasons why each item recommended in the evaluation report was rejected, and shall otherwise revise the student's IEP to add appropriate assistive technology devices and services going forward based on its consideration of the existing evaluative information, including the May 2021 assistive technology evaluation, concerning the student's need for assistive technology.

2. Prospective Placement

With respect to the parent's request for prospective placement of the student in a State-approved NPS, in certain limited circumstances, an award directing a district to prospectively place a student in an appropriate, but non-approved school may be proper (see Connors v. Mills, 34

F.Supp.2d 795, 802, 805-06 [N.D.N.Y. Sept. 24, 1998]). In Connors, the court stated, in dicta, that "once the *Burlington* prerequisites relative to a non-approved private school are met, and a parent shows that his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school, the public school must pay the cost of private placement immediately" (id. at 805-06). However, the prospective placement at issue in Connors constituted the only available remedy that would have provided the student with an appropriate education as "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate" (id. at 799, 804). At least one court has noted this distinction, citing Connors for the proposition that the court ordered the "district to pay tuition directly to [the] private school unilaterally chosen by [the] parent, when the parent and district agreed that the district could not provide a FAPE" (Z.H. v. New York City Dept. of Educ., 107 F. Supp. 3d 369, 376 [S.D.N.Y. 2015]).

When determining an appropriate placement on the educational continuum, a CSE is required to first determine the extent to which the student can be educated in a public school setting with nondisabled peers before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "[u]nder the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [a nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, a directive that required placement of the student in a nonpublic school would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers (see Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]).

Here, the evidence in the hearing record does not support a finding that the student's removal from the public school and her placement in an NPS is necessary for her to receive a FAPE. Equally problematic is the parent's requested relief itself, as the parent has requested prospective placement in an unnamed, State-approved NPS for an unspecified school year. This matter involves the 2017-18, 2018-19 and 2019-20 school years. The impartial hearing was held during the 2019-20 and 2020-21 school years and this decision will be rendered during the 2021-22 school year. Under the circumstances presented, prospective placement would not be appropriate (see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1179-80 [S.D.N.Y. 1992] [while a court may provide conditional approval for an appropriate placement in the event there are no State-approved nonpublic schools that can meet the student's needs, the more appropriate course of action is to remand the matter to the CSE to find an appropriate program as it is the province of the local educators to initially determine placement]).

Based on the foregoing, the hearing record does not support the parent's request for prospective placement at a State-approved NPS.

VII. Conclusion

In summary, the evidence in the hearing record demonstrates that the IHO incorrectly denied the parent's request for door-to-door transportation to and from compensatory educational services and correctly denied the parent's requests for prospective relief.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated November 12, 2021, is modified by reversing those portions which denied the parent's request for door-to-door transportation to and from compensatory educational services and awarded the student a MetroCard;

IT IS FURTHER ORDERED that the district shall provide door-to-door transportation for the student to attend compensatory educational services that is consistent with the student's recommended special transportation related services.

Dated: **Albany, New York**
April 13, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER