The University of the State of New York

The State Education Department
State Review Officer
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No. 17-015

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

Appearances:
Kevin A. Seaman, Esq., attorney for respondent

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which did not award the entirety of the relief now sought by the parents to remedy respondent's (the district's) failure to provide the parents' son an appropriate educational placement for the 2015-16 and 2016-17 school years. The appeal must be dismissed.[1]

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];

[1] In September 2016, Part 279 of the Practice Regulations were amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision, when necessary, are to the amended provisions of Part 279.

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 that the scope of the parents' appeal is limited to the relief awarded by the IHO, a recitation of the student's educational history is not necessary. This appeal arises from an IHO's decision issued after remand (see Application of a Student with a Disability, Appeal No. 16-040). Therefore, the parties' familiarity with the procedural history of the case, including the IHO's decision before remand, the issues presented for review on appeal before remand, and the

instructions to the IHO and the parties upon remand, is presumed and they will not be repeated in detail (id.).

Briefly, however, the parents initiated the instant proceedings by due process complaint notice dated May 10, 2016, which incorporated by reference all of allegations the parents set forth in an amended federal complaint against the district (see generally IHO Ex. I). In addition, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and asserted that the district unlawfully denied the student's "placement" in the district (id. at p. 2). As relief, the parents requested that the district accept and enroll the student and provide him with a FAPE (id.). By decision dated June 4, 2016, the IHO granted the district's motion to dismiss the parents' due process complaint notice with prejudice (see IHO Ex. IV at pp. 13-14). The parents appealed the IHO's June 2016 decision, and although the undersigned SRO sustained the parents' appeal, the matter was ultimately remanded for further administrative proceedings consistent with my directives (see Application of a Student with a Disability, Appeal No. 16-040).

A. Impartial Hearing and Second Due Process Complaint Notice

On July 26, 2016, the parties returned for an impartial hearing, which concluded on November 29, 2016, after nine days of proceedings (see Tr. pp. 1-1842). During the impartial hearing, the district convened a CSE meeting on September 22, 2016, to develop an IEP for the student for the 2016-17 school year (see Dist. Ex. 5 at pp. 1-2; see generally Dist. Ex. 4). Shortly thereafter, the parents filed a second due process complaint notice, dated September 27, 2016, which alleged that the IEP created at the September 2016 CSE meeting failed to offer the student a FAPE based upon various procedural and substantive violations (see IHO Ex. XVII at pp. 2-5). As relief, the parents requested that the IHO consolidate the September 2016 due process complaint notice with the "existing complaints" against the district (id. at p. 5). In an order dated October 11, 2016, the IHO granted the parents' requested relief and consolidated the matters for impartial hearing (see IHO Ex. XVI at pp. 3-5).

B. Impartial Hearing Officer Decision on Remand

In a decision dated January 26, 2017, the IHO concluded that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (see IHO Decision at pp. 36-54). In fashioning relief, the IHO noted the "limited help from the parties" notwithstanding the IHO's specific instructions prior to the conclusion of the impartial hearing for the parties to provide her with guidance about any relief to be ordered in their respective post-hearing briefs (id. at p. 54; see Tr. pp. 1764-65; IHO Exs. XXI-XXII).[2] Nonetheless, the IHO, upon consideration of the substantial evidence presented in the case, first ordered the district to "formally enroll" the student in the district and for the CSE to conduct a "meaningful review" of the student's needs, as well as the "program and supplementary aids he will need to succeed" (IHO Decision at p. 54). The IHO

[2] The district argued in its memorandum of law to the IHO that, for various reasons, no relief was warranted in this matter even if the district failed to offer the student a FAPE for the 2015-16 or 2016-17 school years (see IHO Ex. XXII at pp. 25-27). On the other hand, the parents did not address the issue of relief in the body of their brief, but noted in the "Wherefore" clause that the IHO should "award all damages, including but not limited to, compensatory (including compensatory education) and punitive damages, as well as reimbursement for all legal costs, disbursements, expenses, and fees" (IHO Ex. XXI at p. 30). The parents also requested that the IHO order the district to "internally implement" the student's IEP "'within district'" (id.).

ordered the district to provide the student with an "appropriate placement," and further indicated that the student's program, "[a]t a minimum," must focus on "life skills" with the ability to "address the goals in his IEP" (id.). In addition, the IHO recognized that the student required a program with "students of similar needs," whom the IHO described as "verbal" students (id. at pp. 54, 58). Next, the IHO noted the district's "legal obligation" to consider placing the student in a "neighborhood school before deciding to implement his IEP elsewhere" (id. at p. 54). However, while stating that the district "must consider" an in-district placement, the IHO recognized that the district's obligation must be balanced with the "considerable obstacles to any in-district placement" for the student, such as his "academic and functional weaknesses, special education needs, and limited progress on [annual] goals" (id. at pp. 54-55). Therefore, to assist the district with this task, the IHO ordered the district—within 10 days from the date of the decision—to hire a "qualified" inclusion consultant with "experience at the middle/high school level, to advise and report to the district on inclusion at the middle school level" (id. at pp. 55, 57).[3]

With respect to the contours of the inclusion consultant's role, the IHO directed the consultant to "review [the student's] education record" and to conduct an "examination of instructional programs and curricula available in [the district], to assess whether supplementary aids and supports would allow him to benefit from inclusion in any classes in the district, and to make recommendations in accordance with the results of the review" (IHO Decision at pp. 55, 57). The IHO also indicated that the inclusion consultant "may also examine programs in other districts to assess their suitability" for the student (id.).

Next, the IHO ordered the district to convene a CSE meeting—within 10 days of the receipt of the inclusion consultant's report—to consider the "results and recommendations of the consultant's report" and to develop an IEP with an "appropriate placement" for the student, which "shall include a life skills program sufficient to address the [annual] goals" in the student's IEP (IHO Decision at pp. 55, 57-58). The IHO also directed that the "results and recommendations" of the inclusion consultant's report be "included on the child's IEP" (id. at pp. 55, 58). Additionally, the IHO ordered that the CSE convened to review the inclusion consultant's report must "invite" the inclusion consultant to the meeting to "report orally on the report's findings" (id. at p. 58). Upon review, if the CSE decided to recommend the student's placement "out of the district," the IHO directed that the CSE "must invite representatives from the agency or district in which it plan[ned] to place [the student]"; moreover, the CSE's "discussion will include both a description of [the] program and of [the student] to ensure that it me[t] the requirements as set forth in this decision" (id. at pp. 55, 58). The IHO also encouraged the parents to cooperate in this process (id. at p. 55).

Finally, the IHO denied the parents' request for compensatory education, which the IHO noted the parents raised for the first time in "their post-hearing brief" (IHO Decision at pp. 55-56, 58). On this point, the IHO explained that the parents refused to allow the student to attend the recommended program for the 2015-16 school year—a program that the parents did not object to, other than the student's "placement out of district" (id. at p. 55). Rather, the IHO found that the

[3] Without specifying a timeframe, the IHO ordered the district to retain the inclusion consultant for a "reasonable time necessary to complete the review" and further noted that the district "may" retain the inclusion consultant to "assist in developing a plan to implement recommendations or other follow-up, including training for staff as may be needed" (IHO Decision at p. 57).

parents' decision to continue the student's education in sixth grade for "an additional year," in a restrictive 1:1 setting, belied the parents' continued insistence on the importance of developing and maintaining friendships for the student as he "transitioned out of elementary school" (id. at pp. 55-56). The IHO further found that the parents' decision to "demand home instruction as pendency" for the 2016-17 school year "continued" the student's "isolation from peers" (id. at p. 56). Consequently, the IHO concluded that the parents were estopped from any compensatory award (id.).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents allege that the IHO erred in denying their request for "compensatory damages," and request an award of "compensatory damages" as relief. Additionally, the parents contest the IHO's decision conferring the district with the "unilateral discretion" to hire an inclusion consultant and, as relief, seek an order granting the parents a "meaningful role" in the selection and hiring of the inclusion consultant. Finally, the parents challenge the IHO's decision authorizing the inclusion consultant to examine other school district programs' "relative capacities to fulfill" the district's FAPE obligations. As relief for this error, the parents seek an order limiting the scope of the inclusion consultant's inquiry to whether the district can implement the student's IEP within the district.

In an answer, the district responds to the parents' allegations. The district also alleges that the parents' request for review must be dismissed for failing to comply with the regulations governing practice before the Office of State Review. Overall, the district generally argues to dismiss the parents' request for review and to uphold the IHO's decision in its entirety.[4]

In a reply, the parents respond to the allegations in the district's answer.

V. Discussion

A. Preliminary Matters—Compliance with Practice Regulations

Initially, the district contends that the parents' request for review must be dismissed because it did not include the proper notice. The district further asserts that the request for review must be dismissed because it does not clearly indicate the reasons for challenging the IHO's decision, and fails to comply with the requirements set forth in 8 NYCRR 279.8(c). With respect to the parents' memorandum of law, the district argues that it, too, fails to comply with requirements set forth in 8 NYCRR 279.8(d).

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to

[4] As neither party appealed the IHO's ultimate conclusions—or any of the findings underlying those conclusions—that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years, all of the IHO's findings and determinations have become final and binding on both 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]).

the request for review (8 NYCRR 279.3).[5] State regulations further provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]).

Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

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

(8 NYCRR 279.8[c][1]-[3]).

State regulation further requires that a memorandum of law "shall include a table of contents and set forth" the following:

> (1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and
> (2) a statement of the party's arguments, including the party's contentions regarding the decision of the [IHO] and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal.

(8 NYCRR 279.8[d][1]-[2]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.13; see 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]).

Before turning to an analysis of the district's arguments, it does not go unnoticed that the

[5] This is a separate filing from the notice of intention to seek review (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

district's assertions pertaining to the form and content of the parents' pleadings and memorandum of law repeat, nearly verbatim, the contentions the district asserted about the parents' pleadings in Application of a Student with a Disability, Appeal No. 16-040. In the previous appeal, I declined to dismiss the parents' appeal based solely upon the failure to comply to the practice regulations (see Application of a Student with a Disability, Appeal No. 16-040). At this juncture, however, the parents are cautioned that, while a singular failure to comply with practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements. This is especially true where, as here, I provided the parents with an opportunity to amend the original request for review and memorandum of law filed in the Office of State Review to comply with the practice regulations applicable to this appeal. Taking advantage of that opportunity, the parents filed a second request for review and memorandum of law, which did not differ in content from their original pleadings, other than including page numbers. The parents did, however, include an affidavit of verification, modify the affidavit of service, and provide a table of contents with the memorandum of law.

Turning now to the district's specific contentions, although the district correctly indicates that the parents did not serve a "Notice of Request for Review," it is unclear how the absence of such notice requires a dismissal of the parents' request for review when the district timely prepared, served, and filed an answer responding to the allegations in the parents' request for review (8 NYCRR 279.3). Moreover, the district does not otherwise allege how the absence of such notice compromised or prejudiced its ability to timely prepare, serve, or file an answer. With regard to the district's contentions relative to the form and content of the request for review and memorandum of law, I decline to dismiss the parents' request for review on these grounds, given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).[6] In this instance, while the failure to comply with practice regulations will not ultimately result in a dismissal of the parents' appeal, the parents' failure to reference facts in the hearing record relevant to the issues submitted for review, as discussed more fully below, made a meaningful review of the parents' request for compensatory education more difficult in this instance.

B. Relief

1. Compensatory Damages

Turning to the merits of the appeal, the parents assert that the IHO erred in denying their request for "compensatory damages." In response, the district argues that the IHO properly denied the parents' request because they did not present the issue for the IHO's consideration and review and, thus, failed to preserve the issue for consideration on appeal. Alternatively, the district argues

[6] The parents' reply to the district's answer also fails to comply with practice regulations, as it exceeds the page limitations and permissible scope of a reply (8 NYCRR 279.6[a], 279.8[b]).

that compensatory damages—or monetary damages—are not available to remedy violations of the IDEA.

Initially, the parents—while demanding "compensatory damages"—do not otherwise characterize or identify any specific relief in the request for review or memorandum of law (see generally Req. for Rev.; Parent Mem. of Law; see also 8 NYCRR 279.8[c][1]-[3]). If strictly construed as a request for an unspecified amount of monetary damages, this relief—as the district correctly argues—is not available in the administrative forum under the IDEA (see Baldessarre v. Monroe-Woodbury Cent. Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 483-86 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]), and the parents' request must be dismissed.[7] However, a closer examination of the parents' arguments reveals that the parents refer to specific language used in the IHO's decision wherein the IHO denied an award of compensatory education services (compare Req. for Rev. ¶¶ 4-5, and Parent Mem. of Law at pp. 2-13, 16-17, 20-22, with IHO Decision at pp. 55-56). Therefore, to the extent that the parents' challenge to the IHO's failure to award "compensatory damages" more accurately asserts a challenge to the IHO's failure to award compensatory education services, it will be addressed, next, as such.

2. Compensatory Education

In support of the assertion that the IHO erred in denying their request for compensatory education, the parents argue that they are entitled to such an award because it is the district's obligation to offer the student a FAPE and not the parents' responsibility. The parents also argue that, contrary to the IHO's finding, they did not "'contribute' to any educational suffering endured" by the student. Additionally, the parents contend that the IHO improperly relied upon the parents' right to maintain the student in his pendency placement—which the parties agreed upon—during the proceedings as a basis for denying their request for compensatory education. The parents also contend that they have "consistently acted in the best interests" of the student, and contrary to the IHO's opinion, their decision to maintain the student in his pendency placement during the proceedings, rather than removing the student from his "educational womb" and placing the student in a "foreign district," reflected that intention. Finally, the parents assert that "even assuming 'contribution', such a finding should not eviscerate" the district's liability.

In response, the district alleges that IHO properly denied the parents' request for compensatory education services since the parents did not include this as a claim for relief in either of the two due process complaint notices filed against the district in this case. Instead, the district asserts that the parents first raised the concept of compensatory education as relief in their closing brief to the IHO, and thus, it was not preserved for review. Additionally, the district contends that the parents have not established an entitlement to such an award.

[7] The parents also continue to seek relief in the form of "attorney fees and costs" (Parent Mem. of Law at p. 30; Reply at ¶¶ 8, 10). The IDEA does not authorize an IHO or an SRO to award attorneys' fees or other costs to a prevailing party and entitlement, if any, to costs must be determined by a court of competent jurisdiction (20 U.S.C. § 1415[i][3][B]; 34 CFR 300.517; Mr. B. v. E. Granby Bd. of Educ., 201 Fed. App'x 834, 837 [2d Cir. Oct. 27, 2006]). Accordingly, this aspect of the parents' request is also dismissed.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[8] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

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]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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]"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. Mar. 6, 2008], adopted at, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]). Likewise, SROs have awarded compensatory "additional 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. 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]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the

[8] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]).

With regard to the parents' request for relief, pursuant to the IDEA, the due process complaint notice must provide a "proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. § 1415[b][7][A][ii][IV]; 34 CFR 300.508[b][6]; 8 NYCRR 200.5[i][1][v] [emphasis added]; see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011 [upholding SRO's decision denying an award of compensatory education services based upon the parents' failure to raise such claim for relief in the due process complaint notice]; see also J.M. v. Kingston City Sch. Dist., 2015 WL 7432374, at *15-*16 [N.D.N.Y. Nov. 23, 2015] [dismissing "late-blossoming claim for compensatory education" due to parents' failure to raise such a claim for relief in the due process complaint notice]). In this case, the district correctly asserts that neither the May 2016 due process complaint notice nor the September 2016 due process complaint notice included a request for compensatory education as a form of relief (see IHO Exs. I at p. 2; XVII at pp. 1-5). In addition, to the extent that the parents' May 2016 due process complaint notice incorporated by reference all of allegations set forth in an amended federal complaint against the district, a review of the federal complaint also reveals that the parents did not include a request for compensatory education as relief in this matter (see generally IHO Exs. I[a]-I[b]). Furthermore, a review of the evidence in the hearing record demonstrates that the parents, in the closing brief to the IHO—and only after an explicit instruction from the IHO near the conclusion of the impartial hearing—requested that the IHO should "award all damages, including but not limited to, compensatory (including compensatory education) and punitive damages, as well as reimbursement for all legal costs, disbursements, expenses, and fees" (IHO Ex. XXI at p. 30; see Tr. pp. 1764-65; IHO Decision at p. 53). Despite raising the request, the parents' closing brief did not identify for the IHO their position about how to best remediate the situation (i.e., the total amount of compensatory education services by type, along with frequency, duration, and location recommendations) (see generally Req. for Rev.; Parent Mem. of Law; IHO Ex. XXI).[9] Likewise, the parents do not articulate such

[9] Had the parents requested compensatory education services in either of the two due process complaint notices, the district—since New York State law has placed the burden of production and persuasion at an impartial hearing on the district, unlike states which align the burden of production and persuasion consistent with Schaffer v. Weast, 546 U.S. 49, 58-62 (2005)—would have been required under the due process procedures set forth in New York State law to address its burdens in the impartial hearing context by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016], quoting Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [noting that the "'ultimate award [of compensatory education] 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"']). Here, while the district understandably did not present evidence at the impartial hearing regarding an appropriate compensatory education remedy since the parents did not request such relief in their due process complaint notices (see IHO Exs. I; XVII), consistent with the IHO's direction (Tr. p. 1764), the district presented its position regarding relief in its closing brief to the IHO (see IHO Ex. XXII at pp. 25-27).

a position in either their request for review or memorandum of law.[10] As noted, at least two federal district courts have found the parents' failure to raise a request for compensatory education in their due process complaint notice was, alone, sufficient for dismissing a belatedly asserted request for compensatory education services (see J.M., 2015 WL 7432374, at *15-*16; M.R., 2011 WL 6307563, at *12-*13).

Putting aside, however, whether the parents' request for compensatory education could be dismissed based solely upon their failure to request such relief, the parents' remaining arguments in the request for review and memorandum of law do not support an award of compensatory education. Significantly, the parents' arguments—other than those based upon the student's pendency placements discussed below—repeatedly reference what they perceive as either the IHO's flawed reasoning or their desire to punish the district (see generally Req. for Rev.; Parent Mem. of Law).[11] The parents' arguments do not focus on the purpose of an award of compensatory educational services or additional services, which is to provide an appropriate remedy for a denial of a FAPE (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [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 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] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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. 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

[10] For the first time in their reply, the parents indicate that an appropriate award might consist of "compensatory education" to be delivered "upon the 'back-end' of the [student's] graduation year" in order to "'redeem' [the student's] lost educational rights" (Reply ¶ 13). While alluding to when the parents believe an award should be delivered to the student, this statement still does not identify the type of compensatory education the parents believe the IHO should have awarded.

[11] The arguments set forth in the parents' reply continue in the same vein (see generally Reply).

occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

While the parents' frustration with the district is understandable, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).

One final point: the parents do correctly argue that the IHO should not have denied their request for compensatory education services based, in whole or in part, on a review of the appropriateness of the decision to maintain the student in his pendency placements for the duration of the administrative proceedings (see Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; see also Mackey v. Bd. of Educ., 386 F.3d 158, 162 [2d Cir. 2004] [noting the independent of the inquiries relating to pendency versus claims for relief "pursuant to the inadequacy of an IEP"]). The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X, 2008 WL 4890440, at *20; O'Shea, 353 F. Supp. 2d at 455-56). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey v, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; see Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]). The United States Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then-current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

While it does not appear that the IHO relied solely upon this rationale to deny the parents' request for compensatory education services as relief for both the 2015-16 and 2016-17 school years, the IHO's decision specifically referred to the educational programs the student attended during both school years and appeared to weigh the restrictiveness of both settings as a factor in

denying the parents' request for relief (see IHO Decision at pp. 55-56). Based upon the evidence in the hearing record, however, it appears that the educational programs the student attended for both the 2015-16 and 2016-17 were, in fact, pendency placements that arose either through the implementation of an IEP generated to reflect special education services agreed upon in a stipulation of settlement (between the parents and another school district) for the 2015-16 school year, or through the implementation of special education services agreed upon by the parents and the district for the 2016-17 school year (see Tr. pp. 688-91, 693-94, 947-48, 952-61, 1432, 1671-79, 1707-08; IHO Exs. IV[b]; IV[c]; see also Application of a Student with a Disability, Appeal No. 16-040). As such, the parents had the right to maintain the student in those educational programs as pendency placements—regardless of the restrictiveness—under both State and federal laws and regulations and thus, the IHO erred in weighing this factor against the parents (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).[12]

Nevertheless, the IHO's point about the level or intensity of support the student received in his pendency placements (as opposed to the appropriateness or restrictiveness of the student's pendency placements) is well-taken, meaning that the student received his special education services in, arguably, the most supportive and intensive settings available on the continuum of special education placements during the 2015-16 and 2016-17 school years (see IHO Decision at pp. 55-56). The evidence in the hearing record reveals that the student continued to receive academic instruction, he worked on his annual goals, and he received related services throughout both school years (see Tr. pp. 952-61, 1671-79). Therefore, it is altogether unclear from the evidence in the hearing record—and, again, without the parents identifying the specific relief sought in the request for review—what compensatory education services would effectuate the purpose of this equitable remedy: that is, to provide special education services that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (E. Lyme Bd. of Educ., 790 F.3d at 457). In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated (see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Consequently, there is no reason to disturb the IHO's decision to deny the parents' request for compensatory education services.

3. Inclusion Consultant

Here, the parents argue that the IHO's failure to assign them with an "'equal' and/or 'participatory' role in selecting" the inclusion consultant bestows the district with an unfettered opportunity to hire a "person who presumptively will be loyal only" to the district's wishes and not to the student's "genuine educational needs." The parents also argue that the IHO erred in granting the inclusion consultant the "discretion to review and visit foreign districts, in order to seemingly ascertain whether these districts are capable of providing FAPE." The district contends that the

[12] On the other hand, given the equitable nature of compensatory education, a parent's failure to cooperate with the district's attempts to provide a student a FAPE could, under some circumstances, serve as a basis for a denial of an award of compensatory education (see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471-72 [2d Cir. Nov. 3, 2011]). While the IHO noted the lack of cooperation demonstrated by both parties at the September 2016 CSE meeting (IHO Decision at pp. 38, 55), the parents' lack of cooperation in this context does not appear to have factored into the IHO's decision to deny an award of compensatory education.

IHO's order directing the district to retain an inclusion consultant was reasonable and within the IHO's broad authority to fashion equitable relief.

Without a doubt, the parents' primary objective throughout the course of legal proceedings was for the district to enroll the student in the district and for the district to implement the student's IEP (see generally IHO Ex. I). And although the district, during the impartial hearing, did enroll the student at the district, it ultimately recommended a placement that required the implementation of the student's IEP within another school district for the 2016-17 school year (see IHO Decision at pp. 8-14, 19-27, 31-32). Having determined that the district failed to offer the student a FAPE, the IHO attempted to address the parents' continued concerns for including the student within the fold of his "neighborhood school" through an order directing the district to retain an inclusion consultant to assist in this process (id. at pp. 13-15, 31-32, 34-35, 49-55).

Intrinsically, the IHO's order directing the district to retain an inclusion consultant falls within the ambit of an equitable remedy (see Dracut Sch. Comm. v. Bureau of Special Educ. Appeals, 737 F. Supp. 2d 35, 56 [D. Mass. 2010] [finding that the hearing officer had the equitable power to order that the district "hire and compensate" independent consultants]). According to the IHO's decision, the IHO ordered the district to retain the inclusion consultant and did not otherwise describe or detail what role, if any, the parents had in selecting the consultant (see IHO Decision at pp. 54-55, 57-58).[13] However, other than relying upon what the parents consistently characterize as the district's past '"bad faith"' practices, they do not point to any authority to conclude that the IHO did not appropriately fashion an equitable remedy, which was well within the scope of the IHO's broad authority (Newington, 546 F.3d at 122-123 [approving an IHO's directive ordering the district to retain a consultant to develop an FBA and provide advice with respect to an appropriate amount of mainstreaming]; Dracut Sch. Comm., 737 F. Supp. 2d at 56 [finding that the hearing officer had the equitable power to order that the district "hire and compensate" independent consultants]; Matanuska-Susitna Borough Sch. Dist. v. D.Y., 2010 WL 679437, at *4 [D. Alaska Feb. 24, 2010] [finding that in fashioning an appropriate remedy, a hearing officer has the authority to require a district to retain the services of an expert]).

In addition, the parents ignore the fact that the IHO did require that the inclusion consultant draft a report, and further ordered the district to convene a CSE to review and consider such report and to invite the inclusion consultant to the meeting to discuss the report's findings (see IHO Decision at pp. 54-55, 57-58). Perhaps the only additional relief to be granted, in this instance, would be to order the district to provide the parents with a copy of the inclusion consultant's report at least five business days prior to the CSE meeting scheduled to review the report, and to remind the parents that, consistent with State regulation, they may invite "other persons having knowledge or special expertise regarding the student, . . . as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][ix]). In addition, it is strongly suggested that the parents cooperate in the CSE review process, as indicated initially by the IHO in the decision (see IHO Decision at p. 55).

Finally, the parents' last argument—that is, whether the IHO erred in directing the inclusion consultant to review and visit "foreign districts" to determine whether "these districts are capable

[13] Based on the parents' reply, it appears that the district already hired an inclusion consultant, and now the parents raise new allegations concerning the district's handling of information supplied to the inclusion consultant (see Reply ¶¶ 16-29).

of providing FAPE"—is somewhat misguided and must be dismissed. Here, the IHO's order indicated that the inclusion consultant "may also examine instruction programs in other districts, . . . to assess whether supplementary aids and supports would allow [the student] to benefit from inclusion in available classes, and to make recommendations in accordance with the results" (IHO Decision at p. 57). While the parents readily acknowledge that "foreign districts have the theoretical capacity to provide FAPE for their respective students," they continue to press that the district "should first be beholden to at least attempting to implement special education students['] educational needs through the provision of special education and related services, prior to summarily outsourcing its FAPE obligations to foreign [d]istricts" (Parent Mem. of Law at pp. 24-29). In other words, the district must attempt to educate the student—consistent with what the parents stress as the importance of "'community-based' integration" as a factor under principles of the least restrictive environment—within his "neighborhood" school district (id. at pp. 10-20, 24-29).

In determining a student's educational placement, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]). Numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992]).

To the extent that the parents continue to insist that the student must be educated within the district, and therefore, that the inclusion consultant's role must also be limited to implementing the student's IEP within the district, ignores the plain language of the regulations, which ultimately contemplate an educational placement outside a given school district, when necessary. Given the foregoing, there is no reason to disturb the IHO's orders regarding the inclusion consultant as they were well within the scope of the IHO's broad authority to craft an equitable remedy in this matter.

VI. Conclusion

In summary, a review of the evidence in the hearing record supports the IHO's decision denying the parents' request for "compensatory damages" or compensatory education services, and further supports the IHO's directives related to the retention of an inclusion consultant and the parameters of the inclusion consultant's role going forward. Additionally, however, the district is further directed that, upon receipt of the inclusion consultant's report, it shall immediately forward a copy of the inclusion consultant's report to the parents and allow the parents at least five business days to read and review such report prior to convening a CSE meeting, consistent with the IHO's decision and order.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 23, 2017

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SARAH L. HARRINGTON
STATE REVIEW OFFICER