The University of the State of New York

The State Education Department
State Review Officer
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No. 18-135

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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Charles Scholl, Esq. and Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for an award of compensatory education services as relief for respondent's (the district's) failure to provide the student with an appropriate educational program for the 2016-17 and 2017-18 school years. The appeal must be sustained in part, and for reasons set forth below, the matter is remanded for further administrative proceedings.

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 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

While the student's IEP for the 2016-17 school year is not a part of the hearing record, the evidence indicates that the student began the 2016-17 school year (kindergarten) in a general education classroom with an IEP, "which accommodated an integrated co-teaching (ICT) placement and speech and occupational therapies" (Parent Ex. M at pp. 3, 5; see Parent Ex. L at p.

1).[1] The student also received one hour per day of special education teacher support services (SETSS) in a group of eight students from the beginning of the 2016-17 school year (Parent Exs. E at pp. 2-3; L at p. 1).[2] With regard to related services, during the 2016-17 school year, the student received one 30-minute individual session and one 30-minute group (3:1) session per week of speech-language therapy and two 30-minute individual sessions per week of occupational therapy (OT) (Parent Ex. E at pp. 2-3; see Parent Ex. M at p. 3).

The student experienced social difficulties during kindergarten and was reportedly "'traumatized'" by incidents in school (Parent Exs. L at p. 1; M at p. 3). The hearing record also reflects that, as of March 24, 2017, the parent decided to keep the student out of school, due to the student exhibiting "great distress" when she got home from school, and that the student remained at home for the remainder of the 2016-17 school year (Parent Ex. L at p. 1; see Parent Exs. M at pp. 3, 5; O).[3] According to the parent, she requested home instruction services for the student, but the student did not receive any services from April through June 2017 (Tr. pp. 97-98; Dist. Ex. 3 at p. 1).

The parent obtained a private evaluation of the student, which was conducted on March 22, 2017 and April 13, 2017 (Parent Ex. L). The April 2017 developmental reevaluation summary reflected that the parent wanted the student "to receive home instruction with therapies in the home" (id. at p. 1). One of the student's physicians completed the district's medical request for home instruction form on May 5, 2017, which indicated the student could not attend school due to anxiety and previous physical encounters at school (Parent Ex. V at p. 1; see Parent Ex. W).

On May 25, 2017, the CSE convened to develop an IEP for the student for the 2017-18 school year (Parent Ex. E at pp. 1, 10). The CSE found the student eligible for special education as a student with a speech or language impairment and recommended ICT services for academic subjects (math, English language arts [ELA], social studies, and sciences) and related services, including one 30-minute session per week of counseling in a group (2:1), three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual speech-language therapy per week (id. at pp. 1, 7).[4] The May 2017 IEP reflects that the parent submitted an application for

[1] State regulation defines ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). It is unclear from the hearing record whether the student received ICT services as special education student or whether she attended an ICT class as a regular education student.

[2] It appears that the student was "discharged" from receiving SETSS on February 8, 2017 (Parent Ex. E at p. 2).

[3] As part of its triennial evaluation of the student, the district conducted a psychoeducational evaluation (dated March 28, 2017) and a classroom observation of the student (dated April 5, 2017) (Parent Ex. K; Dist. Ex. 4; see Parent Ex. Y). It appears that the listed date of the classroom observation (April 5, 2017) may have been in error (see Parent Ex. K), since the hearing record reflects that the student was not attending school at that point.

[4] One of the OT sessions was recommended for delivery in the student's general education classroom with the other two sessions in a separate location (Parent Ex. E at p. 7). Similarly, one of the speech-language therapy sessions was recommended for delivery in the student's general education classroom with the other two sessions in a separate location (id.).

home instruction, which "was forwarded to the home instruction district office for review" (id. at p. 11; see Parent Exs. V; W).

The student attended a Success Academy charter school (Success Academy) from September to mid-November 2017, where the student was initially placed in first grade but was moved back to kindergarten within a few weeks (Tr. pp. 98-99; Dist. Ex. 3 at p. 1; see Tr. pp. 204-05). According to the parent, CSE meetings were held on October 30, 2017 and November 9, 2017, which did not result in IEPs for the student because the district wanted to review recent private evaluation reports provided by the parent and to conduct a classroom observation and updated social history (Tr. pp. 99-100; see IHO Ex. I at pp. 11, 14).[5]

On November 13, 2017, the CSE reconvened, found the student eligible for special education as a student with autism, and developed an IEP for the student (Parent Ex. F).[6] At that time, the CSE recommended that the student attend a 12-month school year program in a 12:1+1 special class in an approved nonpublic school, to be identified through deferral to the central based support team (CBST), and related services consisting of one 30-minute session of counseling in a group (2:1) per week, three 30-minute sessions of individual OT per week, five 30-minute sessions of individual speech-language therapy per week, as well as four 60-minute sessions of parent counseling and training per year (Parent Ex. F at pp. 17-18, 20, 22; see Tr. pp. 206, 221-22, 227). The IEP reflects that all parties agreed with the recommendations and that the student would continue to attend her then-current school setting (Success Academy) during the CBST deferral process (Parent Ex. F at p. 23). However, the parent testified that the student stopped attending Success Academy after the November 2017 CSE meeting because "they told me that [the student] would get home instruction, like home school, pending CBST placement" (Tr. pp. 101-02).[7, 8]

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[5] The parent obtained additional private evaluations leading up to and during the early months of the 2017-18 school year (Parent Exs. M; N; P). This included an August 17, 2017 clinical research feedback report based on the student's participation in a research study in June and July 2017, which included psychiatric interviews, as well as administration of cognitive and learning assessments (Parent Ex. M). The parent also obtained an October 6, 2017 speech-language feedback report, which represented an addendum to the August 2017 clinical research feedback report (Parent Ex. N). Further, the student underwent an evaluation on October 9, 2017, resulting in a developmental testing-extended report (Parent Ex. P). The district conducted a social history update and a classroom observation of the student on November 9, 2017 (Parent Ex. Q; Dist. Ex. 3).

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

[7] The parent testified that the district social worker suggested homeschooling to her at the November 2017 CSE meeting but did not explain the difference between homeschooling and home instruction (Tr. p. 102). She further testified that, when the idea of homeschooling was presented to her in November 2017, it was her understanding that a teacher would be coming to her home to teach her daughter until a school was provided for her (Tr. pp. 101-02).

[8] Both regular education and special education students may receive instruction at home or outside of school (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a];

By email to the district, dated December 5, 2017, the parent indicated that the student's "full mandate per her IEP [wa]s not being fulfilled" and requested related service authorizations (RSAs) for all related services (Parent Ex. QQ). According to the parent, the student began to receive her speech-language therapy and OT related services at Sensory Freeway in December 2017, but the parent indicated that she could not find a provider to deliver the mandated counseling or parent counseling and training services (Tr. pp. 105-06).

On or around February 3, 2018, a physical therapy (PT) evaluation was conducted at the parent's request (Parent Ex. VV at p. 1; see Parent Exs. X; RR; SS; TT at pp. 1-2; Dist. Ex. 2).[9] The parent requested that the district convene a CSE in order to review the PT evaluation and further "remind[ed]" the district of her "previous requests for SETSS to be provided" to the student pending the identification of a nonpublic school placement (Parent Ex. VV at pp. 1, 3; see Parent Ex. TT at pp. 2, 7-8).

The CSE convened on February 15, 2018 and amended the student's programming by adding two 30-minute sessions of individual PT per week and 10 sessions per week of SETSS in ELA and math to be implemented while the student was waiting for placement in a nonpublic school (compare Parent Ex. B at p. 18, with Parent Ex. F at p. 17; see Tr. pp. 102-03; Parent Ex. H at p. 2). By email to the parent on the same date, the district provided RSAs for the PT services and a "P3 form" for the SETSS, along with "the most current list of approved independent special education teachers" (Parent Ex. WW). During March and April 2018, the parent and the district exchanged emails about finding a provider but no SETSS were delivered to the student except for two sessions (Parent Exs. YY at pp. 1-4; ZZ at pp. 1-3).

On March 22, 2018, the parent provided the district an OT evaluation report from Sensory Freeway that summarized results of the administration to the student of the Beery-Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition (Beery VMI) and observation of the student for her visual tracking abilities (Parent Ex. XX at pp. 1-3). The parent requested that the CSE reconvene to review the OT report (Parent Ex. XX at pp. 1, 4-8; see Parent Ex. ZZ at p. 3; AAA at p. 1; BBB at p. 1; DDD at p. 1). A subsequent OT report, dated April 26, 2018, included the results provided to the district, as well as results of additional testing and recommendations from the provider for an increase in OT services from three 30-minute sessions per week to four 45-minute sessions per week (compare Parent Ex. C at pp. 1-7, with Parent Ex. XX at pp. 2-3).

In emails to the district, dated May 2, 2018, the parent requested RSAs for summer related services and SETSS (Parent Ex. AAA at pp. 1-2). The district responded indicating that it did not have the ability to create RSAs for the summer at that time as that process typically takes place in mid-June (id. at p. 2).

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see Educ. Law § 3602[1][d]).

[9] The PT evaluation was not included in the hearing record.

On May 8, 2018, the district informed the parent by email that the CBST was "returning the case to the CSE" as it had been unable to locate an approved nonpublic school for the student (Parent Ex. ZZ at p. 4).

A progress report from the student's PT provider was completed on May 15, 2018 and included a summary of the results of administration of the Bruininks-Oseretsky Test of Motor Proficiency (BOT-2) (Parent Ex. T). The May 15, 2018 PT progress report recommended that the "intensity (length and frequency)" of the student's PT sessions be "increased to ensure she reaches her IEP goals and gains motor abilities require[d] to keep [up] with peers in academic environments" (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated May 24, 2018, consisting of 18 pages and 159 enumerated paragraphs, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see Parent Ex. A). The parent also asserted claims concerning various district policies, including systemic violations of the IDEA and section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), affecting the CSE's ability to offer specific programming and services (see id.).

Specifically with respect to the 2016-17 school year, the parent asserted that the district: failed to identify the student as a student with autism and did not have staff trained in education of students with autism, terminated PT and extended school year (ESY) services without reevaluating the student; failed to discuss ESY at the CSE meeting; did not implement ESY services; recommended "SETSS instead of the 1:1 instruction they had discussed"; failed to recommend 1:1 support of a teacher in the classroom; proposed transfer of the student to a school that could not implement the student's IEP; failed to offer a paraprofessional, toilet training, assistive technology, or social skills training; and failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) (Parent Ex. A at pp. 3-6).

With respect to the May 2017 IEP, the parent alleged that the CSE: failed to classify the student as a student with autism; failed to recommend 1:1 instruction, a paraprofessional, or academic remediation services; and did not consider a 1:1 push-in teacher (Parent Ex. A at pp. 6-8). Regarding the 2017-18 school year, the parent contended: that the district did not respond to the parent's request for home instruction; that, although the November 2017 IEP called for placement in a nonpublic school, the recommended services were insufficient and the class ratio was too large; that the district was unable to identify an appropriate nonpublic school; that the district failed to implement the recommended interim services plan; and, more specifically, that the district did not provide recommended SETSS (id. at pp. 8-10).

The parent also generally raised issues concerning the 2016-17 and 2017-18 school years, such as the parent's disagreement with the adequacy and accuracy of the evaluative information, the accuracy of the student's present levels of performance, CSE composition, predetermination and parent participation, the sufficiency of the recommended annual goals, the sufficiency of the recommended related services, consideration of assistive technology, compliance with the State regulation regarding the provision of a FAPE to students with autism, the student's least restrictive environment (LRE), and the provision of home instruction (id. at pp. 3-16). In addition, the parent

alleged that at a CSE meeting on May 18, 2018, she requested an increase in the amount of OT, PT, and speech-language therapy, based on reports from the student's providers but the CSE rejected her request (id. at pp. 12-14).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, and the State Education Law and that the student was denied a FAPE for the 2016-17 and 2017-18 school years; implementation of the interim services plan included in the February 2018 IEP and an increase in speech-language therapy, OT, and PT during the pendency of the proceeding; funding for an appropriate private school; "[a] legally valid IEP that comports with the procedural aspects of the IDEA"; funding for "an extended observation by an expert in Autism"; funding for an FBA and BIP; and compensatory education (Parent Ex. A at pp. 17-18). Regarding compensatory education, the parent requested: 1:1 private instruction and tutoring; 1:1 instruction using behavior therapy; "ABA/SETSS"; supervision by a licensed behavior analyst (LBA) or board certified behavior analyst (BCBA); a bank of speech-language therapy, OT, and PT; assistive technology; parent counseling and training; and services to make up for missed social interaction, leisure, and extracurricular activities (id. at p. 18).

B. Impartial Hearing Officer Decision

On May 29, 2018, a pendency hearing was conducted, after which the IHO issued an interim decision dated June 7, 2018, in which the IHO found that there was no dispute of fact as to pendency and that, while the IEPs in the instant matter were being challenged, the interim services plan was not directly challenged, and the interim services plan constituted the basis for pendency (Tr. pp. 1-21; June 7, 2018 Interim IHO Decision at p. 2). The IHO ordered that the student receive, for the pendency of the proceedings, 10 hours of 1:1 SETSS per week, 90 minutes of individual OT per week, 90 minutes of individual speech-language therapy per week, and 60 minutes of individual PT per week, with all services "at a cost not to exceed $150/hour for each service provider, or such lower rate as the district has paid to that same provider for comparable service during the 2017-18 school year, whichever is lower" (June 7, 2018 Interim IHO Decision at p. 2). The IHO also found that special transportation was a part of the interim services plan and, accordingly, included it as a part of pendency and directed the district to reimburse the parent for documented transportation expenses and provide a payment card for the parent to use for transportation of the student to and from her pendency services (id. at pp. 2-3).

The IHO further ordered the district to pay for an assessment by an LBA or comparable behavior expert on primary aged children with autism, as well as an FBA and, if needed, a BIP by a similarly certified provider (id. at p. 3). Lastly, the IHO directed the district to compensate the parent, on a minute-for-minute basis, for any services recommended in the February 2018 IEP but not delivered (id.).

The parties returned for further proceedings regarding pendency on June 28, 2018 and August 8, 2018 (Tr. pp. 22-54). The parties then proceeded to an impartial hearing on August 24, 2018, which concluded on the same day (Tr. pp. 55-272). In a second interim decision dated August 30, 2018, the IHO determined that the district had not yet been able to find a nonpublic school in which to place the student and that the student had, in effect, been out of school since November 2017 (Aug. 30, 2018 Interim IHO Decision at p. 1). The IHO also found that the district had been unable to deliver the interim SETSS services "in more than a cursory fashion,

notwithstanding efforts to do so" (id.). Relying on an independent psychological assessment conducted pursuant to the IHO's June 2018 interim decision, the IHO found that the student required applied behavior analysis (ABA) services in a far more intensive program than the 10 hours of SETSS previously directed and also referenced testimony and related services provider reports indicating the student required a higher level of related services than that currently mandated on her IEP (id. at p. 2). Accordingly, the IHO directed that the district increase the related services provided to the student to three hours weekly of PT, three hours weekly of OT, and five hours weekly of speech-language therapy (id. at p. 2). The IHO also ordered the district to provide the parent with a Nickerson/P-1 letter and to reimburse her for any and all documented out-of-pocket expenses for speech-language services paid during 2017-18 school year through the summer of 2018 and "the cost of transportation to and from the related service venue (Sensory Freeway) on each date the student attended" (id. at p. 3).[10] The IHO also ordered the district "to add 'for the purpose of delivery of ABA services' to the IEP Program section related to SETSS" (id.).

In a final decision dated October 16, 2018, the IHO determined that the district failed to offer the student a FAPE for both the 2016-17 and 2017-18 school years (IHO Decision at pp. 6, 67-68). Specifically, the IHO found that the district presented no witnesses and offered no evidence to meet its burden of showing that it provided the student a FAPE, either for the period before the nonpublic school recommendation was made or for the period during which it had been seeking to locate a nonpublic school (id. at pp. 4-5, 67-68). As for the student's attendance at Success Academy, the IHO found that this placement "did not even remotely provide FAPE" (id. at p. 5). The IHO further noted that the district's sole witness, and the entirety of its case, amounted to an effort to demonstrate that it had been trying to effectuate a nonpublic school placement (id. at pp. 4, 67-68). The IHO also found that the hearing record did not support a finding that the parent failed to cooperate with the district or that the parent's actions in declining the proposed nonpublic school placements was for "anything other than being active and eager participant[s] in crafting the student's educational program within the boundaries anticipated by the IDEA" (id. at p. 68). In so finding, the IHO noted that, while the parent rejected four of the proposed nonpublic school placements, two could not provide the level of related services that the student required and the parent made her reasons for rejecting the other two known to either the schools or the district (id. at pp. 5, 68).

With respect to the CSE's recommendation for services for the student to be implemented while the district searched for a nonpublic school, the IHO found that the recommended services amounted to an interim service plan (IHO Decision at p. 4). The IHO characterized interim service plans as "creatures of agreement" and found that the parent challenged aspects of the plan in the

[10] Although not described in the hearing record, a "Nickerson letter" or district form "P-1" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The issuance by the district of a Nickerson letter/P-1 letter authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]).

present case "thereby functionally extinguishing it" (id.). Further, the IHO indicated that this "awaiting-placement program" could not constitute "an alternative form of FAPE" (id. at p. 68).

The IHO then addressed relief. With respect to the provision of SETSS to the student, while the student is not otherwise receiving an educational program, the IHO determined that the student required an increase in the provision of SETSS to 40 hours per week, and that the SETSS would provide ABA instruction, taught by a BCBA or an LBA (IHO Decision at p. 70). The IHO capped the payment for the BCBA or LBA to at $200 per hour (id.). The IHO also ordered that, after the student started at a nonpublic school placement, SETSS would be reduced to 10 hours per week of home-based ABA (id.).[11] The IHO further determined that the student required provision of her related services and SETSS for 52 weeks per year "in order to minimize the likelihood of regression" (id. at p. 70). The IHO also ordered that the district provide "transportation for the student (and an adult to accompany her) to and from the related service providers" and, in order to ensure such transportation, directed the district to "maintain a bank of such available car service use totaling at least $1,000, to be replenished upon use" (id.).

Finally, the IHO declined to order any compensatory education services to make up for the district's denial of FAPE to the student for the 2016-17 and 2017-18 school years because "any such remedy must be built upon the delivery of FAPE, which, while defined, has not yet been effectuated and cannot be predicted to be effectuated at any time certain" (IHO Decision at p. 69). The IHO characterized the requested remedy as "not yet ripe" and dismissed the parent's request for compensatory education "without prejudice . . . for review in a subsequent hearing the [parent] may bring after a[] [nonpublic school] placement has been implemented" (id.). The IHO also noted his "unwillingness" to consider a compensatory education award "derive[d] both from uncertainty in the record about how many hours of service the student may productively receive in any one day," as well as from "reservations . . . about trying to capture in an isolated and static decision a necessarily dynamic remedy" (id. at pp. 6, 69).

IV. Appeal for State-Level Review

The parent appeals, challenging the IHO's setting a rate cap of $200 per hour for the awarded instruction/ABA services and the IHO's dismissal without prejudice of the parent's request for compensatory education for the 2016-17 and 2017-18 school years. Specifically, with respect to compensatory education, the parent alleges that the IHO erred in finding the parent's request for relief for the 2016-17 and 2017-18 school years was not ripe because the claims accrued when the parent knew or should have known of the alleged denials of FAPE. The parent contends that the dismissal without prejudice effectively bars the parent's request for compensatory education for the 2016-17 school year because, if the parent attempts to refile her request, it will be barred by the statute of limitations. The parent also contends that the IHO applied an incorrect legal standard in considering compensatory education and asserts that the IHO should not have delayed rendering a decision on compensatory education until the student's future placement is determined. Relatedly, the parent also contends that the IHO erred in finding that the CSE should

[11] The IHO also reiterated the award of related services and a Nickerson letter from his August 2018 interim decision (IHO Decision at p. 69).

have a role in determining an appropriate compensatory education award. For the 2016-17 school year, the parent requests 105 hours of speech-language therapy, 63 hours of OT, 42 hours of PT, and 600 hours of 1:1 instruction. For the 2017-18 school year, the parent requests 120 hours of speech-language therapy, 72 hours of OT, 80 hours of PT, and 1040 hours of 1:1 instruction.[12] The parent further requests compensatory education to make up for pendency services missed between June 7, 2018 (the date of the IHO's pendency decision) and the date of the IHO's final decision, which was October 16, 2018.

The parent also asserts that the IHO erred in: considering cost as an equitable factor; shifting the burden of proof; failing to deem unrebutted factual allegations as admitted by the district; failing to follow the recommendations made by the parent's witnesses; and failing to render determinations concerning the parent's section 504 claims.

As for the IHO's ruling that the instruction/ABA services be delivered by a BCBA or an LBA at a cost not to exceed $200 per hour, the parent asserts that the cap was arbitrary and unsupported by the evidence in the hearing record. Further, the parent indicates that she can not locate a provider to deliver the services at the rate set by the IHO.

In an answer, the district responds to the parent's request for review with general admissions and denials. The district also asserts that the SRO should reject the additional documents that accompanied the request for review. The district further asserts that the SRO lacks jurisdiction to address the parent's section 504 claims.

With respect to the IHO's dismissal without prejudice of the parent's compensatory education request, the district acknowledges that it does not appeal the IHO's findings that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and that " an award of compensatory education may be appropriate in this case." Accordingly, the district requests that the issue be remanded back to the IHO to develop the hearing record and make a determination regarding compensatory education. With respect to the $200 per hour cap imposed by the IHO for ABA services, the district asserts that the IHO acted within his discretion to do so; in the alternative, the district requests that the matter be remanded back to the IHO to develop the record and make a determination as to what the appropriate rate should be.

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]).

[12] Although the request for review indicates a "request for 42 hours of OT for 2016-2017 and 80 hours of OT for 2017-2018," the request is under a numbered heading asserting that the IHO should have awarded PT.

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]).[13]

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

VI. Discussion

A. Initial Matters

1. Additional Documentary Evidence

The parent has submitted two documents with the request for review as additional evidence, and the district objects to the submissions and asserts that they should not be considered. Generally, documentary evidence not presented at an impartial hearing will 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 (Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; 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]).

As to the first document labeled "Parent's Proposed Findings of Fact and Decision," it appears to have been created for consideration by the IHO in rendering his decision (see Parent Mem. of Law at p. 7). State regulation specifies that, in addition to exhibits and the transcript of the proceedings, the due process complaint notice, any briefs filed by the parties for consideration by the IHO, and "any other documentation deemed relevant and material by the [IHO]" are part of the hearing record (8 NYCRR 200.5[j][5[vi][a], [b], [e]-[g]). Accordingly, if the document was

[13] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

considered by the IHO in rendering his decision it should have been included as a part of the hearing record pursuant to State regulation. The second document (an affidavit by the parent), contains factual statements concerning the parent's claims raised on appeal. Given the nature of my decision herein, neither document is necessary to render a decision. However, on remand the parent may submit the documents to the IHO for consideration, to the extent she has not already done so.

2. Scope of Review

The district does not appeal the IHO's findings that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years. The district also does not appeal from the IHO's orders crafting certain interim, compensatory, and prospective relief as outlined above in the description of the IHO's interim and final decisions. An impartial hearing officer's decision is final and binding upon the parties unless appealed to an State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, these determinations and orders will not be reviewed herein.

3. Section 504 Claims

The parent appeals the IHO's lack of determination concerning those section 504 claims contained in the due process complaint notice. State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and Article 89 of the Education Law (Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-044; see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012], aff'd, Moody v. New York City Dep't of Educ., 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parent's claims related to section 504 shall not be reviewed in this appeal.

B. Compensatory Education

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]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[14] 8 NYCRR 100.9[e], 200.1[zz]; see 34

[14] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August

CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; 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, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

The parent's requests for compensatory education fall into two basic categories: a compensatory education award for the deprivation of FAPE for the 2016-17 and 2017-18 school years and a separate compensatory education award for the district's failure to implement the student's stay-put placement during pendency of these proceedings. They are addressed in turn below.

1. Compensatory Education for Denial of FAPE

The gravamen of the parent's appeal is that the IHO erred in denying relief in the form of compensatory education services despite finding a denial of FAPE for the 2016-17 and 2017-18 school years. While the IHO found that the district failed to offer the student a FAPE, the IHO nonetheless determined that a compensatory education award was impossible to calculate as the issue was not "yet ripe for [him] to craft a specific remedy for that denial because any such remedy must be built upon the delivery of FAPE, which, while defined, has not yet been effectuated and cannot be predicted to be effectuated at any time certain" (IHO Decision at p. 69). The IHO required that the student first be provided a FAPE before calculating a compensatory education award (id.). The IHO further noted that he believed it was impossible to calculate how many hours of related services and instruction the student could tolerate, and therefore it was impossible to know how much compensatory education services needed to be provided (id.).

The IHO's reticence in calculating a compensatory education award without a full understanding of how the student would fare in the program outlined in the IHO's final decision is understandable, and it would have been appropriate for the IHO to take into account the prospective program that he ordered the district to implement when calculating a compensatory education award (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at *8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]). Likewise, it is understandable that the IHO would consider the student's tolerance for services and instruction before calculating an award (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [SDNY Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). However, rather than supporting the IHO's determination to refrain from making a decision about compensatory education, these considerations could have weighed in the IHO's decision about what compensatory education award was appropriate.

However, the IHO's refusal to make a determination was not proper and did not serve to advance the purposes of compensatory education. As noted above, the ultimate purpose of an award of compensatory education services is to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services she should have received (Reid, 401 F.3d at 524; see Newington, 546 F.3d at 123). "Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." (Stanton v. Dist. of Columbia, 680 F Supp 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at *1 [D.D.C. Jan. 3, 2017]). While the IHO did not outright deny compensatory education, his deferral of the parent's request on ripeness grounds is not

supported by precedent. Generally, claims are ripe once a cause of action accrues, and under the IDEA a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza, 538 F.3d at 114-15 & n.8). While the analysis of compensatory education may, at times, feel like speculative assessments of future educational needs, it has been held that, since the injury has been done, the issue is ripe for review (see Lester H. v. Gilhool, 916 F.2d 865, 868 [3d Cir. 1990]). [15] To the extent that the IHO is concerned that ordering compensatory education services may interfere with the CSE's ability to develop a program for the student, the CSE may not consider compensatory education services in developing future IEPs for the student, as they are awarded to remedy a past violation, rather than to offer the student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [internal quotations omitted]). Rather, in formulating an award, it must be assumed that the student will be provided with a FAPE going forward, and, if the parent believes the student is not provided with a FAPE in the future, the parent may pursue further due process for that future denial.

While the IHO correctly identified the legal standard for determining how to compute an award of compensatory education, the IHO did not apply it. Further, the hearing record does not include some of the essential information required to craft an award. In order to compute an award of compensatory education, the parties must present evidence regarding the student's specific educational deficits resulting from the denial of FAPE and the parties' positions about what specific compensatory measures are needed to best correct those deficits (see Reid, 401 F.3d at 526). Accordingly, the adjudicator needs to know the following: what services (type, frequency, and duration) the student should have received as part of a FAPE, what services the student actually received, and what proposed remedy might enable the student to make the progress he or she should have made had appropriate services been provided. When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10 [c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]). As the hearing record does not provide an adequate basis to calculate an appropriate award of compensatory education, this matter is remanded to the IHO for that purpose. However, a brief review of the facts that are available in the hearing record (and those that are missing but may be relevant to a compensatory award) is provided to assist the parties and IHO in resolving this matter expeditiously after remand.

[15] Additionally, as alleged by the parent, the effect of the IHO's dismissal of the parent's compensatory education claims may have an impact on her ability to refile her claims in the future due to the two year statute of limitations. The hearing record shows that the parent timely filed her due process complaint notice on May 24, 2018 (Parent Ex. A at p. 1); however, if the parent is not allowed to have her request for compensatory education resolved until after the student receives a FAPE and the student's progress while receiving a FAPE has been determined, a future due process complaint notice requesting compensatory education may run afoul of the IDEA's two-year statute of limitations.

First, the hearing record includes insufficient evidence as to what services the student should have been receiving during the 2016-17 school year, as the IEP for that school year was not placed into the hearing record. This document would have been crucial in determining any compensatory education award for that school year. However, it appears that the parties do not dispute that, after the student stopped attending school, no services were delivered for the remainder of the school year.

Turing to the 2017-18 school year, as summarized above, the May 2017 IEP, which had an implementation date of September 7, 2017, provided that the student would attend a 12:1+1 special class in a nonpublic school, and receive related services of: one 30-minute group (2:1) counseling session per week; three 30-minute individual OT sessions per week; five 30-minute individual speech-language sessions per week; and four 60-minute group sessions of parent counseling and training per year for the 2017-18 school year (Parent Ex. E at pp. 1, 17, 18, 21, 22). The February 2018 CSE added two 30-minute sessions of individual PT per week and 10 sessions per week of SETSS in ELA and math, to be delivered in the interim while the student was waiting for placement in a nonpublic school (Tr. pp. 102-03; Parent Exs. B at p. 18; H at p. 2). Since the district did not locate a nonpublic school, the student did not attend this recommended program but did receive some of the services recommended in the IEP(s) during the 2017-18 school year. Further, in his June 2018 interim decision, the IHO already ordered the district to provide compensatory education services that should have been provided pursuant to the February 2018 IEP and ordered the parties "to work together to ascertain the total number of minutes of each IEP service not provided since the start date of [the February 2018 IEP]" and ordered the district to "create a bank for the payment of [such] compensatory services" totaling an amount representing the cost of delivering the missed services at the enhanced rate (June 7, 2018 Interim IHO Decision at p. 3). Further, the IHO ordered the district to reimburse the parent for any out-of-pocket expenses incurred for speech-language therapy at Sensory Freeway for the 2017-18 school year (August 30, 2018 IHO Decision at p. 3).[16]

As to services received by the student, the evidence in the hearing record indicates that the student began to receive speech-language therapy and OT services at Sensory Freeway in December 2017 (Tr. p. 105). However, the hearing record only contains billing records for speech-language therapy and OT services provided to the student at Sensory Freeway beginning in February 2018 and through June 2018 (Parent Exs. FF-JJ). Further, the hearing record indicates that the SETSS mandate added in February 2018 was not implemented, with only two sessions being delivered, one on March 20 and one on March 30, 2018 (Parent Ex. YY at pp. 1-2; see Tr. pp. 109-10, 111). Regarding PT, billing records indicate the student began receiving PT services through Sensory Freeway on February 26, 2018 (Parent Ex. FF at p. 4). The hearing record also includes billing records that indicate the student received PT services from Sensory Freeway during March, April, and May 2018, but does not contain a billing record for PT during June 2018 (Parent Exs. GG at p. 3; HH at p. 3; II at p. 5; see Parent Ex. JJ). It also appears that the counseling and parent counseling and training services mandated in the IEPs were not delivered, as the parent

[16] As relevant to the implementation of pendency discussion below, the IHO also ordered the district to reimburse the parent for any out-of-pocket expenses incurred for speech-language therapy at Sensory Freeway for the summer 2018 (August 30, 2018 IHO Decision at p. 3).

testified that Sensory Freeway does not provide counseling or parent training and that she was not able to locate a provider that did (Tr. p. 106).

Based on the foregoing, additional evidence is necessary to formulate a compensatory education award, if any, for the period of time predating the February 2018 IEP. In terms of the student's academics, the time period prior to the February 2018 IEP (and prior to the addition of the interim SETSS to the student's IEP) does not lend itself as seamlessly to the quantitative approach to calculating an award. Accordingly, the IHO may wish to solicit the parties' positions regarding what sort of services might place the student in the place she should have been but for the district's denial of a FAPE. Further, in addition to review of the IEP(s) for the 2016-17 school year, clarification regarding what the student received at Sensory Freeway would inform an award of compensatory education for the time period leading up to the February 2018 IEP. Lastly, although the IHO awarded compensatory education for services that the student did not receive pursuant to the February 2018 IEP, additional fact development on what services were delivered would offer the parties additional certainty as to the final award. On remand, the IHO may revisit his order of compensatory education pertaining to implementation of the February 2018 IEP for this purpose.

Overall, the hearing record is not as developed as necessarily required when determining if a student should receive an award of compensatory education, and the above-noted missed services and instruction may not constitute an all-encompassing list. Therefore, on remand, the IHO is directed to more fully develop the record as to what services the student should have received, what services the student received, and, if necessary, what compensatory education services should be provided. The hearing record in this case is such that it may require a monthly accounting of each service and period of instruction to accomplish this.

2. Implementation of the Pendency Placement

The parent asserts that the IHO erred in not ordering compensatory education services for services missed following the IHO's June 7, 2018 interim decision establishing pendency (June 7, 2018 Interim Decision).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

While the parent alleges on appeal that the IHO "was aware that [the student] was not receiving her pendency," the hearing record is not fully developed as to what services the student received pursuant to the IHO's June 2018 interim decision. Given that the matter is being remanded for determinations regarding the compensatory education for the district's denials of

FAPE, the IHO should specify what compensatory education the student is entitled for the district's failure to implement the stay-put placement during the pendency of the proceedings thus far. As summarized above, the June 2018 interim IHO decision ordered that the district provide: ten hours per week of 1:1 SETSS; 90 minutes per week of individual OT; 150 minutes per week of individual speech-language therapy; and 60 minutes per week of individual PT, all at a cost not to exceed $150/hour for each service provider (June 7, 2018 Interim IHO Decision at p. 2).

For the period from June 7, 2018 to the close of the impartial hearing, evidence in the hearing record shows that the student received some related services pursuant to pendency.[17] Testimony by the physical therapist, who was the clinical director of Sensory Freeway and had assessed the student in May 2018, indicated that she had been providing PT services to the student for July and August 2018 (Tr. pp. 161, 162, 163, 166; Parent Ex. T).[18] She also testified that the student received speech-language therapy and OT, along with PT, at Sensory Freeway (Tr. pp. 55, 168-69). The August 12, 2018 behavioral and program assessment also reflected that, in August 2018, the student was receiving two 30-minute sessions of PT per week, three 30-minute OT sessions per week, and five 30-minute sessions of speech-language therapy per week (Parent Ex. NN at pp. 2, 9). The hearing record does not reflect that the student received SETSS after the IHO issued his June 7, 2018 interim decision; rather, the hearing record includes evidence indicating that the district and parent continued having difficulties finding a SETSS provider for the student (see Parent Exs. D at p. 1; NN at p. 2).

While the parent asserts that the IHO did not provide any compensatory pendency services, the IHO did order the district to reimburse the parent for any out of pocket expenses incurred for speech-language therapy at Sensory Freeway for the 2017-18 school year and the summer 2018 (August 30, 2018 IHO Decision at p. 3). The IHO also ordered placement in a State approved non-public school after finding that the district did not implement the student's pendency placement in a timely manner (id.). The way the decision is written it is unclear if the IHO intended the placement in a State-approved nonpublic school as a form of compensatory education to make up for the failure to implement pendency services.

On remand, the IHO should clarify whether his prior orders were intended as a form of compensatory education and should make specific findings as to each service the district failed to provide the student pursuant to pendency, and if pendency services were missed, the IHO should direct the district to provide make up services for all services missed (see E. Lyme, 790 F.3d at 456).

[17] Although an educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (E. Lyme, 790 F.3d at 445, 452), here, given the IHO's June 2018 interim decision awarding compensatory education for the district's failure to implement the February 2018 IEP (the same IEP on which pendency was based), the IHO already awarded an hour-for-hour award of compensatory education pertaining to the period of time between the parent's May 24, 2018 due process complaint notice and the IHO's June 7, 2018 interim decision. Accordingly, that period of time shall not be further discussed in this section.

[18] The hearing record also includes billing records for related services provided at Sensory Freeway in June 2018 (Parent Ex. JJ).

C. Cap for Costs of Related Services

The parent asserts that the IHO exceeded his authority by sua sponte raising the cost of the SETSS provider as an issue and restricting the reimbursement rate for the provision of ABA services to $200 per hour, while the district asserts that the IHO had the discretion to do so as part of his award.

While the IHO does have discretion in crafting appropriate compensatory relief, the decision of an IHO must be based solely upon the record of the proceeding before the IHO (8 NYCRR 200.5[j][5][v]). The hearing record shows that the issue of the providers' rate was not raised during the impartial hearing (see Tr. pp. 1-272). As the hearing record does not include evidence regarding an appropriate rate for ABA services, the IHO's order capping the hourly rate at $200 per hour is remanded for further proceedings, and the parties should develop the hearing record so that the IHO can make an informed determination as to an appropriate rate for the awarded services.

VII. Conclusion

Based on the above, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years is final and binding. However, this matter is remanded to the IHO for further development of the hearing record and determinations with respect to an appropriate award of compensatory education services, in a manner not inconsistent with the body of this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the October 16, 2018 IHO decision is modified by reversing that portion which denied the parent's request for compensatory education services; and,

IT IS ORDERED that the matter is remanded back to the IHO who issued the October 16, 2018 decision, for a determination regarding compensatory education for the 2016-17 and 2017-18 school years in accordance with this decision; and,

IT IS FURTHER ORDERED that, in the event the IHO who issued the October 16, 2018 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
January 10, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER