The University of the State of New York

The State Education Department
State Review Officer
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No. 19-016

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Gina DeCrescenzo, PC, attorneys for petitioner, by Benjamin Brown, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2016-17 and 2017-18 school years were appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

With respect to the student's earlier educational history, evidence in the hearing record indicates that the student received five hours per week of home-based special education itinerant teacher (SEIT) services as a preschool student with a disability during the 2012-13 and 2013-14 school years and began receiving six hours per week of home-based SEIT in July 2015 pursuant to an award of compensatory educational services following the parent's challenge to a CSE's

refusal to recommend home-based services for the student for the 2014-15 school year (kindergarten) (see Parent Exs. D at p. 1; J at p. 1; K at p. 1; Ex. M at p. 3).[1]

For the 2015-16 school year (kindergarten repeated), the student began attending the LearningSpring School (LearningSpring) a State-approved, nonpublic school, pursuant to his IEP (see Parent Exs. F; G at pp. 12, 16; H at p. 1; UU at pp. 1-2; see also Tr. pp. 145, 207).[2] In response to the parent's request that the CSE convene to reconsider home-based services for the student in light of a decision by an IHO in a prior administrative proceeding that the student needed such services, as well as to correct omissions on the student's IEP, the CSE reconvened on October 13, 2015 (Parent Exs. D at pp. 1-3; E; F; G at p. 16). Having previously found the student eligible for special education as a student with autism, the October 2015 CSE continued to recommend that the student attend a 12-month school year program in an 8:1+2 special class in a State-approved nonpublic school with two periods per week of adapted physical education and the following related services: one 30-minute session per week of counseling in a group of four; two 30-minute sessions per week of individual occupational therapy (OT); two 30-minute sessions per week of OT in a group of seven; one 30-minute session per week of individual physical therapy (PT); and two 30-minute sessions per week of individual speech-language therapy (Parent Ex. G at pp. 1, 12-13, 16).[3] The October 2015 CSE also recommended special transportation in an air-conditioned minibus with limited travel time and a "bus matron" (id. at pp. 16). According to the parent, during the October 2015 CSE meeting, the district representative informed the parent that the CSE needed current reports or documentation in order to recommend that the student receive home-based services (Parent Exs. H at p. 1; M at p. 2). On March 16, 2016, a CSE reconvened to review documentation provided by the parent regarding the student's need for home-based services (Parent Exs. M at pp. 1, 3-6; P at p. 15; see Parent Exs. J; K; L). The March 2016 CSE generally continued the program as set forth in the October 2015 IEP but added a recommendation for parent counseling and training services once per month for 60 minutes and omitted details describing the recommendation for special transportation (compare Parent Ex. P at pp. 11-12, 15, with Parent Ex. G at pp. 12-13, 16).[4]

[1] The student received no home-based services during the 2014-15 school year (Parent Ex. M at p. 3).

[2] For the 2015-16 school year, the hearing record includes IEPs developed at CSE meetings on October 13, 2015 and March 16, 2016 (Parent Exs. G; P); however, according to references in correspondence from the parent to the district, the CSE also met before the beginning of the school year to develop the student's IEP (see Parent Exs. D at p. 2; E; H at p. 1; U at p. 1); the earlier IEP(s) were not included in the hearing record.

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

[4] Subsequent to the March 2016 CSE meeting, the parent sent several communications to the district, among other things, requesting that the CSE reconvene, stating her disagreement with the CSE's refusal to recommend home-based services, and noting that the transportation services were not included on the IEP and that the parent counseling and training had been added without discussion (see Parent Exs. Q at pp. 1-2; R; S; T at pp. 1-3). There is indication in the hearing record that a CSE meeting took place on April 20, 2016 to address some of the parent's concerns (see Parent Exs. T at p. 3; U at p. 1); however, no IEP resulting from this meeting was included in the hearing record.

The hearing record indicates that a CSE convened on June 22, 2016 to conduct the student's annual review and develop an IEP for the 2016-17 school year (first grade) (see Parent Exs. W; Y at p. 1; RR at p. 1). Although the hearing record does not include a copy of an IEP resulting from the June 2016 CSE meeting, in an email to the district dated June 29, 2016, the parent summarized that the June 2016 CSE agreed that counseling services would terminate, that another session of PT would be added to the IEP, and that parent's concerns would be entered into the IEP (Parent Ex. RR at p. 1). The parent also indicated that the CSE again declined to recommend home-based services for the student (id.). The parent listed a number of errors on the student's IEP in an email to the district dated December 13, 2016 (Parent Ex. Y at pp. 1-2). Subsequently, in an email to the district dated January 9, 2017, the parent requested that the district conduct a neuropsychological and an updated speech-language evaluation of the student (Parent Ex. Z at p. 1).[5]

A CSE convened on September 27, 2017 to review evaluations completed by the district, including a July 2017 psychoeducational evaluation and a July 2017 speech-language evaluation, and to develop the student's IEP for the 2017-18 school year (second grade) (Parent Ex. MM at pp. 1-2, 14; see Parent Exs. GG; HH). The September 2017 CSE recommended that the student attend a 12-month school year program in an 8:1+2 special class in a State-approved nonpublic school with four periods per week of adapted physical education and the following related services: two 30-minute sessions per week of individual OT; two 30-minute sessions per week of OT in a group; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of speech-language therapy in a group of two (Parent Ex. MM at pp. 11-12, 14). Among the parent's concerns included on the September 2017 IEP were the lateness of the 2016-17 IEP, the lack of special transportation recommended for the 2017-18 school year, and that a document she presented to the CSE be included "verbatim" on the September 2017 IEP (id. at p. 15; see Parent Ex. KK). Further, as noted on the September 2017 IEP, the parent requested home-based special education teacher support services (SETSS) (Parent Ex. MM at p. 15). The hearing record reflects that the parent continued to communicate with the CSE regarding her requests for special transportation and home-based SETSS during the 2017-18 school year (Parent Exs. NN; OO).

A. Due Process Complaint Notice

In a due process complaint notice dated November 27, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years based on the CSEs' failures to recommend home-based SETSS for the student for all three school years, as well as special transportation for the 2017-18 school year (Parent Ex. A at pp. 8-10). The parent initially argued that the CSE chairperson's decision to foreclose discussion of home-based SETSS was both arbitrary and contrary to law (id. at pp. 8-9). The parent also argued that the district members of the CSE predetermined that they would not

[5] Correspondence from the parent to the district dated July 10, 2017 indicates that the district had scheduled a speech-language evaluation to be conducted but that the speech-language evaluator was incorrectly assigned to complete the evaluation at the student's home (Parent Ex. EE at p. 1; see also Parent Ex. FF). Additionally, the parent stated that she had never received a response to her inquiry from December 13, 2016 regarding the 2016-17 IEP and that she had not received a response to her request for a neuropsychological evaluation from January 9, 2017 (Parent Ex. EE at p. 1). The parent requested a CSE meeting to take place before the end of the summer session (id.; see also Parent Ex. II).

recommend home-based services for the student such as SETSS (id. at p. 9). Next, the parent asserted that the district failed to appropriately evaluate the student in that it failed to conduct a functional behavioral assessment and a neuropsychological evaluation (id.). Lastly, the parent contended that, to the extent that any of her arguments were procedural in nature, a FAPE was denied because the parent was significantly impeded from participating in the decision making process and the student was deprived of educational benefits, and that numerous procedural violations had a cumulative effect constituting a denial of FAPE for all three years (id.). For relief, the parent sought compensatory 1:1 home-based services (representing 6 hours per week of SETSS) and provision of IEEs and requested that the student's IEP be revised.

B. Impartial Hearing Officer Decision

After a pre-hearing conference on January 18, 2018,[6] (Tr. pp. 1-14), the parties proceeded with the impartial hearing on March 28, 2018, which concluded on August 27, 2018, after three hearing dates (Tr. pp. 15-278). By interim decision dated June 18, 2018, the IHO directed the district to fund an independent neuropsychological evaluation (IHO Ex. II). An independent neuropsychological evaluation was conducted on six dates in July 2018 (Parent Ex. UU). By a second interim decision dated August 27, 2018, the IHO found that the district had conceded FAPE for the "years in question" and that the parent had exhausted her prior award of compensatory services; therefore, the IHO ordered the district to fund 80 hours of compensatory SETSS (representing five hours per week for the ensuing sixteen weeks) to prevent a lapse in services (IHO Ex. III at pp. 2-3).

In a decision dated December 24, 2018, the IHO found that the district denied the student a FAPE for the 2015-16 school year because, although the district knew that the student had been receiving home-based SEIT services, the CSEs failed to recommend transitional support services or parent counseling and training services "to support the [student's] transition" to a program without the home-based component (IHO Decision at pp. 12-13). However, with regard to the 2016-17 and 2017-18 school years, the IHO found that the student's program at LearningSpring met his educational needs and afforded the student a FAPE both academically and socially (id. at pp. 8-9). The IHO further found that home-based SETSS were for the purpose of generalizing skills learned in school to the home environment and that the student did not require home-based services to receive a FAPE (id. at pp. 9-11). In so finding, the IHO acknowledged that the district had conceded at the impartial hearing that it had failed to offer the student a FAPE but indicated that "there is no such thing as default for a compensatory education claim under the I.D.E.A." (id. at pp. 11-12). The IHO found that the parent's request for the home-based services for the 2016-17 and 2017-18 school years was "excessive and not required for FAPE" and, as such, no compensatory services were warranted for those school years (id. at p. 12).

As relief for the 2015-16 school year, the IHO ordered the district to provide compensatory education equal to five hours per week of special education instruction for the student and to one hour per week of parent counseling and training for the parent for each school week in the 2015-16 school year (IHO Decision at pp. 13, 14-15). The IHO noted that, although he no longer believed that the student was entitled to the home program, the compensatory award set forth in

[6] The cover page of the transcript is incorrectly dated January 18, 2016 (see Tr. p. 1).

his interim decision continued to be appropriate "for no other reason than the misleading position the [district] took in this matter by initially claiming it was not defending FAPE when ultimately that is what [it] effectively did" (id. at pp. 3 n.2, 14 n.5). Concerning the parent's request to amend the student's IEP to include the home program, the IHO determined that the request was moot and that the record did not support such finding in any event (id. at p. 14). The IHO also determined that the parent's remaining claims were without merit or insufficiently asserted (id.).

IV. Appeal for State-Level Review

On appeal, the parent argues that the district conceded it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and, therefore, that the IHO erred by finding that the district offered the student a FAPE. The parent further argues that such finding was against the weight of the evidence as the district did not present any direct case during the impartial hearing and failed to refute the parent's evidence. Specifically, the parent alleges that the student required home-based SETSS in addition to his day program at LearningSpring in order to receive a FAPE.

The parent also argues that the IHO failed to address all of the parent's claims raised in the due process complaint notice. In particular, the parent alleges that the CSE predetermined its refusal to recommend home-based SETSS for the student for both the 2016-17 and 2017-18 school years. The parent contends that she was denied the right to participate in the development of the student's IEP. Further, the parent asserts that the district has a policy that the CSE may not recommend home-based services if a student is already attending a school day program (dual recommendation), regardless of need. To that end, the parent alleges that the CSE chairperson foreclosed the possibility of a dual recommendation and would not permit any substantive discussion. The parent also challenges the IHO's denial of her request to present evidence on the issue of predetermination. According to the parent, the IHO held that her predetermination claim was irrelevant given the district's concession on the issue of FAPE. The parent asserts that the IHO should have ordered the district to include home-based SETSS on the student's IEP prospectively, when the district conceded FAPE. As additional relief, the parent requests an award of 624 hours of compensatory SETSS to be provided by a specific provider of the parent's choosing (or similarly qualified provider if unavailable) at the prevailing rate and an order directing the district to include six hours per week of home-based SETSS on the student's IEP.

In an answer, the district generally responds to the parent's claims with admissions and denials and again concedes that the student was denied a FAPE. However, the district argues that the IHO properly determined that the student was not entitled to compensatory home-based SETSS as relief for a denial of a FAPE for the 2016-17 and 2017-18 school years.[7]

[7] Neither party has appealed the IHO's determinations regarding the 2015-16 school year or his interim orders directing the district to fund 80 hours of compensatory education and an independent neuropsychological evaluation of the student; as such, these determinations have become final and binding on the parties and will not be further discussed (34 CFR 300.514; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8 [c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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. FAPE

In her appeal, the parent argues that the IHO erred by making a determination on the issue of FAPE given that the district had conceded that the student had been denied a FAPE for the 2016-17 and 2017-18 school years. In its answer, the district reaffirms its concession that it denied the student a FAPE but argues that, even if the IHO erred by making a FAPE determination, the outcome was correct in that the student was not entitled to compensatory educational services.

With regard to the district having conceded a denial of a FAPE for the years at issue, the hearing record indicates that the IHO expressed confusion about the district's position. During the impartial hearing, the district conceded that the student had been denied a FAPE for the 2016-17 and 2017-18 school years and initially argued that the 2015-16 school year was barred by the

[8] 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).

statute of limitations (Tr. pp. 21, 261). The IHO allowed the parent to pursue her claim regarding the 2015-16 school year because the district did not timely assert statute of limitations as a defense and did not file a response to the due process complaint notice or raise the defense during the prehearing conference (Tr. pp. 21-24). The IHO also stated that the only claim before him was for compensatory relief (Tr. p. 27). At several points during the impartial hearing, the parent's attorney reminded the IHO that the district had conceded that it denied the student a FAPE (Tr. pp. 144, 147-48). The IHO and the parent's attorney continued to discuss whether FAPE was at issue, despite the district having conceded it, while the district's attorney said nothing to clarify the district's position (Tr. pp. 148-51, 172, 262-68). Notwithstanding the district's concession, the IHO determined that the district offered the student a FAPE for the 2016-17 and 2017-18 school years (IHO Decision at pp. 8-9).

The source of the confusion about the district's concession appears to arise from the narrow grounds for the parent's claim that the district denied the student a FAPE, the district's general concession that it denied the student a FAPE (without specifying the grounds therefor), and the content of the district's argument against an award for compensatory education. That is, the gravamen of the parent's substantive challenge to the district's provision of FAPE related to the CSEs' failure to recommend home-based SETSS for the student (see Parent Ex. A at pp. 8-10). Although the district conceded a denial of a FAPE, it did not state on what grounds. Absent some articulation to the contrary, the district's concession must be taken to mean that the district conceded a denial of a FAPE based on the substantive allegations of the due process complaint notice—that the student needed home-based services in order to receive a FAPE and the CSEs failed to recommend the same (see Application of a Student with a Disability, Appeal No. 15-011; Application of a Student with a Disability, Appeal No. 14-179). And yet, during the impartial hearing and in its answer, the district argues against an award of compensatory education based on arguments that are directed—not to the inquiry of what relief would put the student in the place he should have been but for the district's conceded denial of a FAPE, as discussed below—but rather, to the merits of the parent's substantive claims; i.e., that home-based services were not required for the student to receive a FAPE and were sought by the parent for the improper purpose of generalizing skills and maximizing the student's potential (see Answer ¶ 24). Moreover, even if it would be appropriate it this instance to disregard the district's concession and find that the district offered the student a FAPE based on evidence presented by the parent during the impartial hearing, the hearing record is insufficient to support such a finding; the hearing record includes no IEP for the 2016-17 school year and insufficient articulation by the district for both school years as to how the CSEs reached their determinations that the student did not require home-based services in order to receive a FAPE. Accordingly, based on the district's concessions at the impartial hearing and its accord with the parent's position on appeal that the IHO erred (Answer ¶¶ 2, 18), the IHO's determination that the district offered the student a FAPE for the 2016-17 and 2017-18 school years is reversed (see R.L. v. Miami-Dade County Sch. Bd., 757 F.3d 1173, 1182 [11th Cir. 2014] [noting the confusing nature of the district's position in that case but, ultimately, holding on procedural ground that the district was bound to its concession that it denied the student a FAPE]).

B. Compensatory Education

In her appeal, the parent requests an award of 624 hours of home-based SETSS as relief for the district's denial of a FAPE for the school years at issue. In addition to the district's arguments that the student did not need home-based services to receive a FAPE—which, as

discussed above, were not properly interposed for the purposes of determining appropriate relief—the district further asserts that, even though the CSE did not recommend home-based services for the student for the 2016-17 and 2017-18 school years, he received 570 hours of home-based services over the course of three years pursuant to a prior award of compensatory educational services and that delivery of these services should be considered in determining relief for its failure to offer the student a FAPE for the 2016-17 and 2017-18 school years.

Once the district conceded that the student was denied a FAPE for the 2016-17 and 2017-18 school years, this left, as the primary issue to be resolved through the impartial hearing, what compensatory education remedy, if any, was available and appropriate to remediate the denial of a FAPE. The district was required under the due process procedures set forth in New York State law, to address its burdens in the due process 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'"]). The hearing process in this case was essentially an inquest as to the appropriate relief. However, as noted above, the district, rather than setting forth a position about appropriate relief, fell back on misdirected arguments pertaining to its provision of a FAPE notwithstanding its concession. Where, as here, 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)—it is not an SRO's responsibility to craft the district's position regarding the primary issue in the case: the appropriate compensatory education remedy.

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];[9] 8 NYCRR 100.9[e], 200.1[zz]; see 34 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.

[9] 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 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]).

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"]).

As the IHO acknowledged, a default judgment awarding the parent compensatory education may be a disfavored outcome (IHO Decision at pp. 11-12, citing Branham v. Gov't of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]); however, "[o]nce 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]). In the present case, there is sufficient evidence in the hearing record to support the parent's request for compensatory education without resorting to a default judgment.

While the district's failure to offer the student a FAPE is not at issue as discussed above, some of the facts underlying the student's receipt of home-based services provides background to the issue to be resolved—i.e., what remedy is appropriate. The hearing record indicates that the student had received SEIT services as a preschool student with a disability and that once he transitioned to the CSE as part of the "[t]urning 5" process, the student was no longer provided home-based services (Parent Ex. D at pp. 1-3). In July 2015, pursuant to an award of compensatory services, the student began receiving home-based SETSS (id.). According to his current provider, SETSS consisted of the same instruction the student would receive from a SEIT provider; the difference being that the student was now school age (Tr. p. 231).

The student's LearningSpring classroom teacher testified that the student attended a 12-month program, five days per week, for seven hours per day in an 8:1+2 classroom (Tr. pp. 48, 79). According to the classroom teacher, the student had difficulty generalizing academic and social skills during the school day (Tr. pp. 48-49). She also testified that the student had difficulty transitioning between activities, required a lot of prompting, redirection and 1:1 teacher support (Tr. pp. 49-51). The classroom teacher described the student as highly distractible and generally needed to be redirected three times during a 30-minute class period (id.). She further testified that the student required repetition and repeated practice throughout the school day in order to reinforce and retain learned skills (Tr. pp. 59-60). The classroom teacher also testified that she coordinated with the student's SETSS provider by communicating via email and sending homework and work sheets for the student to practice academic and behavioral skills learned during the school day (Tr. pp. 60-61, 75-76). She also testified that the student's SETSS provider would pre-teach skills that would be taught during the school day in upcoming classes (Tr. p. 61). The student's classroom teacher also testified that the student had received home-based SETSS during the entire time that the student was in her classroom (Tr. p. 77). She further testified that, in addition to generalization of skills, the purpose of the student's home-based SETSS was to assist the student with retaining information (Tr. p. 82). The student's classroom teacher also testified that she believed LearningSpring met the student's academic and social needs (Tr. pp. 82-83).

The student's behavioral and developmental pediatrician (pediatrician) testified that she had treated the student beginning in 2014, observed him at home with his SETSS provider, observed him at school, and saw him at least twice per year (Tr. pp. 96-99, 106, 107, 108). The student's pediatrician testified that she had observed the student six times and found that generalizing skills was an area of difficulty for the student due to a lack of mental flexibility (Tr. pp. 106-08, 110). She further testified that the student required reinforcement (Tr. p. 108). The pediatrician described the student as having variable attention and that this was an area of relative weakness for him (Tr. p. 110). She also described the student as avoidant, unwilling to engage in learning, reading, and listening and, as a result, unable to answer questions about what was being taught in the classroom (Tr. pp. 110, 112, 115-17). When asked about the elimination of home-based services, the pediatrician testified that she thought the student would "possibly slip and lose some of his skills" and "certainly wouldn't be able to maintain the rate of progress that he's making now" (Tr. p. 126). The hearing record also reflects that, in 2017, the pediatrician recommended

that the student receive six hours per week of home-based SETSS (Parent Ex. BB at p. 2; see also Tr. pp. 131-33).[10]

The student's SETSS provider testified that, when she first began working with the student in September 2017, he exhibited high energy, was very distractible and required frequent movement breaks (Tr. pp. 231-32). She further testified that the student appeared to have "a disconnect" between school and home and that she was working on generalization of skills to develop consistency between school and home (Tr. pp. 232-33). Consistent with the testimony of the student's classroom teacher, the SETSS provider testified that she communicated well with the classroom teacher via email and received topics and skills to pre-teach the student, as well as worksheets and homework to complete (Tr. pp. 233-35). While describing 1:1 instruction with the student, she also testified that she used applied behavior analysis (ABA) techniques and methods and began each session with a motivating or preferred activity (Tr. pp. 235-36). The student's SETSS provider further testified that the student demonstrated "cognitive" progress by showing improvement in the areas of math and reading and social/emotional growth by exhibiting flexible thinking and social skills (Tr. pp. 236-38). When asked if more time would be beneficial for the student, the SETSS provider testified that it would be beneficial; however, she believed that children need to "be kids" and that two hours every day may be "a little too much" for the student (Tr. p. 242).

The neuropsychologist, who completed the July 2018 independent neuropsychological evaluation of the student pursuant to the IHO's June 2018 interim decision (see Parent Ex. UU IHO Ex. II), testified that part of his evaluation included an observation of the student at school and an observation of the student with his home-based SETSS provider (Tr. p. 197). Additionally, he reviewed prior testing which indicated that the student was significantly impaired (Tr. p. 193). Regarding his assessment, he testified that the student performed better than he had on the evaluations the neuropsychologist reviewed, which the neuropsychologist attributed to securing participation from the student to ascertain areas of relative strength, instead of focusing on the student's more easily observed areas of relative weakness (Tr. pp. 190-91, 193-99). The neuropsychologist further described the student as complicated and very unique, with "huge discrepancies in his abilities and functioning, which require[d] a lot of work to get to the strength areas" (Tr. p. 190). The neuropsychologist also reported that, with significant 1:1 support, the student was able to demonstrate "age-appropriate or average cognitive abilities in some areas," when language was not a requirement (Tr. p. 191). The neuropsychologist also identified areas of significant qualitative and quantitative weakness, such as the student's ability to sustain attention and share attention, as well as his reciprocity, use of language, processing speed, ability to stay on task, and maladaptive behaviors (id.). He further described the student as having a "really difficult presentation" that impacted all areas of functioning (id.). Based on his evaluation of the student, the neuropsychologist observed that the student was "not always available for instructional control" or for responding (Tr. p. 194). He opined that the student required a tremendous amount of "one-on-one patience" and behaviorally-directed intervention to keep the student focused (id.). The neuropsychologist further testified that the student's presentation was "very rare" in that he exhibited good cognitive abilities, potential, and the ability to make progress and learn that were

[10] By letter dated, February 29, 2016, the pediatrician recommended that the student receive ten hours of home-based SETSS during the 2015-16 and 2016-17 school years (Parent Ex. L at p. 2).

negatively impacted by the areas of impairment in attention and self-directed behaviors (Tr. p. 199; see also Tr. pp. 197-98). The neuropsychologist opined that the student required 1:1 ABA instruction in order to make appropriate progress and not regress, and recommended that the student receive ten hours per week of home-based ABA/SETSS (Tr. pp. 202-03; Parent Ex. UU at p. 11).

The parent testified that the student had received 570 hours of home-based SETSS during the 2015-16, 2016-17 and 2017-18 school years and that she knew the exact number because she had been rationing the compensatory education award she had received in a prior proceeding (Tr. pp. 245-47, 250). She further testified that she expected to exhaust the award the same week that she testified (Tr. p. 246). The parent also testified that she had requested that home-based SETSS be recommended for the student at every CSE meeting during the 2015-16, 2016-17 and 2017-18 school years (Tr. pp. 250-51). Regarding the student's need for home-based services, the parent testified that the student did not receive SETSS when he turned five in the 2014-15 school year, and that it was a very hard year for the student, he did not make any significant progress according to his records, and he "ended up repeating kindergarten at LearningSpring" (Tr. pp. 254-55). Additionally, the parent testified that any professional she had ever consulted had recommended home-based services (Tr. p. 255). Concerning the number of hours, the parent indicated that she was mindful of providing too many hours of home-based SETSS during the week and testified that she would want the student to receive between six and eight hours per week (Tr. pp. 256-57).

Among the district's arguments against an award of compensatory educational services is that the student should not be entitled to any relief because he was making progress in a program that included home-based services from a prior compensatory award. For the 2014-15 school year, the student was entering his kindergarten year and transitioning from a preschool program that had historically included a home-based component. The evidence in the hearing record demonstrates that, for the 2015-16 school year through the course of the impartial hearing, the student was achieving benefit from the totality of the services he was receiving, which included drawing from a bank of 570 hours of compensatory SETSS. According to the parent, during the time period he did not receive SETSS, the student regressed (Tr. pp. 254-55). The district has not refuted the parent's assertion. With regard to the relevance of such progress to the consideration of a remedy in this matter, contrary to the district's argument, "a prediction regarding how far [the student] would have progressed with an IEP that provided a FAPE needed to be separated from progress that [the student] made as a result of using [compensatory education] services, which were not part of the services provided to [him] in order to achieve a FAPE for that year, but were to remedy past FAPE deprivations" (M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017]). Likewise, it would be improper for the district's CSE to consider compensatory education services when 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]). Therefore, the student's progress as a result of the prior award of compensatory education services is not justification for denying (or reducing) an award for the district's failure to offer the student a FAPE for the 2016-17 and 2017-18 school years.

The hearing record reflects recommendations ranging from six hours per week of home-based SETSS to ten hours per week of home-based SETSS for the student. The parent has requested six hours per week in both her due process complaint notice and her request for review. The past recommendations of ten hours per week were viewed through the lens of what was required for the student to make progress, rather than what level of service was required to place the student in the position he would have been in had the district met its obligation to offer a FAPE during the school years at issue. It is also necessary to consider the student's tolerance for services and instruction before calculating an award (see M.M., 2017 WL 1194685, at *8 ["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"]). Thus, the district shall be ordered, upon completing delivery of the SETSS owed to the student pursuant to the IHO's interim and final decisions (see IHO Decision at pp. 13, 14-15; IHO Ex. III at pp. 2-3), to provide 624 hours of compensatory home-based 1:1 SETSS.[11]

C. Other Relief

With respect to the parent's request for a prospective order requiring the district to revise the student's IEP to include six hours per week of home-based SETSS, such relief in this matter is not appropriate as it would tend to circumvent the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). At this point in the school year, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2018-19 school year (see Parent Ex. MM at p. 1; see also 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parent remains displeased with the CSE's recommendation for the student's program for the 2018-19 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

However, when the CSE next convenes to conduct an annual review of the student's program, the district is hereby directed to consider whether home-based educational services are

[11] As an aside, it is entirely unclear from the hearing record why the student has not received home-based services pursuant to pendency, since it appears that, including in the present proceeding, the parent has challenged all of the student's IEP(s) for the 2014-15 through 2017-18, likely making the student's CPSE IEP from the 2013-14 school year the student's last agreed-upon placement pendency (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

required to enable the student to benefit from instruction and, after due consideration thereof, provide the parent with prior written notice on the form prescribed by the Commissioner specifically indicating whether the CSE recommended or refused to recommend such services on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as describing the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]).

VII. Conclusion

For the reasons stated above, the student is entitled to receive compensatory home-based 1:1 SETSS as relief for a denial of a FAPE for the 2016-17 and 2017-18 school years. In light of the foregoing, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the December 24, 2018 IHO decision is modified by reversing that portion which found that the district offered the student a FAPE for the 2016-17 and 2017-18 school years and which denied the parent's request for compensatory education services; and,

IT IS FURTHER ORDERED that the district shall, after fully providing the SETSS awarded by the IHO, thereafter provide the student with 624 hours of home-based SETSS consistent with the directives in this decision; and

IT IS FURTHER ORDERED that the district shall ensure that, when the CSE next convenes, provision of home-based educational services shall be considered for inclusion on the student's IEP and prior written notice shall be issued thereafter consistent with the body of this decision.

Dated: **Albany, New York**
March 28, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER