The University of the State of New York

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

No. 19-018

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 Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Reimels, Esq. and Mary H. Park, 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 the decision of an impartial hearing officer (IHO) which determined that the educational programs and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2015-16, 2016-17, and 2017-18 school years were not appropriate, but did not order all of the relief the parent had requested. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties familiarity with the student's educational history and the procedural history of this proceeding is presumed. Briefly, the student had attended district schools during the time period in question and received diagnoses of an auditory processing disorder, social phobia, and selective mutism, and also exhibited decreased sensory processing abilities (Tr. pp. 141, 143-44;

Parent Exs. HH; OO at p. 1; Dist. Exs. 12 at p. 6; 20 at p. 5; 21 at p. 9; 29).[1] A CSE convened on June 11, 2015 to develop an IEP for the student for the 2015-16 school year (fifth grade), and recommended that she receive integrated co-teaching (ICT) services in English language arts (ELA), math, and social studies in a community school, as well as speech-language therapy and occupational therapy (OT), among other supports (Dist. Ex. 5 at pp. 1, 12, 14, 16). The CSE reconvened on November 12, 2015 and modified the student's recommended program by removing ICT services in social studies (compare Dist. Ex. 5 at p. 12, with Dist. Ex. 8 at pp. 12, 16).[2] On October 31, 2016, November 17, 2016, and March 17, 2017, the CSE convened and recommended that the student receive ICT services in all academic subjects, along with OT and speech-language therapy, among other supports (Dist. Exs. 22 at pp. 1, 14, 16, 18; 23 at pp. 1, 20, 22, 25; 30 at pp. 1, 12-13, 16).[3]

In a due process complaint notice dated June 30, 2017, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (Dist. Ex. 1).[4] The essence of the parent's complaint was that the CSE erroneously classified the student as a student with autism prior to November 2016 and thereafter created a substantively inappropriate IEP for the student after a procedurally deficient CSE process and, as a result, failed to offer special education and related services that were appropriate for her as a student having selective mutism and school phobia (id. at pp. 2, 15-17). For relief, the parent requested an order directing the CSE to develop an IEP with particular services (including, but not limited to, staff training and consulting in selective mutism, 1:1 instruction, afterschool services, communication protocols, alternate forms of assessment/participation for speaking activities, and testing accommodations), compensatory education (including, but not limited to, 1:1 tutoring, OT services, speech-language therapy, and assistive technology services), specific psychoeducational and assistive technology evaluations, and reimbursement for the cost of evaluations, services, and transportation provided by the parent. (id. at pp. 17-20).

[1] According to a speech-language therapy report, selective mutism is defined in part as a "[c]onsistent failure to speak in specific social situations (in which there is an expectation for speaking e.g. at school) despite speaking in other situations," which interferes with "educational or occupational achievement or with social communication" (Parent Ex. C at p. 1). Additionally, the failure to speak is not due to a lack of knowledge of, or comfort with, the spoken language required in the social situation, and is not better accounted for by a communication or other disorder (id.).

[2] The total amount of time the student was recommended to spend in a classroom with the support of ICT services was reduced from 24 periods per week in the June 2015 IEP to 20 periods per week in the November 2015 IEP (compare Dist. Ex. 5 at p. 12, with Dist. Ex. 8 at pp. 12).

[3] Although the student's educational history includes determinations that she was eligible for special education as a student with autism, at the November 17, 2016 CSE meeting her classification was changed to speech or language impairment following review of the August 2016 neurodevelopmental testing, which revealed the student did not meet the criteria for an autism diagnosis (Parent Ex. XXX at p. 2; Dist. Exs. 5 at p. 1; 8 at p. 1; 21 at pp. 1, 5-6; 22 at p. 1).

[4] The parent filed a second due process complaint notice dated January 2, 2018 (Parent Ex. A). The January 2, 2018 due process complaint notice was consolidated with the matter initiated by the June 30, 2017 due process complaint notice, in a consolidation order dated January 11, 2018 (see IHO Order on Consolidation at p. 3).

After a pre-hearing conference on August 17, 2017, the parties proceeded to an impartial hearing on March 13, 2018, which concluded on September 13, 2018 after six days of hearings (Tr. pp. 1-868).[5] By decision dated January 14, 2019, the IHO determined that the district failed to establish that it offered the student a FAPE for the school years at issue and ordered a variety of relief (Req. for Rev. Ex. A at pp. 1-22).[6] Specifically, the IHO ordered the CSE to develop an IEP with particular services, and also ordered the district to provide funding for the student's attendance at a State-approved nonpublic school for the 2018-19 school year, compensatory education, specific evaluations, and reimbursement for the cost of assessments, services, and programs provided by the parent (id.).

IV. Appeal for State-Level Review

The parent appeals.[7] The parent alleges that the IHO properly determined that the district failed to offer the student a FAPE for the school years at issue, but erred in the manner in which

[5] There was a lengthy delay between the August 17, 2017 prehearing conference and the next hearing date which occurred on March 13, 2018 (see Tr. pp. 1-2, 37). In addition, there was another delay between the final day of the hearing on September 13, 2018 and the issuance of the IHO's decision on January 14, 2019 (Tr. pp. 840-42, Req. for Rev. Ex. A at p. 21). The IHO identified January 1, 2019 as the record close date; however, the IHO did not explain why the record close date was extended more than two months after the post-hearing briefs were submitted, as both parties post-hearing briefs were dated October 11, 2018 (see Req. for Rev. Ex. A at pp. 1-22; Parent Ex. BBBB; Dist. Ex. 30). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf; see 8 NYCRR 200.5[j][5][iii]).

[6] The hearing record contains an identically worded copy of the IHO decision, printed in a different format, dated January 24, 2019 (see IHO Decision; Req. for Rev. Ex. A at pp. 1-22). In her request for review, the parent asserts that the district held the decision for ten days and changed the date from January 14, 2019 to January 24, 2019 (Req. for Rev. at p. 3). The district failed to respond to this serious assertion, and simply references the IHO's decision as being dated January 24, 2019 (Answer ¶ 7). Notwithstanding that the IDEA does not preclude a school district from taking on ministerial actions to assist IHOs in issuing decisions (i.e. formatting, copying, postage), State regulation provides the IHO "shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). Additionally, in changing the date on a decision that was transmitted to district personnel and then reissuing the decision to the parent, the district changes a material element of the decision as the regulations governing practice before the Office of State Review set timelines based on the date of the IHO decision (see 8 NYCRR 279.2[b], 279.4[a], 279.9[d]). Additionally, once an IHO issues a decision, that decision is final; allowing issuance of multiple final decisions with material changes would create confusion and quickly throw the due process hearing system envisioned by Congress into disarray (see e.g., Application of the Dep't of Educ., Appeal No. 17-009). Accordingly, the January 24, 2019 IHO decision is treated as a nullity and all references to the "IHO Decision" are to the January 14, 2019 IHO decision annexed to the request for review (Req. for Rev. Ex. A at pp. 1-22). Going forward, the district is free to explain whatever circumstances it feels are appropriate regarding the transmittal of an IHO's decision; however, the district is warned that any material alteration of the written decision of an IHO, including the date of transmittal by the IHO to the parties, may be viewed as tantamount to fraud and be met with appropriate sanction in a State-level appeal proceeding and/or further referral of the matter to the proper authority.

[7] The parent attached three exhibits to her request for review. Generally, documentary evidence not presented at

he conducted the impartial hearing, erred in failing to award certain requested relief, and erred in failing to find that the district violated section 504 of the Rehabilitation Act of 1973 (section 504). Specifically, the parent alleges that the IHO denied the parent her due process rights in the conduct of the hearing, erred in refusing to admit certain evidence, and failed to order the district to provide certain records. The parent also contends that the IHO erred insofar as the amount of the compensatory special education teacher support services was insufficient, the award of selective mutism oriented services was insufficient, and the time period for implementing the relief should be extended. According to the parent, the IHO erred in failing to award compensatory assistive technology services, failing to award independent educational evaluations (IEEs), and failing to direct reimbursement relief with sufficient specificity. The parent requests that the undersigned extend the timeline for implementing the relief in some of the IHO's orders and requests that the matter not be remanded to the IHO for additional fact-finding.

In an answer, the district generally admits or denies the parent's allegations, asserts that the relief awarded by the IHO was adequate and proper, and argues that the IHO's decision should be upheld in its entirety. The district also asserts that in the event the SRO finds that there is insufficient evidence to reach a determination on the merits of the parent's claims, the matter should be remanded to the IHO to further develop the hearing record.

V. Applicable Standards

Although the IHO's finding that the district denied the student a FAPE for each of the school years at issue has not been appealed, the nature of the denial of FAPE is relevant to the relief the parent seeks. 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

---

an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). However, except for a copy of the IHO's January 14, 2019 decision which should have been included as part of the hearing record and therefore does not represent additional evidence (Req. for Rev. Ex. A at pp. 1-22), and the receipts for services discussed in further detail below (Req. for Rev. Ex. B), the documents included with the parent's request for review are unnecessary to render a decision in this matter. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][b], [c], [e]-[f]).

(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]

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

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

VI. Discussion

A. Preliminary Matters

1. Educational Records

The parent alleges she was denied access to the student's educational records under 34 C.F.R § 300.613. Parents must be afforded "an opportunity to inspect and review all education records with respect to (1) The identification, evaluation, and educational placement of the child; and (2) The provision of FAPE to the child" (34 CFR 300.501, 613[a]). However, a district is only required to provide copies of education records "if failure to provide those copies would effectively

[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).

prevent the parent from exercising the right to inspect and review the records" (34 CFR 300.613[b][2]).

The parent requested documents from the district pursuant to a subpoena signed by the IHO on September 18, 2017.[9] Rather than seeking to enforce the September 18, 2017 subpoena, counsel for the parent filed a due process complaint notice on January 2, 2018 reframing the September 18, 2017 subpoena as a request for the student's education record pursuant to the IDEA and asserting that the parent's due process rights were compromised because the district had only turned over "a small number" of documents in response to the September 18, 2017 subpoena (Tr. p. 100; Parent Ex. A at p. 2). Additionally, although the parent testified that she did not receive a response regarding the documents requested in the January 2018 due process complaint notice, the due process complaint notice does not specifically mention any document request other than the September 18, 2017 subpoena and counsel for the parent indicated at other points during the impartial hearing that the district did respond, at least in part, to the subpoena (Tr. p. 823; Parent Ex. A; see Tr. pp. 119, 125, 127). Finally, the parent has not specifically identified which of the items on the subpoena to which the district allegedly failed to respond, accordingly it is impossible to determine if those requests were for education records subject to the provisions of the IDEA.

On review, the September 18, 2017 subpoena includes requests for documents that may be considered a part of the student's education records, such as assessments conducted with the student in ELA, math, science and social student and progress reports for the student during the 2015-16 through 2017-18 school years (see 34 CFR 99.3, 600.611[b] [defining "education records" as "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution" with a number of exceptions). However, many of the documents requested in the September 18, 2017 subpoena do not appear to be comprised of the student's education records and instead relate to the district's policies and procedures or district staff qualifications and training.

Nevertheless, the district is required to afford the parent of an opportunity to inspect and review the student's education records, including providing copies of the records if failure to provide copies would prevent the parent from exercising her right to inspect and review the records or allowing a representative of the parent to inspect and review the records (34 CFR 300.501, 613[a], [b][2]-[3]). In its Official Analysis to Comments in the Federal Register, the United States Department of Education noted the importance of ensuring that parents have the information they need to participate in CSE meetings, further noting that such information "may include reviewing their child's records" (Determination of Eligibility, 71 Fed. Reg. 46,645 [Aug. 14, 2006]). While the hearing record does not support finding that, in this instance, the parent was prevented from participating in the development of the student's program or the due process proceedings due to a lack of access to the student's education record, the district is reminded of its obligations.

[9] A copy of the subpoena was not admitted as an exhibit during the hearing; however, it is a part of the hearing record pursuant to State regulation (8 NYCRR 200.5[j][5][vi][d]).

A. Relief

The remainder of the parties' dispute on appeal is over the extent to which IHO ordered appropriate compensatory and other relief in light of the district's failure to provide the student a FAPE for the three school years at issue, a finding which has not been appealed by either party and has therefore become final and binding upon them (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]). Each of the parent's claims will be addressed in turn below.[10]

Case law instructs that 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]; 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. 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

[10] The parent also appeals the IHO's lack of determination concerning claims she raised under Section 504 of the Rehabilitation Act of 1973. 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.

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"]).

1. Compensatory Education-Multisensory Tutoring

The IHO's decision ordering compensatory relief included the directive to provide the student with two hours of multisensory tutoring per day, five days per week for the remainder of the 2018-19 school year, at a cost not to exceed $175 per hour (Req. for Rev. Ex. A at p. 21). In this appeal, the parent contends that the hearing record conclusively established that the student had academic delays across all areas (citing to Tr. p. 853; Parent Ex. XXX; Dist. Exs. 5; 8; 19; 20; 22; 23; 26; 30), such that the student should receive two periods per day of 1:1 tutoring (one for math and one for ELA) for each of the three years she was denied a FAPE, or at least 840 hours at an enhanced rate. The district argues that the compensatory services awarded by the IHO were appropriate to address the denial of FAPE. Although some of the cited documentary evidence demonstrates that the student exhibited difficulties in specific academic areas, overall the hearing record does not support a finding that those deficits were to the degree that she requires the amount of compensatory education the parent seeks on appeal. In consideration of the student's skills and abilities as discussed below, I see no reason to disturb the IHOs finding as it relates to the number of hours of compensatory 1:1 tutoring awarded.

According to results of an administration of the Weschler Individual Achievement Test-Third Edition in spring of the 2015-16 school year (fifth grade), the student achieved scores in the average range on tasks measuring her word reading (standard score 101) and pseudoword decoding (standard score 96) abilities, and in the below average range on subtests measuring numerical operations (standard score 87) and spelling (standard score 89) (Dist. Ex. 26 at pp. 1, 9, 14). The evaluator concluded that the student's performance was "better" than in the school setting, and

opined that the discrepancy may have been due to the student's attentional difficulties that impeded her ability to learn as efficiently as possible (id. at p. 14). In August 2016, the parent reported that although the student had "some difficulty with math" during fifth grade, her performance was "on grade level" in reading and math, but below grade level in writing during that school year (Dist. Ex. 21 at p. 3). The parent further indicated that the student's difficulty with auditory processing and organization affected her school performance (id.).

Review of the student's progress report included in the hearing record shows that during the 2016-17 school year (sixth grade), she struggled with some components of math, including organizing her work to solve calculations and dividing fractions (Dist. Ex. 28 at p. 1). The math teacher reported that the student solved "real-world problems" when provided with supports including checklists to ensure the student completed the appropriate steps to answer questions, graphic organizers to assist with organizing her thoughts, guiding questions to aid her in answering appropriately, sentence starters to assist with her answers, leveled work tasks and scaffolded instruction, and the opportunity to work at her own pace (id.). Results of a reading assessment conducted in February 2017 indicated that the student comprehended material on an eighth grade level (id.). The teacher report indicated that the student had difficulty producing "grade level writing assignments," specifically, supporting her claim with sufficient, relevant evidence and organizing her ideas (id. at pp. 1-2). According to her report card for the 2016-17 school year, the student achieved a final grade of "2" in language arts and mathematics, as well as a final grade of "3" for all other subjects, including social studies and science, and a final grade of "4" in "Culture of Hispanic Countries 6" (Parent Ex. SSS at p. 1).[11]

Moving to the 2017-18 school year (seventh grade), a progress report from various dates in January 2018 reflected that the student was approaching mastery for the standard in mathematics and science, and had mastered the standard in language arts and Spanish (Parent Ex. RRR at pp. 1-2).[12] In May and June 2018, a district school psychologist conducted a psychoeducational evaluation of the student (Parent Ex. XXX). According to the June 2018 psychoeducational evaluation report, teacher reports obtained during the recent annual review meeting overall described a shy, quiet, but attentive student, who struggled to complete work in groups, and preferred independent learning tasks (id. at p. 4). In math, the teacher reported that although the student struggled to complete grade level tasks independently, with teacher support she was able to "fix her mistakes" and was "approaching mastery" in math problems involving computing unit rates and other quantities measured in like or different units, and recognizing and representing proportional relationships between quantities (id.). In ELA, the student used graphic organizers and models to complete her work, and her teachers supported her communication in the classroom through writing (id.). Additionally, the teacher reports reflected that in science, the student

[11] According to the report card, the student received "Proficiency/Performance" grades on a scale of 1 to 4, with numbers 2-4 designated as "Passing Grades" and number 1 designated as a "Failing Grade[]" (Parent Ex. SSS at p. 2).

[12] The student received a designation of "un-scored" in social studies, which according to the report, could have been because "those grades are habits of success which do not have any value added to the child's mastery level," or, because "there [wasn't] enough work graded for that standard" (Parent Ex. RRR at p. 1).

excelled at lab activities, and in social studies, she completed grade level work with teacher support (id.).

During the May/June 2018 psychoeducational evaluation, the school psychologist reported that the student was "cooperative and polite throughout the test administration," and exhibited constant attention and concentration (Parent Ex. XXX at pp. 4-5). Administration of the Wechsler Intelligence Scale for Children, Fifth Edition yielded a verbal comprehension composite standard score of 113 (high average), a visual spatial composite standard score of 111 (high average), a fluid reasoning composite standard score of 100 (average), a working memory composite standard score of 82 (low average), a processing speed composite standard score of 86 (low average), and a full scale IQ of 106 (average) (id. at p. 6).[13] The school psychologist reported that the student's performance on the verbal comprehension index—measures of the student's "ability to access and apply acquired word knowledge"—was "above average for her age," and a "relative strength" (id. at pp. 5-6). Her performance on the nonverbal index—"a measure of general intellectual functioning that minimizes expressive language demands for children with special circumstances or clinical needs"—fell in the average range as compared to other students her age (id. at p. 9).

To assess the student's academic abilities, the school psychologist administered the Woodcock-Johnson Tests of Achievement IV (WJ IV) to the student (Parent Ex. XXX at pp. 9-10). The student achieved the following subtest standard scores: applied problems (107), spelling (90), passage comprehension (84), calculation (90), sentence reading fluency (110), and math facts fluency (96) (id. at p. 13). Overall, the student achieved a broad reading (reading decoding, reading speed, and reading comprehension) standard score within the average range, and she exhibited reading skills—according to the school psychologist—that were "on grade level" (id. at pp. 10, 11). The school psychologist reported that the student's broad math (mathematics reasoning and problem solving, number facility, and automaticity) standard score of 97 was also within the average range (id. at pp. 10, 11, 13).

Turning to the parent's assertion on appeal regarding the expert witness' opinion that the student was "significantly delayed relative to her grade level," review of the expert witness' affidavit shows that she was aware of the student's diagnosis of selective mutism, speech-language delays, auditory processing disorder, and anxiety (Parent Ex. CCCC at p. 3; see Tr. p. 850). Furthermore, although the expert witness indicated that she reviewed "various documents" regarding the student including "IEPs and evaluations," her identification of the student's deficits came primarily from her analysis of the results of the district's WJ IV administration to the student (id. at pp. 3-5; see Tr. p. 859). Specifically, review of testimony and the affidavit indicates that the expert witness focused her opinion regarding the number of compensatory tutoring hours the student required based upon the student's reported grade equivalent scores rather than the student's standard scores and corresponding qualitative descriptions (compare Tr. pp. 852-54 and Parent Ex. CCCC at pp. 3-5, with Parent Ex. XXX at pp. 10, 11, 13). Consequently, the expert witness—who testified that she did not meet or assess the student, or speak to her teachers or the parent—concluded that the student's "basic academic skills [were] significantly delayed in relation to her age" such that she required "one period per day" of both 1:1 ELA and 1:1 math instruction, "as

[13] The school psychologist noted in the report that the student was allowed to type/handwrite her responses in order to provide her with "an opportunity to show the knowledge she has attained" (Parent Ex. XXX at p. 6).

well as additional tutoring and remediation" totaling 1140 hours, to be provided after school and during summers (Tr. p. 847; Parent Ex. CCCC at pp. 3, 5).

The parent's expert asserted that her review of student records results in a "projection of the number of hours it may take to reach grade level," which she acknowledged was "not an exact science" and also that it was "impossible to predict" a student's rate of progress in a 1:1 setting due to a variety of factors (Parent Ex. CCCC at p. 3).[14] Those caveats aside, the number of compensatory education hours the expert witness and the parent deemed "reasonable" as a remedy for the student's academic deficits is not supported by the teacher reports, the student's progress reports, or the results of the academic achievement testing conducted in June 2018—the conclusion of the period of time the district failed to offer the student a FAPE. Therefore, for these reasons, I decline to disturb the IHO's award of two hours per school day of multisensory tutoring for the number of school days between January 14, 2019—the date of his decision—to the final day of school for the 2018-19 school year. However, I will modify the IHO's decision to the extent that the student is not required to have used the compensatory education hours awarded by the end of the 2018-19 school year. Rather, the parties shall count the number of school days between January 14, 2019 and the last day of the school year in June 2019, and the district shall provide the student with compensatory education equaling two hours per school day, to be used within one year from the date of this decision.

2. Selective Mutism Assessment and Services

In his decision, the IHO ordered the district to reimburse the parent "and/or directly pay the cost of the student's receipt of a selective mutism assessment and recommendations in an amount not to exceed $275 per hour, for as long as it reasonably takes to make such an assessment and recommendations to be implemented at the student's private school for the remainder of the 2018-19 school year" (Req. for Rev. Ex. A at p. 21).[15] On appeal, the parent requests that the timeline for providing the recommended services be extended to three years, to reflect the three-year denial of FAPE the IHO identified and because the length of time the selective mutism services will be provided will be determined by the assessment and the effectiveness of the services as implemented. The parent also requests that the maximum rate for the services ordered by the IHO ($275 per hour) be modified to reflect what the evidence shows in testimony, that the services were billed at a rate of $250 or $300 per hour, depending on the personnel providing the service (Tr. pp. 530-34). The district objects to "[e]xpanding the requested relief by two years," because the student has not been evaluated yet, therefore, the relief sought by the parent "has no basis in

[14] Additionally, the directive that an award of compensatory education "should aim to place [a student] in the same position they would have occupied but for the school district's violations of IDEA" (Reid, 401 F.3d at 518), is not necessarily the same standard that the expert witness testified to, which is that the student achieve grade level standards (see Tr. pp. 855-57; Parent Ex. CCCC at pp. 3-5).

[15] The parent requests that the restriction on the services being provided in a private school be removed, because at the time of the commencement of the appeal, the student did not attend a private school and because some of the services may be recommended to take place in the home or otherwise outside of a private school setting. In an answer, the district does not contest that the parent may place the student at a different private or nonpublic school than identified by the IHO for the duration of the 2018-19 school year and still receive the awarded selective mutism compensatory services, and does not assert that the IHO intended to limit the provision of the selective mutism services to school grounds or only school hours.

the record and is currently premature, since it is unclear how many hours, or years of [selective mutism] services would compensate [the student]."

The hearing record reflects documentary evidence that described the student's deficits and needs related to her selective mutism diagnosis (see e.g. Parent Exs. B; C; T; HH; KK; OO; BBB; XXX; Dist. Exs. 12; 13; 19; 21; 26). Specifically, at school the student struggled to complete work tasks in a group setting due to her difficulty communicating with classmates, and during collaborative work opportunities the student appeared uncomfortable, even when direct communication was not required (Parent Ex. XXX at p. 4). She tended to have minimal to no social relationships with other students due to her lack of verbal communication (Parent Ex. XXX at p. 2; Dist. Ex. 26 at pp. 3, 6). When the student did speak in school, she spoke one or two words in a whisper (Tr. pp. 186-87, 190-91, 331-32; Parent Ex. B at p. 1). The parent testified that at home, the student spoke "fluently" in a "regular" voice whereas in public she might whisper to her (Tr. p. 704).

The hearing record contains ample support for the contention that the student required services to address needs related to her selective mutism diagnosis in order to receive a FAPE, and the IHO's finding that the district failed to provide those services and his award of a compensatory selective mutism assessment and services was well founded. For example, a March 2017 summary and recommendations report, written by the clinical director of a private psychological consulting practice that evaluated and provided services to the student, indicated that selective mutism often manifests the most in the school setting and accordingly, for students with selective mutism, it was "crucial that the school be heavily involved in the intervention" (Parent Ex. OO at p. 2). Specifically, the clinical director reported that it was "highly unlikely that [the student] w[ould] be able to overcome her [selective mutism] and begin engaging with peers and adults in school without a systematic and directed approach" (id.). The March 2017 report provided recommendations for the student included the following: (1) that school staff working with the student should be trained by selective mutism specialists; (2) that the school identify a "point person" to act as a liaison with the selective mutism specialist and consult on an ongoing basis; (3) that the student receive individual "fade-ins" with the point person and subsequently other school staff; (4) that the student meet with and verbalize to her teachers before the start of school to set her up for success; (5) that a home-school communication system be established to keep the parent apprised of the student's progress in school and allow the parent to "discuss and reinforce accordingly with the student"; (6) that the student participate in a social skills group at school to help her develop her skill set and get comfortable with a small group of peers (id. at pp. 2-3). A final recommendation indicated that as the student advanced in treatment and her goals, she would be expected to increase her verbal participation in class (id. at p. 3). However, at the time of the report, the student was unable to verbally participate given her high level of anxiety, and the report indicated that prompting the student to speak in situations that were too challenging would only exacerbate her anxiety (id.). Therefore, at the time the report was written, it was suggested that the expectation for the student to increase her verbal participation in class be removed and instead, the report recommended that the student be presented with alternatives to assignments, projects, or tests that required verbalization (id.).

Further, in a May 5, 2017 "letter of medical necessity," a certified school psychologist—employed by the same private psychological consulting practice that prepared the March 2017 summary report and recommendations—indicated her "strongest professional recommendation for

school-based accommodations" for the student (Parent Ex. KK at pp. 1-2).[16] The letter indicated that selective mutism "is an anxiety disorder that renders children speechless in school and community situations, while their speaking is within normal limits in their homes (provided only the parents and siblings are present)" (id. at p. 1). In addition, the letter noted, "[u]ntreated, [selective mutism] renders children unable to participate in general education settings in a typical manner, leaves their educators unable to accurately gauge their progress, and results in abnormal or stunted social relationships with peers" (id.). Despite the student's progress in the consultant's office and her parent's efforts to facilitate the student's continued development, the student's severe anxiety continued to influence her ability to navigate a typical school day (id.). Specifically, the school psychologist reported that the student must receive specialized support and scaffolding to navigate daily tasks such as asking to use the bathroom, transitioning from one activity to the next, and participating in group activities (id. at pp. 1-2). According to the letter, the student's ability to participate in routine activities or engage socially with peers was limited (id. at p. 2). The school psychologist recommended that, due to such behaviors, it was "essential" that the student's teachers learn behavioral techniques to help her face her social fears, and that she be provided with "continued behavioral, academic, and psychosocial support in the school setting for the foreseeable future," including services provided by a behavioral psychologist with specific expertise in treating children with selective mutism (id.). Specifically, the school psychologist indicated that "appropriate services" for the student included the services of a "specialist" who would provide an in-service training for school staff who come into contact with the student on a regular basis and "intensive behavioral therapy" in the school and weekly follow-up consultation to assist with ongoing implementation and modification of the student's program (id.). The school psychologist concluded the letter by stating that the interventions and accommodations recommended were "medically relevant and critical for the treatment of [the student's selective mutism]," further stating that "the prognosis absent treatment in the school setting is poor, conferring considerable risk for subsequent added anxiety disorders" (id.).

The clinical psychologist from the private psychological consulting practice that prepared the March 2017 summary and recommendations report testified that he had not assessed the student, and that he would need to conduct a clinical assessment and design an individualized treatment plan for her in coordination with her school and her parents before determining the number of hours per day or week of services she required, the exact type and location of the services, and the duration of the required treatment plan (compare Tr. pp. 496-97, 532-36, 540, 547, with Parent Ex. OO). The psychologist testified that the cost for services at his clinic "would be between 250 to 300 an hour, depending on who on our team was providing the service," and also that the cost of the selective mutism assessment was $1,200 with an additional fee of $500 for travel expenses (Tr. pp. 530, 533-34).

Taking into account the reasonable finding of the IHO that the selective mutism assessment and services should be part of the compensatory education award to remedy the three-year denial of a FAPE to the student, the district's concession to some of the IHO's findings, as well as the fact that the student has not yet been placed in a private school pursuant to the IHO's decision for the 2018-19 school year and will likely not receive the benefit of that award until the 2019-20 school

[16] The May 5, 2017 letter indicated that the student had been evaluated by the private psychological consulting practice in January 2017; however, the hearing record did not include the report from that evaluation.

year, the IHO's order with respect to the selective mutism assessment and services is modified as set forth below. The selective mutism assessment will be at district expense up to the amount of $1,700 and may be conducted in the student's current school or the nonpublic school the student attends for the 2019-20 school year at the discretion of the parent. The services recommended after completion of the selective mutism assessment shall be provided at the student's school and elsewhere, to potentially include services and supports for the student's teachers and related service providers; such services shall be at district expense up to a rate of no more than $300 per hour, and such services may be provided through the end of the 2019-20 school year. At the student's next annual review, a CSE should consider the results of the selective mutism assessment and the student's progress under the resulting protocol, as well as any other relevant evaluative information available at the time, and develop an IEP to address the student's then-current needs.

3. Prospective Placement in a Nonpublic School

In his decision, the IHO ordered the district to reimburse the parent "and/or directly pay the cost of the student's tuition at the private school for the 2018-19 school year" (Req. for Rev. Ex. A at p. 20). In this case it does not appear that the parent placed the student in a nonpublic school, so reimbursement and/or direct funding for a nonpublic school placement that has already been effectuated does not appear to be an issue. However, the parent was nevertheless very clear in her desire that the student attend a nonpublic school in the future and, therefore, she appeals from the IHO's decision and asserts that the award allowing the parent to place the student in a nonpublic school is not useable unless it is extended into the 2019-20 school year.

Courts and hearing officers have treated claims for relief seeking a future educational placement in a nonpublic school numerous ways with both analogous and sometimes disparate elements in the approaches taken. One district court recently described a situation similar to the one in this matter insofar as:

> [the parents] have not expended any money on tuition thus far and are not, at this time, requesting any tuition reimbursement for past-made payments [i]nstead, [their] request can reasonably be understood only as a request for prospective placement reasonably intended as compensatory education. Although apparently less common, courts have ordered prospective placement under express or at least implicit treatment as compensatory education. See Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232, 1252 (10th Cir. 2009) (referring to private school placement funded by the school district as "compensatory-education payments."); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1290 (11th Cir. 2008) (approving of a district court's award of compensatory education in form of placement at private school); see also Perry A. Zirkel, Adjudicative Remedies for Denials of FAPE Under the IDEA, 33 J. OF NAT'L ASS'N OF ADMIN. L. JUDICIARY 213, 225 n.49 (2013) (citing cases ordering educational placement as compensatory education).
>
> * * *

> Indeed, "[t]he question of who must bear the financial responsibility for a private school placement turns upon [in part]...the inappropriateness of the alternative public school placements." Davis v. D.C. Bd. of Ed., 530 F. Supp. 1209, 1212 (D.D.C. 1982). The IDEA encourages school districts to avoid "separate schooling or other removal...from the regular educational environment" unless a child's "regular" classes cannot meet his needs. 20 U.S.C. § 1412(5)(A); see also, e.g., Burlington, 471 U.S. at 369 (IDEA "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible."); Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860, 870 (D.N.H. 1992); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

Smith v. Cheyenne Mountain Sch. Dist. 12, 2018 WL 3744134, at *8 (D. Colo. Aug. 7, 2018) [concluding that the ALJ's decision not to award compensatory education services was supported by the record and not erroneous and that an award of prospective nonpublic school placement as compensatory relief was likewise unwarranted]; see also Eley v. District 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 that IEP]).

However, in another example involving a parent from Rhode Island seeking a nonpublic school placement on a prospective basis, a district court seemed less concerned over whether relief could be crafted to provide an appropriate education in the public school and the need to avoid an unnecessary removal from public schooling and instead appeared to employ an analysis closer to, but not identical with a parental unilateral placement/reimbursement case, relying on the Supreme Court's decision in Carter to determine whether the parent's proposed private school placement, the Gove School, was 'proper under the Act' (S.C. by & through N.C. v. Chariho Reg'l Sch. Dist., 298 F. Supp. 3d 370, 381 (D.R.I. 2018); see Carter, 510 U.S. at 15; see also D.C. v. Oliver, 2014 WL 686860, at *5 [D.D.C. Feb. 21, 2014] [discussing both Reid compensatory education relief, Carter, and Forest Grove reimbursement, and finding that when a school district has failed to develop an IEP, propose a location of services and otherwise offer an eligible child a FAPE, parents may seek placement at a nonpublic school on a prospective basis and are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate nonpublic school]; J. v. Portland Pub. Sch., 2016 WL 5940890, at *23 [D. Me. Oct. 12, 2016], report and recommendation adopted, 2016 WL 7076995 [D. Me. Dec. 5, 2016] [suggesting that LRE considerations, although required by the Act, may be of lesser importance when an administrative hearing officer is fashioning relief in the form of a compensatory educational placement in a nonpublic school setting]).

There are at least two areas of concern in a case involving a "proposed" nonpublic school placement wherein the form of relief makes a difference when sought by a parent and/or granted by an administrative hearing officer (i.e. Carter unilateral placement/reimbursement relief versus compensatory education relief under East Lyme or Reid), at least as it relates to IDEA disputes brought in due process hearings in New York. First, unlike many jurisdictions, New York State

has, by statute, deviated from the Supreme Court's holding in Schaffer v. Weast, (546 U.S. 49, 58-62 [2005] [placing the burden of production and persuasion on the party seeking relief]) and placed the burden of production and persuasion at an impartial hearing on the school district with the only limited exception being that a "parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law § 4404[1][c]). If a case reaches the stage where it has been determined that there is a denial of a FAPE, it makes an enormous difference to the parties and an IHO as to how an impartial hearing is conducted if it is the parent's responsibility to produce the evidence and prove that a proposed private school placement is appropriate, and it can be months or years to correct the matter if the allocation of the burden is handled incorrectly Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 372 [2d Cir. 2006] quoting Connors v. Mills, 34 F.Supp.2d 795, 804 [N.D.N.Y.1998] [stating that "even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional, and psychological deterioration"]). Conversely, if the school district has the burden to produce the evidence and essentially disprove the need for or the appropriateness of the parent's requested compensatory education relief (i.e. where the parent desires that the student be placed in a different type of educational setting such as a residential school or seeks afterschool, home-based tutoring as compensatory education), then the proceeding takes on a very different character. SRO's have tended to place the burden of production and persuasion on the district in compensatory education relief (see, e.g., M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017]; Application of a Student with a Disability, Appeal No. 19-016; Application of the Dep't of Educ., Appeal No. 17-105). In some cases, the evidence regarding the parentally selected nonpublic school setting is not evidence within the district's sphere of influence to obtain and it would become relatively easy for a parent to obtain the relief of private schooling by seeking it prospectively rather than under Burlington/Carter reimbursement.[17]

The second area of concern is that it is far less problematic for an administrative hearing officer to direct a school district to provide a student with discrete forms of compensatory education in a placement that is implemented by the public school district, such as additional instructional time in a specific subject area or additional related services to support a particular need or remediate a past deficiency. It is expected that such remedial services will be provided in a setting in which the CSE will also continue to have the responsibility to develop and implement a comprehensive IEP that takes into account all aspects of the student's needs and educational environment into account when delivering the remedial, compensatory remedy, and such relief is typically flexible and can be provided in a wide variety of educational placements. However, relief in the form of a prospective placement in a parentally-selected nonpublic school is far less predictable and does not assure the presence of the same familiar mechanisms under which public school districts are required to operate. Once a prospective placement in a nonpublic school (a third party) is effectuated pursuant to an order of an administrative hearing officer, to me it becomes very unclear how a district should proceed to support a student going forward especially if the procedural protections of the IDEA—that is IEP development and placement selection

[17] If, under the burden of proof statute in New York, all "relief" had to be proven by the party seeking it, the problem would not be so pronounced. To be candid, I have, in some instances held that certain matters had to be proven by a parent in direct funding cases, such as whether the parent lacked the financial resources to front the cost of tuition.

process—has been circumvented and the cart is placed before the horse because student has been already been placed beyond the reach of the school district with a third party before ink has been put to paper in drafting an proposed IEP. These concerns simply do not arise in the same way in retrospective, unilateral placement cases in which the public school district's responsibly to assess the student and continue to propose an appropriate public school placement typically continues uninterrupted and there is only a deviation in the delivery of services that changes while the student is unilaterally placed at the parent's own risk.[18]

Here, by the time the IHO issued his decision in January 2019, the three school years at issue (2015-16, 2016-17, and 2017-18) had already passed and the student was half way through the 2018-19 school year. Nevertheless, as noted above the district does not appeal or cross-appeal from the IHO's award of prospective placement and the IHO's decision has become final and binding on the district (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]). Thus some of the most perplexing questions regarding the framework in which this case sits, need not be decided and, consequently I do not opine on them at this juncture.[19] I offer the information about the frameworks above to explain why I do not lightly issue directives that have the effect of prospectively curtailing the flexible process used by CSEs for placing a student with a disability in an educational setting as envisioned by Congress. In my view, one of the best features of the IDEA for students with disabilities is its flexible, continuously available, individualized planning approach tailored to each student with a disability as well as the wide variety of procedural protections in place to safeguard a student's rights (i.e. mediation, State administrative complaints, due process). There is less risk of causing educational harm to a student when imposing a tuition remedy for a placement that has already occurred and therefore is more easily assessed. My concern is that imposing rigid, long-term prospective relief through due process, even assuming on good authority that it is permissible,[20] leaves behind the best features envisioned by Congress

[18] Remedial relief in the form of compensatory education tends to be established in fixed amounts or for a fixed period of time and does not factor heavily into stay-put determinations should the parties continue to disagree after returning to the CSE planning process. However, it is not uncommon, at least in New York, for private school placements successfully obtained by parents under a Burlington/Carter theory, to be continued for years after the first disputed school year under the various iterations of the stay-put rule. If an IHO ordered a prospective nonpublic school placement as a compensatory education award for a fixed period of time, some case law may suggest that such a compensatory remedy should not form the basis for a student's pendency placement in a subsequent dispute, while other authorities suggest it would serve as the pendency placement in the event that due process or judicial review continues. I am not sure at this juncture how a stay-put placement in a subsequent proceeding would be analyzed, and I only mention it to underscore to the parties that the area of prospective nonpublic school placements as relief under IDEA can quickly become a byzantine maze of potential of legal landmines.

[19] To be sure however, the parties cannot simply avoid mentioning these issues to the IHO and then the SRO in their memoranda of law in cases where these issues remain in dispute. It is incumbent upon them to clearly make their positions known and bring the most up-to-date law available to the attention of the administrative hearing officers.

[20] The Second Circuit has indicated that there is a "broad spectrum of equitable relief contemplated under the IDEA" when considering a prospective payment versus a retroactive reimbursement remedy (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).

and may backfire and may cause the student as much or more harm than the violation(s) it was intended to remediate.

As for the available facts in this case, according to the parent, prior to the close of the impartial hearing, the student was accepted at Sage, a nonpublic, out-of-State therapeutic day school (Tr. pp. 790-92; Parent Ex. ZZZ). Sage has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).[21] The parent also contacted the Community School, which was described as a State-approved nonpublic school, and in a post-hearing brief, dated October 11, 2018, the parent requested funding for a private school placement (see Tr. pp. 790-92; Parent Ex. BBBB at pp. 21, 23, 28). In the request for review, the parent notes that although the IHO ordered funding for a nonpublic school for the 2018-19 school year, there were "now no seats left" (Req. for Rev. at p. 10).[22] Further, the parent asks for an order directing the district to "defer to the CBST to enable [the student] to use the relief that the IHO ordered or at least extend the award to the 2019-2020" school year (id.). The parent also asserts that the student has now been accepted to the Community School, a State-approved nonpublic school, for the 2019-20 school year, and requests funding for the Community School and the designation of placement in a nonpublic school on the student's IEP, so the student can enroll in the Community School as soon as an opening becomes available (id.; see Parent Mem. of Law at p. 29).

In an effort to avoid crafting additional relief requested by the parent that could not be implemented by the parties, the Office of State Review, at my direction, wrote to the parties on April 9, 2019 directing the submission of additional evidence and offered the parties an opportunity to be heard regarding whether the requested evidence should be considered (see 8 NYCRR 279.10[b] [permitting a State Review Officer to seek additional evidence if he or she determines that such additional evidence is necessary]). In particular, the district was directed to provide any IEPs developed for the student subsequent to the March 17, 2017 IEP, and the parties were asked to identify whether there was a seat available for the student in the State-approved nonpublic school for the remainder of the 2018-19 school year. The district promptly replied and provided a February 13, 2018 IEP that, among other things, recommended that the student receive ICT services in a public school, and a February 4, 2019 IEP recommending that the student be placed in a State-approved nonpublic school for the 2019-20 school year.[23] Counsel for the parent also

[21] Authorities differ on whether a private school placement that is "unapproved" by State educational authorities is a permissible form of relief (Connors v. Mills, 34 F. Supp. 2d 795, 805 [N.D.N.Y. 1998] [noting that when a child's access to a free and appropriate public education in a substantive sense conflicts with the state's approval process, Carter instructs that the state's approval process must give way].

[22] This is an extremely unfortunate but foreseeable risk of seeking a nonpublic school placement on a prospective basis by means of litigation. Events may not transpire in the way the parent envisions. As one district court addressing a prospective nonpublic school placement described it, "[b]ecause the [nonpublic school]—a private, third party to this litigation—has determined that it can no longer accept [the student] for safety reasons, the Court cannot grant any meaningful relief. As the D.C. Circuit has instructed, if 'events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot'"(Jones, v. Dist. of Columbia, 2017 WL 10651264, at *15 [D.D.C. Jan. 31, 2017]).

[23] The district objected to the use of the provided IEPs, contending that the IEPs covered school years not at issue in the present matter. I consider the IEPs provided by the district solely for the purpose of developing

promptly replied and related the information that there are no seats available for the student at the State-approved nonpublic school for the remainder of the 2018-19 school year, but that the student remains accepted at the Community School for the 2019-20 school year. The parent's counsel also relates ongoing difficulties in effecting the relief ordered by the IHO in the instant matter, and requests an order from the undersigned placing the student in the Community School, a state-approved nonpublic school, for the 2019-20 school year.

The district's remaining objection to this relief sought by the parent is the timing of the relief in that that it should be provided during the 2018-19 school year rather than in the 2019-20 school year, not that the IHO erred in ordering prospective placement in a nonpublic school as a remedy for its three-year denial of a FAPE to the student. While I agree that placement in a nonpublic school would be preferable sooner than later, the district's objection to the parent's requested modification is severely anemic in that offers no explanation whatsoever of how it would be beneficial for the student when the only other option would be for the student to continue for the time being in the placement that the IHO found was a denial of a FAPE and then watch helplessly as the order expires by its own terms while nothing to effect a change in the student's educational placement is accomplished. I find it implausible that the IHO countenanced such a pyrrhic victory.

In light of the IHO's final determination that placement in a nonpublic school was warranted as a form of compensatory education, the district's decision not to appeal from that decision, the district's agreement as to a change in schools and lack of any objection to the Community School, the CSE's recent recommendation in a IEP that the student should be placed in a State-approved nonpublic school for the student for the 2019-20 school year, as well as the parent's concern that the student may "lose the placement in the Community School for 2019-2020" unless it is ordered, I will modify the IHO's decision by directing the district to prospectively place the student in the Community School for the 2019-20 school year, unless the parties shall otherwise mutually agree to a different educational setting in writing. Independent of any statutory requirement, the CSE must reconvene by June 1, 2020 to conduct a review of the student's progress in the Community School and, if necessary, revise the educational placement for the period following June 30, 2020 in accordance with federal and State law. To be clear, I view this as an election of remedies by the parent as to the student's educational placement, subject only further modification in judicial review, and the parent has now assumed the risk that unforeseen future events may could render the relief undesirable.[24] This means that the parent cannot later return to the due process hearing system to allege new faults by the district in terms of placement in order to pursue further relief inconsistent with an educational placement at the Community School as she has requested for the 2019-20 school year in this case. The only option for further modification

compensatory services for the student with respect to the school years that are at issue in the present matter.

[24] I hope that the Community School will be able to successfully support the student as the parent envisions; however, due to the dearth of evidence in this case regarding that school and the parties' stipulations to place the student there, it is impossible to determine how likely that is to occur and I lack the authority to reopen a final determination once it has been rendered.

would be to reach a mutual agreement with the district to place the student in another setting for the time period covered by this decision.

4. Evaluations

The IHO ordered the district to conduct a neuropsychological evaluation and an assistive technology evaluation (Req. for Rev. Ex. A at p. 21). The parent asserts the IHO erred and requests an order for funding of a neuropsychological evaluation IEE and an assistive technology IEE.[25] The district asserts the IHO's order was proper with respect to these evaluations.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

In her due process complaint notice, the parent did not request a neuropsychological evaluation of the student (Dist. Ex. 1 at p. 19). Rather, the parent requested that the district arrange for a psychoeducational evaluation "to be conducted by a psychologist who has expertise in selective mutism" (id.). The parent also expressed some expectation that the district would

[25] Relatedly, the parent requests an order providing compensatory assistive technology devices or services based upon the recommendations of the yet to be completed assistive technology evaluation; however, the IHO did not directly order compensatory assistive technology, it may be premature to find that the evaluation will recommend assistive technology, and the already ordered compensatory selective mutism assessment may recommend assistive technology for the student. Accordingly, the CSE should have the first opportunity to review the results of the assistive technology evaluation and make a recommendation for assistive technology devices and services needed for the student to benefit from education (see 8 NYCRR 200.4][d][2][v][b][6]).

unlikely be able to conduct such an evaluation because it did not have a professional with the requested expertise and further requested that if the district could not conduct the evaluation it should pay for a private evaluation (id.). The IHO appears to have addressed this request by ordering both a private selective mutism assessment and a district neuropsychological evaluation (Req. for Rev. Ex. A at p. 21). As the parent did not request a neuropsychological evaluation, or that such an evaluation be conducted by an independent evaluator, the IHO cannot be faulted for ordering the district to conduct the evaluation as part of the remedial relief.

Similarly, with respect to the request for an assistive technology evaluation, the parent's due process complaint notice requested that the district conduct an assistive technology evaluation (Dist. Ex. 1 at p. 19). As the parent did not seek an assistive technology evaluation by an independent evaluator, the IHO did not err in ordering the district to conduct the evaluation.

In the event the district refuses to conduct the evaluations, or the parent disagrees with the results of the evaluations, she is encouraged to request an IEE in the manner as set forth above. Accordingly, I decline to reverse that portion of the IHO's decision as the parent requests.

5. Reimbursement for Parent Provided Services

As part of his compensatory education order, the IHO ordered the district to reimburse the parent for "the 'selective mutism' services received through [the private psychological consulting firm used by the parent] in 2016-17 and 2017-18, as well as . . . other therapies funded by the parent at her own expense, absent those reimbursements already paid by [the district]" (Req. for Rev. Ex. A at p. 21). The parent contends that this award was unclear, particularly with respect to receipts for services obtained by the parent at her own expense that the IHO did not enter into the hearing record.[26]

The district concedes that the IHO order for reimbursement of "other therapies funded by the parent at her own expense" includes all of the expenses set forth in the receipts and other materials attached to the request for review as Supplemental Exhibit B, and that therefore the IHO's decision does not need to be modified to specifically include reimbursement for those expenses (see Answer ¶ 16). In light of the parties agreement as to what the "other therapies" identified in the IHO decision include, and on the basis of the parties stipulation that the expenses in Exhibit B to the parent's request for review are included in the IHO's decision granting reimbursement relief, I will direct the district to reimburse the parent for those expenses.

VII. Conclusion

Based on the above, I find that the IHO's determinations that the district failed to offer the student a FAPE for the 2015-16, 2016-17 and 2017-18 school years are final and binding.

[26] Copies of some invoices and proof of payments are included in the hearing record (Parent Ex. CCC). The parent also submitted additional invoices during the hearing, but the IHO declined to accept them into evidence finding that the documents had limited relevance and that if the IHO awarded reimbursement for services he could direct the parent to submit invoices or proof of payment to the district at a later date (Tr. pp. 689-91, 693-94). The parent has attached copies of all of her receipts to the request for review (see Req. for Rev. Ex. B [consisting of Exhibit CCC and proposed exhibits YYY; AAAA; and BBBB]).

However, I have modified portions of the IHO's compensatory education relief for the reasons set forth above, and sustain the parent's appeal to the extent indicated.

I have considered the remaining contentions, including the parent's claim that her due process rights were impeded by the IHO's ruling that the witnesses must appear in person and the parent must attend the impartial hearing dates, and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 14, 2019 is hereby modified, to the extent that the district shall fund the student's placement at the Community School for the 2019-20 school year in accordance with the body of this decision, unless the parties determine by mutual agreement in writing to place the student in another educational placement; and

IT IS FURTHER ORDERED that the district must reconvene the CSE on or before June 1, 2020 to conduct a review of the student's progress in the Community School and, if necessary, revise the student's educational placement in accordance with federal and State law; and

IT IS FURTHER ORDERED that the district shall reimburse the parent and/or directly pay the cost of the student's receipt of a selective mutism assessment and the services recommended therein with such services to be completed by the end of the 2019-20 school year in accordance with the above;

IT IS FURTHER ORDERED that the selective mutism assessment and the services recommended therein shall be provided at the student's school and/or another location(s) as recommended by the evaluator; the recommended services may include services and supports for the student's parent[s], teachers and related service providers, shall be provided at a rate of no more than $300 per hour, and may be provided from the date of this decision through the end of the 2019-20 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the expenses listed in Supplemental Exhibit B to the parent's request for review.

Dated: **Albany, New York**
April 25, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER