The University of the State of New York

The State Education Department
State Review Officer
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No. 19-056

**Application of the BOARD OF EDUCATION OF THE MOUNT VERNON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Gina DeCrescenzo, PC, attorneys for petitioner, by Benjamin Brown, 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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2017-18 school year were not appropriate. 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 student has received diagnoses of an attention deficit hyperactivity disorder (ADHD)-combined type, trichotillomania, adjustment disorder with anxiety, oppositional defiant disorder, and has a history of mixed receptive-expressive language disorder (Dist. Exs. 5 at p. 9; 10 at p. 2; 20 at p. 3). She began receiving speech-language therapy in preschool, which continued through second grade (Dist. Exs. 3 at pp. 1-2; 5 at p. 2; 10 at p. 2). In elementary school, the student also received resource room and "tutoring" services from the district (Dist. Exs. 4 at pp. 1, 10; 5 at p. 2; 10 at p. 2). The student was previously found eligible for special education and related services as a student with an other-health impairment (Dist. Exs. 4 at pp. 1-3; 5 at p. 2). In March 2016, the CSE convened for the student's annual review and for the 2016-17 school year (sixth grade)

recommended that she receive daily resource room services and one session per week of counseling in a small group "to work on enhancing her social skills" (Dist. Ex. 6 at p. 2, 9).[1]

In fall 2016, the student began residing at a community residence due to "a high level of dysregulated behavior in the home setting" and attended a public school in the district in which the community residence was located (community residence district) (Dist. Exs. 7; 10 at pp. 1-2). At that time, the student was eligible for special education as a student with an other-health impairment related to her attention needs, and she received resource room services, "counseling supports," classroom accommodations, and testing accommodations (Dist. Ex. 10 at pp. 2-3). The community residence district convened CSE meetings in November and December 2016 due to teacher concerns regarding the student's behavior, and also conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) (id. at pp. 3-4; see Dist. Ex. 8). At the December 2016 CSE meeting, the student's classification was changed from other-health impairment to emotional disturbance, and the CSE recommended a "Therapeutic Support Program" (TSP) placement with "counseling supports," and "1:1 support throughout the school day," services that continued through the remainder of the 2016-17 school year (Dist. Exs. 9 at p. 1; 10 at pp. 3-4).

On June 9, 2017 the community residence district conducted an annual review and developed an IEP for the 2017-18 school year (Dist. Ex. 12 at pp. 4-16).[2] The June 2017 IEP recommended one period per day of a 12:1+(3:1) TSP study skills special class, direct and indirect consultant teacher services for one period per week in each of the student's core academic classes and specials, and biweekly in the student's physical education classes, one session of small group counseling per week, full-time 1:1 aide services, one counseling consultation per week, as needed bi-monthly psychiatric consultation services, and a variety of program modifications and testing accommodations (id. at pp. 9, 12-15).[3]

In August 2017, the parent re-enrolled the student in the district and provided notification that the student had previously received special education services (Dist. Ex. 11 at pp. 1-4, 7, 11-12). On August 23, 2017, the district assistant director of special education (assistant director) developed an interim program agreement (IPA), which recommended a 12:1+2 special class placement and counseling effective September 7, 2017 "until such time the CSE meets to

[1] Standardized test results from 2015 indicated that the student's overall cognitive and academic skills were generally in the low average to average range (Dist. Ex. 5 at pp. 9, 12, 14).

[2] In May 2017, the student achieved standard scores in the average range on standardized academic achievement testing (Dist. Ex. 9 at pp. 1-2). In June 2017, results of cognitive assessments indicated that the student's full scale IQ—within the very low range—was lower than prior test results, possibly due to the effect of the student's "variable attention and impulsive responding" to tasks measuring processing speed and working memory (Dist. Ex. 10 at p. 13).

[3] According to the June 2017 IEP, the student required the once daily TSP study skills special class to support progress toward her IEP goals and indicated that the class would "provide an opportunity for [the student] to receive social/emotional behavioral support from her special education teacher to increase emotion identification and regulation as well as distress tolerance" (Dist. Ex. 12 at p. 12). The CSE recommended that the student receive full time 1:1 aide services because the student "require[d] consistent supervision and support to manage social-emotional and behavioral needs across school settings" (id. at p. 13).

recommend an appropriate educational program in the least restrictive environment" (Tr. pp. 81-82; Dist. Ex. 12 at p. 1). The IPA noted that the student's prior educational program was a "12:1:2" and was only signed by the assistant director (Dist. Ex. 12 at p. 1). The student began seventh grade in the district middle school at the commencement of the 2017-18 school year (see Dist. Ex. 22).

On October 3, 2017 the CSE convened a "[r]equested [r]eview [t]ransfer [m]eeting" and recommended a 12:1+2 special class placement for all academic subjects, with one session each of individual and group counseling per week and various program modifications and testing accommodations (Dist. Exs. 14 at pp. 1, 8-10).[4] On December 7, 2017, the district convened a meeting to review and modify the student's BIP; the team determined that the student's BIP would be modified to address the student's punctuality and avoidant behaviors (Dist. Ex. 16 at pp. 1-5).

The student underwent a three-week psychiatric hospitalization in early 2018 (Dist. Ex. 19 at p. 6). Following an incident at school, in April 2018 the student was admitted to a different psychiatric hospital for one week and, upon discharge on April 23, 2018, the physicians recommended "a higher level of educational/therapeutic school setting with intensive psychological support and higher teacher:student ratio in a smaller class setting" (id. at pp. 2, 6, 11-12). The discharge report continued that "in the interim, [the student] could use [an intensive day treatment (IDT) program] that ensure[d] her academic development and psychological wellbeing at school" noting that this recommendation had been "relayed to [the district]" (id. at p. 11).

In a letter dated May 1, 2018, the student's private social worker indicated that the student's outpatient treatment team strongly recommended an IDT program "to manage her psychosocial and educational needs" (Parent Ex. C; see Tr. p. 767). The social worker opined that it was premature for the student to return to school and that she would "benefit from a strategic and planned transition back to community living and to the appropriate educational setting" (Parent Ex. C). Additionally, the social worker opined that a return to the student's current school placement "ha[d] the potential to be damaging to [the student's] emotional and psychiatric well-being" (id.). The student had not returned to school following her April 23, 2018 discharge from the hospital and was admitted to a partial hospitalization program in May 2018, where she remained for approximately 10 days (Tr. pp. 688-89).

On May 7, 2018 the CSE convened for a program review and, according to the meeting information summary attached to the IEP, discussed the student's recent hospitalizations, hospital discharge recommendations, and placement options including in-district special class settings, partial day programs, and an IDT program with home instruction (Dist. Ex. 21 at pp. 1-2). The summary indicated that the private social worker relayed to the CSE the student's need for "consistent structure," and that the CSE noted the hospital's discharge recommendation for an IDT program (id. at p. 1). For the remainder of the school year, the CSE ultimately recommended an 8:1+2 special class at the district's middle school for academic subjects, one session each of individual and small group counseling per week, and the services of a 1:1 teaching assistant for 4

[4] Although not described in the October 2017 IEP as such, the hearing record otherwise refers to the 12:1+2 special class as a therapeutic or emotional support placement (see Tr. pp. 81, 84-85, 88, 101, 143-44; Dist. Ex. 15 at p. 1).

hours and 30 minutes per day (id. at pp. 9-10). The student did not return to school for the remainder of the 2017-18 school year, rather, she received some home instruction services from the district (Tr. pp. 682-84, 90).

**A. Due Process Complaint Notice**

By due process complaint notice dated July 19, 2018, the parent asserted the district denied the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (Dist. Ex. 1 at p. 16).[5]

Regarding the 2017-18 school year, the parent contended that the district failed to implement the June 2017 IEP developed by the community residence district in that the district did not provide the student with "among other things, a therapeutic support program, a [BIP], and the support of a 1:1 aide" (Dist. Ex. 1 at p. 10, 15). The parent alleged that the June 2017 IEP had "many services and supports vital to [the student's] safety and well-being" but that the district did not implement the June 2017 IEP as "the operative IEP" at the start of the 2017-18 school year and did not create its own IEP until October 2017 (id. at p. 15). Further the parent noted that the district provided her with prior written notice that "falsely report[ed] that [the student] would continue to receive special education services as per the information provided in the out of district IEP" (id. at p. 10).

The parent argued that, when the district CSE did convene in October 2017, it had failed to appropriately evaluate the student as the evaluations were "cursory in nature" and did not "thoroughly" evaluate the student in all areas of suspected disability (Dist. Ex. 1 at p. 14). Further, the parent asserted the district failed to consider all the evaluative information before it and failed to identify all of the student's needs (id. at pp. 13-14). Next, the parent alleged that the district failed to conduct an FBA of the student or to consider positive behavioral interventions or a BIP for the student as required by State regulations (id. at pp. 14-15). Instead, the parent alleged that the district "regularly punished" the student "for her maladaptive behaviors" and called the parent "to address them" (id. at p. 15).

For the 2017-18 school year, the parent alleged that the district failed to offer an appropriate program and placement for the student (Dist. Ex. 1 at p. 15). The parent argued that the recommendations of the CSE for this school year were not reasonably calculated to enable the student to "make progress appropriate in light of [her] circumstances" (id.). The parent contended that the CSE convened by the community residence district acknowledged that the student required a therapeutic support program with "consistent 1:1 monitoring" but that "the district ignored these, and other vital recommendations, leaving [the student] vulnerable, unsafe, and uneducated" (id.). Additionally, the parent argued that the district failed to offer a program tailored to the student's individual needs as the district did not provide "'personalized instruction' and 'individualized consideration of and instruction for each child' [as] mandated by the IDEA" (id.). Further, the

[5] It appears that two pages of the parent's due process complaint notice were incorrectly paginated in that the numbered paragraphs on the page labeled as page "12" continue the paragraphs as numbered on page "10" and the paragraphs on page "11" follow those set forth on page "12" (see Dist. Ex. 1 at pp. 11-12). Notwithstanding the incorrect pagination, pages of the due process complaint notice are cited as labeled.

parent contended that the district "did not put in place any scientifically proven methodology or strategy to address [the student's] unique educational needs" (id.).

The parent argued that, during the 2017-18 school year, the CSE failed to reconvene and revise the IEP despite the student's lack of progress (Dist. Ex. 1 at p. 15). The parent also noted that, on December 20, 2017, she "requested an emergency CSE meeting to request a formal BIP and to reiterate the [student's] need for 1:1 support" but that the CSE did not convene until May 2018 (id. at p. 12 [emphasis in the original]). Further, the parent contended that the district failed to "implement, or at best inconsistently implemented" the modifications, accommodations, and related services provided for in the student's IEP (id. at p. 16). As for the period of time when the student was not attending school after mid-April 2018, the parent alleged that the district failed to deliver services or supports to the student (id. at p. 13).[6]

Regarding the 2018-19 school year, the parent alleged that as of the date of the due process complaint notice, the district had not yet offered the student a program or placement and the student was not in school and was not receiving supports or services (Dist. Ex. 1 at p. 14). Further, the parent argued that the district had not offered a program reasonably calculated to enable the student to make progress in light of her circumstances for the 2018-19 school year (id. at p. 15).

Based on the foregoing, the parent requested a finding that the district denied the student a FAPE "for at least" the 2017-18 and 2018-19 school years and significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of FAPE to the student (Dist. Ex. 1 at p. 16). The parent requested that the district be required to fund independent educational evaluations (IEEs) of the student to be performed by evaluators of the parent's choosing at the prevailing rates (id.).[7] The parent requested that the student's IEP be modified to recommend an appropriate therapeutic program, related services, and supports to be implemented in an out-of-district placement (id.).[8] Further, the parent requested compensatory education, including 1:1 academic tutoring and 1:1 counseling, as well as the cost of necessary transportation (id. at p. 17).[9]

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[6] In addition to the claims discussed above, the parent also made allegations regarding the district's non-compliance with the parent's request for access to the student's education records under the IDEA (Dist. Ex. 1 at pp. 14,16). The parent requested that the district be directed to comply with the parent's request for copies of the student's education records (id. at p. 17).

[7] The requested IEEs included: a neuropsychological evaluation, an FBA, a psychiatric evaluation, and a functional vocational assessment (Dist. Ex. 1 at p. 16).

[8] The parent also requested that the IEP be amended to include "appropriate, measurable, and meaningful goals and objectives to address the needs indicated in the private evaluations" (Dist. Ex. 1 at p. 16).

[9] Subsequent to the parent's due process complaint notice, the CSE convened on August 24, 2018 to develop the student's IEP for the 2018-19 school year (see Dist. Ex. 23). The CSE recommended an 8:1+2 special class daily in English language arts (ELA), math, social studies, and science (id. at p. 10). Additionally, the CSE recommended one 30-minute session per week of small group (5:1) counseling, one 30-minute session per week of individual counseling, and a 1:1 teaching assistant during class time and transitions (id. at pp. 10-11).

**B. Impartial Hearing Officer Decision**

After a pre-hearing conference on October 17, 2018, the parties proceeded to an impartial hearing on November 27, 2018, which concluded on March 6, 2019, after five days of proceedings (see Tr. pp. 1-854; IHO Ex. II).[10, 11]

By decision dated May 29, 2019, the IHO found that the district failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at pp. 6-11). The IHO addressed the parent's claims relating to the 2017-18 school year by organizing them into three distinct periods of time: from the beginning of the school year in September 2017 to the CSE meeting on October 3, 2017; from October 3, 2017 to the date on which the incident in school occurred in April 2018; and from April 2018 to the end of the school year in June 2018 (id.). The IHO, for the various reasons discussed in detail below, held that the student was denied a FAPE for all three time periods (id.).

For the first time period, September 2017 to October 3, 2017, the IHO held that the IPA developed by the district did not offer a "comparable service plan" (IHO Decision at p. 8). The IHO found that any comparable service plan would have required a 1:1 aide for the student and that the teaching assistants assigned to the student's special class were not a substitute for an aide (id.). The IHO noted that, although the June 2017 IEP indicated that the student required consistent supervision across all school settings, the IPA did not provide for such support (id.). The IHO also found that the IPA set forth a program that was too restrictive compared to the June 2017 IEP, in that the student's program and services as set forth in the June 2017 IEP provided that the student attend a general education setting, supplemented by a special class setting for one period per week for each subject, whereas the IPA provided that the student attend "a full-time 12:1:2 class" (id.). However, the IHO found that the IPA provided the student with comparable services "with respect to the daily study skills class" (id.).

As for the October 2017 CSE and resultant IEP, initially, the IHO found that the CSE had sufficient evaluative information about the student and that the failure to conduct an FBA did not rise to the level of a FAPE deprivation (IHO Decision at pp. 8-9). The IHO found that the CSE's recommendation that the student attend the district middle school was appropriate in comparison to a recommendation for an out-of-district placement in the community residence district (id. at p. 9). The IHO noted that the student exhibited less aggressive behaviors since attending the district middle school for the beginning of the 2017-18 school year, compared to the 2016-17 school year when she attended the community residence district (id.). However, "[w]ith the exception of the reduction in aggressive behavior," the IHO found that the student's needs had not changed from those set forth in the June 2017 IEP and that, even though the October 2017 IEP provided "appropriate academic support" and "substantial social, emotional, and behavioral support," the student required a full-time 1:1 aide "due to her elopement behavior, and her other social/emotional/behavior and dysregulation issues" (id. at p. 9). The IHO found that the "additional teacher assistant support" in the IEP was limited to core academic classes for a total of

[10] The district filed a motion to dismiss on November 27, 2018 arguing that the parent's claims regarding the 2018-19 school year should be dismissed as premature (IHO Ex. IV at p. 1). On December 4, the IHO denied the motion to dismiss (IHO Ex. VI at p. 8).

[11] The parent filed a subsequent due process complaint notice on February 6, 2019 (see IHO Ex. VII). The IHO declined to consolidate the two due process complaint notices (see IHO Ex. VIII).

less than three hours per day and "was no substitute for a full-time 1:1 aide" (id.). Without the recommendation of a full-time 1:1 aide, the IHO concluded that the student was denied a FAPE "for the period of time the October 3, 2017 IEP was in place" (id. at p. 10).

The IHO noted that the student was out of school from April 18, 2018 to the end of the school year, during which time she was hospitalized from April 17, 2018 to April 24, 2018 and then was admitted into a partial hospitalization program "at some point in May," and received instruction at the partial hospitalization program and, at some point thereafter, at home (IHO Decision at p. 10). For this time period, the IHO held that, although the two hours per day of home instruction "was an appropriate level of instruction" and that "[a]ny services that were not provided due to conflicts with the [p]arent's work schedule and the [s]tudent's limited availability" would not be attributed to the district, the district failed to offer the student a FAPE because it failed to provide the related services of counseling as part of the student's home instruction program (id. at p. 11). The IHO also noted that, although the district appropriately sent applications for the student to attend an "Intensive Day Treatment Center," the district intended that the May 2018 IEP be implemented in the interim (id. at pp. 10-11). The IHO found that the May 2018 CSE "considered appropriate and sufficient evaluations" but failed to recommend the support of a 1:1 aide for the student (id.). The IHO also held that it was not appropriate for the district to recommend that the student return to attend the same school location at which the April 2018 incident occurred (id.).

Regarding the 2018-19 school year, the IHO held that the district's failure to convene a CSE prior to August 2018 was not a denial of FAPE since an IEP was developed on August 24, 2018 prior to the first day of the 2018-19 school year (IHO Decision at p. 12). Further, the IHO declined to determine whether the recommended program and school placement for the 2018-19 school year were appropriate, noting that those issues were pending under the parent's subsequent due process complaint notice (id.).

The IHO then turned to the parent's requested remedies. The IHO determined that the parent did not have the right to the requested IEEs as the district had sufficient evaluative information regarding the student (IHO Decision at pp. 12-14). As for compensatory education, the IHO indicated that she was unable to "fashion a qualitative award" and, therefore, endeavored to calculate a "quantitative award" (id. at pp. 14-15). The IHO stated that, while it was "impossible to tell, based on the Hearing Record . . . , exactly how much instructional time the [s]tudent missed due to the lack of a 1:1 aide," an award of one hour per day of academic tutoring from September 2017 to mid-April 2018, which was about 30 weeks, was reasonable (id. at p. 16). Based on this, the IHO granted compensatory education in the form of 150 hours of 1:1 tutoring (id. at pp. 16-18). The IHO declined to grant compensatory education for any lack of instruction from mid-April 2018 to June 2018 because the IHO determined the reason for the delay in home instruction was the parent's refusal and/or the scheduling issues of the parent and student and was not the fault of the district, and because the district thereafter delivered two hours of instruction per day (id. at pp. 16-17). However, the IHO did award compensatory education in the form of 1:1 counseling services for a portion of this period of time (minus that time that the student was hospitalized or otherwise unavailable), or "two sessions per week . . . for four of the eight weeks after April 18, 2018," totaling eight sessions (id. at pp. 15, 17-18).

Next, the IHO turned to the parent's request that the CSE be required to reconvene and recommend an out-of-district therapeutic program and that a safety plan or anti-bullying plan be

added to the student's IEP (IHO Decision at p. 17). The IHO indicated that "as of the filing date," the district had not made a program or placement recommendation for the 2018-19 school year and the student's "existing IEP would not have been appropriate" (id.). The IHO also noted that the district had not identified an intensive day treatment program that would accept the student (id.). Therefore, the IHO found that "it appear[ed] that the only appropriate program for the Student [wa]s an out-of-district program" and, accordingly, ordered the CSE to reconvene and "develop an IEP for such a program" and to "consider whether or not a safety plan or anti-bullying plan is a necessary component" thereof based on a reevaluation of the student and a review of the student's "current needs and functioning" (id. at pp. 17-18). Finally, the IHO noted that, as of the end of the impartial hearing, the student was attending an out-of-district program but that she would not make a finding as to its appropriateness (id. at p. 18).

**IV. Appeal for State-Level Review**

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2017-18 school year. The district argues that the IHO erred in finding that the IPA was not comparable to the June 2017 IEP. The district contends that the teaching assistants assigned to the recommended 12:1+2 special class also accompanied the students to the mainstream classes and were comparable to a 1:1 aide. Moreover, the district asserts that the IHO improperly found that IPA was too restrictive because the parent did not raise an issue relating to the student's least restrictive environment (LRE) in the due process complaint notice.

Next, the district argues that the IHO erred by finding that the student required a 1:1 aide as there was no evidence at the time of the October 2017 CSE meeting to suggest that the student needed a 1:1 aide. The district asserts that the student did not begin to demonstrate any avoidant behaviors until November 2017 and it appropriately responded at that time by amending the student's BIP. The district contends that the IHO relied upon evidence about the student's behaviors after the October 2017 CSE to retroactively determine that the IEP was not appropriate. Further, the district asserts the IHO incorrectly stated that the May 2018 IEP did not include a 1:1 aide.

As for relief, the district asserts that the IHO erred by ordering an out-of-district placement. The district contends that the IHO's order would be effective for the 2019-20 school year and, therefore, "improperly usurped the statutory process and negated the function of the CSE" even though there was "no evidence of the [s]tudent's present level of performance and no evidence regarding the CSE recommendation for the 2019-20 school year." The district also asserts that there is insufficient evidence in the hearing record to justify an award of compensatory education. Therefore, the district argues that the matter should be remanded to the IHO to develop the record on the issue of the "amount of compensatory time, if any, owed to the [s]tudent."[12]

[12] The request for review includes a footnote regarding the April 2018 incident. While the footnote acknowledges that the allegation contained in it is not relevant to this proceeding, it is also wholly inappropriate. The district's attorney made a purported factual statement based on evidence that is not in the hearing record, in what can only be assumed as an attempt to recharacterize evidence regarding the April 2018 incident that the attorney believed prejudicial to his client's interests. As such, the footnote in the pleading is disregarded. However, the district

In the answer, the parent responds to the district's appeal and requests that the IHO's decision be upheld in its entirety. Initially, the parent notes that the district did not appeal aspects of the IHO's decision, which, therefore, "should be left undisturbed," including that the district failed to provide the student with counseling services during the period from April 18, 2018 to June 2018 and ordered compensatory counseling services and that the district needed to obtain and consider new evaluations of the student. The parent also asserts that the district failed to comply with the regulations governing practice before the Office of State Review, including that the district did not timely serve a notice of intention to seek review and that the district's attorney was not the proper individual to verify the request for review. As for the IHO's order that the CSE reconvene and place the student in an out-of-district placement, the parent argues that the district's appeal of that order is now moot due to a July 2019 IEP that recommends an out-of-district Board of Cooperative Educational Services (BOCES) placement for the student, with which the parent agrees. Additionally, the parent asserts that the district's request to remand the case to the IHO on the issue of compensatory education is without merit as it was the district's burden to present evidence on this issue in the first instance.

## 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

attorney is reminded that it is not appropriate to present unsupported information in a pleading on appeal, especially where, as here, the statement is admittedly not relevant to any point of contention in this proceeding.

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[13]

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

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. Compliance with Practice Regulations

The parent contends that the district did not timely serve the notice of intention to seek review in compliance with State regulation (see 8 NYCRR 279.2). Additionally, the parent asserts that the district's attorney was not an appropriate individual to verify the request for review as he is not "familiar with the facts underlying the appeal" as required by State regulation (8 NYCRR 279.7[b]).

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party . . . a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]).[14] A notice of intention to seek review "shall be served upon the opposing party no later than 25 days after the date of the decision of the [IHO] sought to be reviewed" (8 NYCRR 279.2[b]). "A State Review Officer may . . . review the determination of an [IHO] notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NYCRR 279.2[f]). The purpose of a notice of intention to seek review is twofold. First, in a case where the school district is the respondent, the service of a notice of intention to seek review facilitates the district's timely filing of the hearing record with the Office of State Review (see Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038). In addition, whether the respondent is a school district or a parent, the notice of intention to seek review (along with the accompanying case information statement) provides a respondent with advance notice of a petitioner's imminent challenge to an IHO's determination, which may give a respondent additional time to contemplate a position to be stated in an answer—time that is particularly valuable in light of the short time frame allotted for a respondent to answer a request for review or serve a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[a]).

Here, the IHO's decision was dated May 29, 2019 (see IHO Decision at p. 18). According to the affidavit of service, the notice of intention to seek review was served on the parent's attorney on July 3, 2019, at the same time the district served the request for review and memorandum of law, and beyond the 25 days allotted therefor by State regulation (Dist. Aff. of Serv.; see 8 NYCRR 279.2[b]). Service of the notice of intention to seek review at the same time as the request for review defeats the purpose of providing the respondent with advance notice of the petitioner's intention to appeal the IHO's decision. In this matter, however, the parent sought and was granted extensions of her time to serve the answer (see 8 NYCRR 279.10[e]); therefore, the parent had

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

[14] The Notice of Intention to Seek Review is a filing separate and apart from the "Notice of Request for Review" (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

sufficient time to articulate her position in an answer to the request for review. Further, the parent did not assert that she was unable to properly respond to the district's request for review or that she was otherwise prejudiced by the district's untimely service of the notice of intention to seek review. Accordingly, in my discretion, I will review the determination of the IHO, notwithstanding that the district failed to timely serve the parent with a notice of intention to seek review.

The parent contends the district's request for review was "verified only by counsel, not by a person familiar with the facts" (Answer at p. 2). The form requirements necessitate, in part, that "[a]ll pleadings shall be verified" (8 NYCRR 279.7[b]). The same State regulation specifically allows pleadings filed by the "trustees, the board of trustees, or the board of education of a school district"—i.e., the district—to be verified by "any person who is familiar with the facts underlying the appeal" (8 NYCRR 279.7[b]). Other than arguing a general sense of unfairness in allowing a school district's pleadings to be verified by its attorney, the parent does not point to any legal authority to support her contention that the district's attorney is not sufficiently familiar with the facts of the underlying appeal that would otherwise preclude the district's attorney from verifying the district's request for review. As acknowledged by the parent, the district's attorney represented the district at the impartial hearing and has specific knowledge of the hearing record, albeit the attorney does not have first-hand knowledge of the facts underlying the hearing record. Further, the attorney for the district states in the affidavit of verification accompanying the request for review that the "grounds [for his] belief as to all matters not stated upon [his] own knowledge are upon books, records, papers and documents of the District" (Dist. Aff. of Verification). Thus, I cannot conclude on this record that counsel for respondent lacked familiarity with the facts such that he could not verify the district's request for review. Even so, in this instance, any failure to properly verify the request for review is not grounds to reject the request for review outright and the parent's contention is dismissed.

**B. September to October 2017—Comparable Services**

The district argues on appeal that the IHO erred in finding that the program under the IPA was not comparable to the June 2017 IEP. Specifically, the district asserts that the IHO ignored testimony that the teacher assistants assigned to the 12:1+2 special class (which was attended by only two students including the student) remained with the student in the special class, as well as in the general education setting. The district also asserts that the parent did not raise a claim relating to the student's LRE in the due process complaint notice and, therefore, the IHO erred in finding the program under the IPA to be too restrictive.

State regulation provides that "[i]n the case of a student with a disability who had an IEP that was in effect in this State and who transfers from one school district and enrolls in a new school district within the same school year, the new school district shall provide such student with a [FAPE], including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law and regulations" (8 NYCRR 200.4[e][8]; see 20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]).[15]

[15] While the IHO did not specifically cite the IDEA or federal and State regulations in her decision on this topic, she did articulate the requirement that the district provide the student with comparable services upon the student's transfer into the district from another district within the State (see IHO Decision at p. 7; see also 20 U.S.C.

The United States Department of Education has stated that "'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP" (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]).

In the present matter, on August 23, 2017, the assistant director developed the student's IPA based on the June 2017 IEP developed by the community residence district's CSE (Tr. pp. 72-73, 77, 96-97; Dist. Ex. 12 at p. 1). The June 2017 IEP included the recommendations of the CSE that the student receive one 42-minute period per day of a 12:1+(3:1) TSP study skills special class, as well as direct and indirect consultant teacher services - TSP including one 40-minute period per week in each of the student's general education math, English language arts (ELA), science, social studies, and "specials" classes, and bi-weekly for 40 minutes in her physical education class (Dist. Ex. 12 at pp. 5, 12). The June 2017 IEP also indicated that the student "require[d] access to the TSP classroom (flexible setting) as needed throughout the school day to support emotional/behavior regulation throughout the school day" (id. at p. 13).[16] The IEP provided that the student receive one 30-minute session per week of both individual and small group (5:1) counseling (id. at pp. 5, 12-13). As supports for school personnel on behalf of the student, the June 2017 IEP included one 30-minute per week counseling consultation to "monitor behavior plan and support social interactions across the school day," and two hours bi-monthly as needed of psychiatric consultation services (id. at p. 14).

Additionally, the meeting information summary attached to the June 2017 IEP indicated that the June 2017 CSE discussed the student's continued need for "a high level of support in order to maintain appropriate school behavior," and "significant support with social boundaries in order to maintain appropriate interactions in the classroom . . . requiring ongoing feedback from her 1:1 aide" (Dist. Ex. 12 at p. 5). The present levels of social development contained in the June 2017 IEP stated that, due to the student's need for monitoring in the hallways and classroom settings because of high levels of dysregulation and aggressive verbalizations/physical behavior, in December 2016 the CSE recommended that she have "aide support" (id. at p. 9). The June 2017

§ 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8]). Neither party has taken issue with the IHO's use of this standard; in fact, both the district and the parent cited the applicable provision in either the IDEA or the State regulation in their post-hearing briefs to the IHO (see IHO Exs. X at p. 8; XI at p. 2). Accordingly, the district's obligation to provide the student with a FAPE for the first portion of the 2017-18 school year prior to the October 2017 IEP will be examined by applying the requirements of the comparable services provisions (see 20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8]; see also J.F. v. Byram Township Bd. of Educ., 629 Fed. App'x 235, 238 n.2 [3d Cir. Oct. 29, 2015] [holding that, "although the transfer [in that case] took place between school years," the comparable services provision would apply "because the transfer post-dated the creation of the IEP for the new school year," and, therefore, "[t]he situation . . . resembled[d] a mid-year transfer"]; Letter to Siegel, 74 IDELR 23 [OSEP 2019] [noting that, while the provisions pertaining to intra-state transfers do not "specifically address a situation where a child with a disability transfers to a new public agency during the summer," it is up to each district to determine how to comply with the requirement in the IDEA that a district have an IEP in effect for each student before the beginning of the school year], citing 20 U.S.C. § 1414[d][2][A], and 34 CFR 300.323).

[16] The June 2017 IEP also provided the following supplementary aids and service/program modifications and accommodations: constructive breaks, refocusing and redirection, special seating arrangements, additional time to complete assignments, directions broken down into steps, a copy of class notes, and visuals (Dist. Ex. 12 at p. 13).

IEP also noted that the student required "supervision during transitions and unstructured class periods to support social problem solving and behavioral regulation" (id. at p. 10). As such, the June 2017 CSE recommended that the student receive full-time 1:1 aide services because she "require[d] consistent supervision and support to manage social-emotional and behavioral needs across school settings" (id. at p. 13).

In contrast, the district's IPA consisted of a 12:1+2 special class placement along with counseling as a related service (Dist. Ex. 12 at p. 1).[17] The assistant director testified that as of August 23, 2017 when the student re-enrolled, the district's programs were already established for the 2017-18 school year and the district was unable to develop a program "pursuant to [the June 2017] IEP at that time" (Tr. p. 81; see Dist. Ex. 11).[18] Therefore, taking into account the program recommended in the June 2017 IEP and the programs available in the district, she determined that the 12:1+2 TSP at the district's middle school "was appropriate at that time" for the student (Tr. p. 81; see Dist. Ex. 12 at p. 1). The assistant director explained that the 12:1+2 TSP program: was composed of a maximum of 12 students, one special education teacher, and two teaching assistants; provided counseling; and had a level of therapeutic support from the clinical team and the amount of staff in the classroom (Tr. pp. 82, 114). At the time the IPA was developed, the assistant director was aware that only one other student, who had a 1:1 teaching assistant, was recommended to attend the 12:1+2 TSP special class; resulting in four adults and two students in the classroom (Tr. pp. 82-83, 139-40). The assistant director opined that the student did not require a 1:1 teaching assistant because of the number of adults in the classroom (Tr. pp. 83-84, 114-15).[19] The district school psychologist testified—to the best of her knowledge—that the teaching assistants in the 12:1+2 TSP special class were with the student "throughout the school day;" including being in the classroom during instruction in the "four major subjects," specials, and related services other than counseling, as well as lunch (see Tr. pp. 147, 193, 276-79).

The assistant director testified that she understood the IDEA requirements for transfer students with IEPs to be that the district must "implement the IEP to the best of [its] ability" (Tr. p. 141). The assistant director opined that the services recommended in the June 2017 IEP and the August 2017 IPA were "similar in respects to the level of adult support and the therapeutic component" (Tr. p. 88). When asked if the student received essentially full time 1:1 consistent supervision and support in the district's program, the assistant director opined that, considering the ratio in the classroom of two students to four adults, "it could be very well likely that [the student] did have individualized attention throughout the school day" (Tr. p. 105). She further stated that the responsibility to provide the student with consistent supervision and support "could be placed

[17] The assistant director also characterized the IPA placement as an "emotional support program" or ESP, a term she used interchangeably with "therapeutic support program" (Tr. pp. 143-44).

[18] The student was withdrawn from the community residence district on July 19, 2017 (Dist. Ex. 11 at p. 28). The parent testified that she was not able to register the student in the district until August 2017 "because there was no nurse there" (Tr. p. 644).

[19] The assistant director testified that the district does not employ teacher aides, only teaching assistants (Tr. p. 83).

on the teaching assistants that accompanied the [special] classroom" and would "travel the school building" with the students (Tr. p. 115).

While the assistant director may have envisioned the teaching assistants in the 12:1+2 TSP special class functioning similarly to the 1:1 teacher aide service that was included on the June 2017 IEP, the hearing record does not necessarily show that this was how the student's program was implemented, in that it contains very limited information about the supports other than counseling that the student received from September 2017 until the October 3, 2017 CSE meeting (see Tr. pp. 87-88, 103-04, 232-35, 279-80; Dist. Ex. 14 at pp. 3-6).[20, 21] In reviewing the hearing record as a whole, the most detail regarding the manner in which the student's program was implemented during the beginning of the school year prior to the October 2017 CSE meeting is found in the recording of the May 2018 CSE (see generally Parent Ex. B). During the May 2018 CSE meeting the student's special education teacher for the 2017-18 school year described that the student began the year "as a normal student" who completed work; however, the teacher indicated that this only lasted for a few days and then the student began to be late to class (id.).[22] According to the special education teacher, when questioned about where she had gone, the student responded to the teacher that she had traveled around the school building to see her counselor or her friends (id.). The special education teacher further stated that there were always two teaching assistants in the classroom, and one of them met the students at the buses every morning (id.). However, she indicated that "oftentimes" in the morning the student would ignore the directions of the teaching assistants to go to her class, "go her own way," and then be late to class (id.). When the special education teacher attempted to discuss with the student why she did not follow the teaching assistant's direction, she replied that she had "a hard time in the morning" and that she needed to be with her friends (id.). For the period of time prior to the October 2017 CSE, the special

[20] The district social worker testified the she began providing counseling services "pretty soon after" the student started attending school in the district in September 2017 (Tr. pp. 344, 349-50).

[21] The comparable services requirement imposes an obligation on the district to "provide" (or in other words, implement) a FAPE, including services comparable to those described in the student's previous IEP (see 20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8]). To the extent the district defended the parent's allegations pertaining to this time period as though they amounted to a design claim (i.e., more akin to a defense of an IEP than the implementation thereof), even assuming that this was the appropriate legal framework, the parent would still prevail in that the IPA developed by the district was lacking in procedure and content. As to procedure, State regulation requires that when the "new" district provides "services comparable" to those in the prior IEP, it must do so in consultation with the parent (8 NYCRR 200.4[e][8]). The hearing record shows that the district did not consult the parent in this case. The assistant director testified that she developed the IPA by herself, she never had a conversation with the parent about whether the parent agreed with the interim program, and she did not give the parent any other options at any point in time (Tr. pp. 93-94). The parent testified that she did not have any discussion with the assistant director before the 2017-18 school year began, no other programs were offered to her other than the 12:1+2 class, and she did not recall being asked to sign the IPA at any time (Tr. pp. 645-48; see Dist. Ex. 12 at p. 1). As to content, if the IPA were to be reviewed on its face, the lack of a 1:1 aide or reference to the role of the teaching assistants as extending beyond the special class would be enough to establish that the document failed to offer a program comparable to the June 2017 IEP (see Dist. Ex. 12).

[22] The student's special education teacher for the 2017-18 school year did not testify at the impartial hearing.

education teacher did not otherwise describe what, if any, additional support was provided during the times when the student avoided going to class or left the classroom (see id.).[23]

Therefore, given the very limited information in the hearing record about the type or level of support that the two classroom teaching assistants provided to the student to meet her need for "consistent supervision and support to manage social-emotional and behavioral needs across school settings," the hearing record supports the IHO's determination that the student was denied a FAPE from September 2017 until the October 2017 CSE meeting, as it does not show that the district implemented services comparable to those provided by a 1:1 aide (see G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *7-*8 [S.D.N.Y. Jan. 31, 2012] [finding insufficient support for a determination that a 6:1+3 special class and a 6:1+1 special class with a 2:1 shared aide constituted comparable services]).

Finally, the district argues that the IHO incorrectly determined that the IPA was "too restrictive" as the issue of LRE was not raised in the due process complaint notice. While technically the parent did not raise LRE, she did allege that the district failed to implement the June 2017 IEP (see Dist. Ex. 1 at p. 10, 15; see also 20 U.S.C. § 1415[c][2][E][i]; [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). The IHO reached the LRE issue in this context; i.e., finding that the manner in which the district implemented the student's program changed the restrictiveness of the placement compared to the June 2017 IEP, such that the district's program was not comparable to the June 2017 IEP (see IHO Decision at p. 8). Thus, LRE was not an independent issue to be determined at the impartial hearing separate from the question of comparable services, and the IHO did not treat it as such. Further, the evidence in the hearing record supports the IHO's finding that the IPA placement was more restrictive in nature than the placement recommended in the June 2017 IEP (Tr. p. 275; compare Dist. Ex. 12 at p. 1; with Dist. Ex. 12 at pp. 12-13). For example, the June 2017 IEP provided one period per day of a special class setting (with flexibility for more depending on the student's needs) and general education classes for all academic instruction and specials (Dist. Ex. 12 at p. 12). In contrast, the hearing record shows that the IPA consisted of special class placements for all academic subjects (Tr. pp. 85; Dist. Ex. 12 at p. 1). The IPA placement significantly limited the student's access to non-disabled peers relative to the placement contemplated in the June 2017 IEP developed by the community residence district (8 NYCRR 200.6[a][1]).

[23] The hearing record indicates that, at some point, there was a teaching assistant assigned to "shadow" the student; however, there is no indication that this occurred prior to the October 2017 CSE meeting (see Tr. pp. 281, 368, 378, 390, 425, 656, 727-28). Likewise, while it is unclear what timeframe she was referencing, during the May 2018 CSE meeting, the special education teacher briefly indicated that one of the teaching assistants at times would "follow" or "shadow" the student when she left the classroom, but that sometimes the student would "take off" and "go elsewhere" out of the room (Parent Ex. B). This evidence is too ambiguous as to the timeframe and the described implementation of the "shadow" teaching assistant to overcome the overall lack of evidence in the hearing record regarding the implementation of the student's program during the beginning of the school year prior to the October 2017 CSE meeting.

Therefore, the evidence in the hearing record or lack thereof, regarding the program provided to the student from September 7, 2017 to October 3, 2017, shows that there is no reason to disturb the IHO's finding that the student was deprived of a FAPE during that timeframe.

**C. October 2017 IEP—1:1 Support**

The district argues that the IHO erred in finding that the October 2017 IEP failed to offer the student a FAPE because it did not provide for a 1:1 aide. The district asserts that, as of the October 2017 CSE meeting, there was no evidence suggesting that the student required a 1:1 aide, nor was there evidence of eloping behavior at that time, and it was "improper" for the IHO to cite evidence arising after the CSE meeting to retroactively determine that the October 2017 IEP was not appropriate.

While not set forth as a special factor in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios,[24] how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012, contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

[24] In a Question and Answer document—published subsequent to the promulgation of the provision in State regulation requiring CSEs to consider certain factors before offering a student 1:1 aide services—it was further explained that "[i]n classrooms that have a high staff-to-student ratio, or students with fewer needs, existing staff may be able to support a student with increased needs, and a one-to-one aide may not be necessary" ("Amendment of Sections 200.4, 200.16 and 200.20 of the Commissioner's Regulations Relating to Recommendations for One-to-One Aides for Preschool and School-Age Students with Disabilities and Preschool Special Education Programs and Services: Questions and Answers," at p. 1, Office of Special Ed. [June 2016], available at http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-preschool-regs.pdf).

According to the meeting information summary attached to the October 2017 IEP, the CSE meeting was a requested review for a transfer student, at which the parent reported that the student did not utilize her skills, she had difficulty retaining information and appeared to be very disconnected, and that she displayed significant behavioral issues, was impulsive, and could be aggressive (Dist. Ex. 14 at p. 1). The meeting information summary further reflected reports from the parent that the student had a history of fire-setting behaviors and that she received outside therapy (id.). Finally, the parent described that the student wanted to succeed academically but she had difficulty with reading comprehension, formulating sentences and math, and she opined that the student's anxiety and impulsive behaviors impacted her learning (id.). The student's then-current special education teacher reported to the October 2017 CSE that: the student was interested in learning, but her retention was inconsistent; she was eager to answer questions but needed more time to process information; she was distracted by any action within the classroom and needed to work on staying focused on the task at hand; homework was not always completed; and "simple things c[ould] set [the student] off"; and she would often "shut down" when she did not get her way (id.). Additionally, the special education teacher reported that the student occasionally was late to class and fell asleep during class (id.).

The October 2017 IEP indicated that it was based upon evaluation and progress reports, some of which were included in the hearing record (compare Dist. Ex. 14 at p. 2, with Dist. Exs. 8 at pp. 4-5; 10). Specific to the issue of the student's behavior and need for 1:1 support, the November 2016 BIP identified the target behaviors in need of remediation as physically/verbally aggressive behaviors (hitting, kicking, pushing peers or making inappropriate or threatening verbalizations) and non-compliance/avoidance behaviors (leaving the classroom without permission, sleeping in class) (Dist. Ex. 8 at p. 4). According to a June 2017 psychological evaluation report, during the 2016-17 school year while attending the community residence district, the student's teachers noted concerns related to social problem solving, withdrawal/avoidance behavior in the classroom (e.g., attempting to leave the classroom and falling asleep), and "a high level of disruptive behavior in the hall" (Dist. Ex. 10 at p. 3). The report continued that, following a CSE meeting in November 2016, the student engaged in "multiple incidents of aggressive verbalizations and physical aggression" (id.). Per the report, in December 2016, "the CSE reconvened due to continued concerns related to [the student's] need for consistent supervision in the hallway," and the district attempted to "increase supervision at the building level and change [the student's] schedule to align her with students with additional support" (id.). However, the report indicated that "[e]ven with this support in place, [the student] continued to show difficulty managing her impulses and behavior," in that she "frequently needed feedback on her behavior across settings within the building" (id.). According to the report, at that time the CSE had also recommended that the student receive "1:1 support throughout the school day due to her frequent need for redirection related to behaviors that impact[ed] both her learning and the learning of others" (id.).

The June 2017 psychological evaluation report also included results of an administration of the Behavior Assessment System for Children (BASC-3) to the parent and the student's then-current special education teacher (Dist. Ex. 10 at pp. 9-11). Both the parent's and the teacher's scores indicated that the student exhibited "a high level" of externalizing behaviors across settings, specifically, that she was rated in the clinically significant range "across behaviors in the area of aggression and conduct problems" (id. at pp. 9-10). The evaluator concluded that the student

needed support "developing greater self-monitoring, impulse control and emotional regulation" (id. at p. 11).

Review of the June 2017 IEP shows that the present levels of performance were copied verbatim into the October 2017 IEP with few exceptions (compare Dist. Ex. 12 at pp. 6-10, with Dist. Ex. 14 at pp. 2-6). Notably, the October 2017 IEP present levels of performance—which are not at issue on appeal—do not reflect information regarding the student's performance from the time she began attending the district's program beginning in September 2017 until the October 3, 2017 CSE meeting (compare Dist. Ex. 12 at pp. 6-10, with Dist. Ex. 14 at pp. 2-6).

The October 2017 IEP present levels of cognitive performance reflected results from a June 2017 administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), which showed that the student's full-scale IQ (SS=73) fell within the very low range and was lower than the results obtained in a previous assessment (SS=84) (Dist. Ex. 14 at p. 4; see Dist. Ex. 10 at pp. 1, 5). According to the IEP, the evaluator had suggested that the full-scale IQ be interpreted with caution due to the variability across test administrations, specifically indicating that processing speed and working memory tasks may have been impacted by the student's variable attention and impulsive responding (Dist. Ex. 14 at p. 4; see Dist. Ex. 10 at p. 5). The IEP also indicated that "current levels of emotional dysregulation and variability in [the student's] overall attention [were] having a more significant role in distracting her attention," and that results of behavior scales completed by the parent and the student's teacher showed "a continued need to increase self-monitoring and regulating emotions, impulses, and acting out behaviors" (Dist. Ex. 14 at p. 4).

Review of the October 2017 IEP showed that it provided details regarding the student's present levels of reading, mathematics, and writing performance (see Dist. Ex. 14 at pp. 3-4). With regard to study skills, the IEP present levels of performance reflected that the student's focus and attention had been inconsistent, which significantly impacted her performance in that she had become more distracted than usual, and could not stay on task without continued redirection, especially when processing any multi-step task (id. at p. 4). According to the IEP: the student had difficulty following through on verbal directions; during transitions she may have appeared on task but did not always attend to directions; she tried to manage too many things at once and became "side tracked," and she was easily distracted by typical classroom sounds and activities (id.). Refocusing and redirection was needed for the student to manage her school materials and to complete assignments, and she required reminders to read directions carefully and check work for accuracy (id.).

Turning to the present levels of social development, the October 2017 IEP described that the student exhibited "high levels of emotional dysregulation and difficulty maintaining behavioral/academic progress in mainstream classes" and that the CSE had recommended the student receive aide support "[d]ue to the need for monitoring in the hallways and classroom settings based on high levels of dysregulation and aggressive verbalizations/physical behavior" (Dist. Ex. 14 at p. 5).[25] The IEP also described that the student could identify stressors at home

[25] The failure of the October 2017 CSE to update the student's present levels of performance is especially concerning here, as the student's social and behavioral development were a major area of need, and yet the IEP continued to describe the student's levels as exhibited when she attended the program and placement in the

and worries that were triggers for acting out in school but that her ability to consistently link a trigger to behavior was "gradual" (id.). The present levels of social development indicated that the student continued to benefit from ongoing discussion about the link between thoughts, behavior, and actions, and that she was more consistently maintaining expected school behavior and complying with teacher directives, although she continued to require frequent and ongoing feedback and reminders of behavior expectations (id.). The IEP reflected that the student was able to identify her physical space from others' as being appropriate or "too close," but was not yet translating that knowledge to maintain an appropriate distance (id.). She benefitted from pre/post teaching of expected social behaviors in a given situation and targeted instruction to improve her emotional regulation, distress tolerance, self-monitoring, and social pragmatics (id.). The IEP present levels of performance indicated that the student was "more consistent in her ability to access strategies to maintain expected in[-]school behavior with external supports," including prompting and pre/post teaching (id.). Additionally, the IEP indicated that she needed: frequent and immediate feedback about her interactions with peers, intervention to increase coping strategies for managing feelings of anxiety and frustration due to academic and social demands, support to stop and think about potential courses of action prior to taking action, access to therapeutic supports throughout the school day in addition to counseling, a flexible location available during times of heightened dysregulation, and support with social problem solving and behavioral regulation (id. at pp. 5-6). Finally, the October 2017 IEP indicated that the student "require[d] a behavior intervention plan to address aggressive and eloping behaviors" (id.).

The district argues that, at the time of the October 2017 CSE meeting, there was no evidence that the student required a 1:1 aide. As for the student's performance in the district placement at the beginning of the school year, the IHO noted that the October 2017 CSE "had the benefit of knowing how the [s]tudent performed in the 12:1+2 program," and that "by all accounts, she adapted well to the program and was beginning to make progress" (IHO Decision at p. 8). Additionally, the district's social worker opined that the student had made a "pretty smooth transition into the middle school" and indicated that during the first marking period she was not engaging in "many major significant behavioral issues" and was going to her classes (Tr. pp. 366, 413-14). Despite these positive endorsements about the student's behavior at the beginning of the school year, the lack of this type of information in the present levels of performance and the dearth of information in the hearing record about the discussion, if any, the CSE had about the student's in-school behaviors up until the CSE meeting and potential need for 1:1 assistance, constrains the district to the performance levels reflected in the October 2017 IEP, described above. This includes a description of the student's need that would warrant the CSE's recommendation for the services of a one-to-one aide consistent with State regulation and guidance, including the explicit statement of the student's need for consistent support to remain on task and to transition and her need for aide support for monitoring in the hallways and classroom settings (Dist. Ex. 14 at pp. 4-5; see 8 NYCRR 200.4[d][3][vii]; "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at p. 1 & Attachment 2). Accordingly, the hearing record supports the

community residence district during the 2016-17 school year (see Dist. Ex. 14 at p. 5).

IHO's determination that the October 2017 CSE should have recommended the services of a 1:1 aide or teaching assistant for the student.[26, 27]

### D. Mid-April 2018 through June 2018

As for the final period of time after the student stopped attending school in April 2018 through the end of the school year, the district has not appealed from the IHO's finding that the student was deprived of a FAPE due to the district's failure to provide counseling services (see IHO Decision at p. 11; see generally Req. for Rev.). Further, the district did not appeal the IHO's determination that it was not appropriate for the May 2018 CSE to recommend that the student return to attend the same school location at which the April 2018 incident occurred (IHO Decision at pp. 10-11; see generally Req. for Rev.). Accordingly, the IHO's determinations on these issues have become final and binding on both parties and will not be further reviewed on appeal (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[28, 29]

### E. Relief Awarded by IHO

#### 1. Compensatory Education

The IHO granted 150 hours of 1:1 academic tutoring and 8 hours of 1:1 counseling services as compensatory education (IHO Decision at pp. 17-18). As with the issue of the district's failure to provide counseling services to the student after April 2018, the district has not appealed the IHO's award of compensatory counseling services aligned with this finding (see IHO Decision at pp. 15, 17-18). However, on appeal, the district asserts that the record does not support the award of compensatory services in the form of tutoring as the parties did not present evidence on the

[26] Additionally, contrary to the social worker's opinion, the parent testified that, prior to the October 2017 CSE meeting, the student "wasn't doing too well" in school, and that she had received phone calls from the district about the student's behaviors such as eloping and fighting (Tr. pp. 651-55, 657). The parent further testified that she requested 1:1 support for the student at the October 2017 CSE meeting (Tr. pp. 656-57).

[27] To the extent the district argues that the IHO improperly relied on evidence about the student's behaviors after the October 2017 CSE to retrospectively evaluate the sufficiency of the October 2017 IEP (see R.E., 694 F.3d at 186-88), no such evidence has been relied upon herein to conclude that the hearing record supports the IHO's conclusion that the October 2017 IEP failed to offer the student a FAPE.

[28] Nor did the parent cross-appeal the IHO's findings that the district had sufficient evaluative information at the October 2017 CSE meeting, that the lack of an FBA at the October 2017 CSE did not rise to the level of a FAPE deprivation, or that the parent was not entitled to the requested IEEs (IHO Decision at pp. 8-9, 12-14). These decisions by the IHO are also final and binding on both parties.

[29] Relevant to this time period, the district points out that the IHO incorrectly found that the May 2018 CSE did not recommend a 1:1 aide (Req. for Rev. at p. 6; IHO Decision at p. 11). However it is of limited consequence. While the district is correct that the May 2018 CSE recommended a 1:1 teaching assistant for the student for 4 hours and 30 minutes daily (Dist. Ex. 21 at p. 10), the district did not challenge the IHO's determination that the May 2018 IEP did not offer the student a FAPE and merely pointing out this one error on its own is insufficient to challenge the IHO's conclusion that the district denied the student a FAPE from mid-April through the end of the school year.

issue and, therefore, to the extent compensatory education is deemed necessary, the issue should be remanded for further record development by the parties.

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 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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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"]).

Here, the district failed to provide a FAPE to the student for the 2017-18 school year. The district's argument that the case should be remanded to the IHO for development of the record on the issue of compensatory education is without merit. The district was on notice that the parent was seeking compensatory education as the parent made the request in her due process complaint notice (Dist. Ex. 1 at p. 17). The district is required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing

on the district (Educ. Law § 4404[1][c]), the district had an opportunity during the impartial hearing to set forth its position regarding the appropriate compensatory education remedy. The district did not alternatively assert any arguments or provide evidentiary support on the issue of what, if any, compensatory education award would be appropriate to remedy its denial of FAPE, despite having a full and fair opportunity to be heard at the impartial hearing. On appeal, beyond requesting remand, the district merely asserts that compensatory tutoring is not warranted because of the district's belief that when the student left class to see a district staff she was "assessed and directed back to class" and there was "no evidence in the record showing how much time she left class without going to see a counselor" (Req. for Rev. at pp. 8-9). Any lack of evidence on this point falls on the district. Further, the IHO's calculation of an award of compensatory services appears reasoned and equitable based on the evidence available to her: she opted to apply a quantitative approach based on an approximation related to the basis for her finding that the district denied the student a FAPE (the lack of 1:1 support)—rather than deferring to the parent's relatively unsupported request for 1,000 hours of services—and constrained the time frame to which the award referred based on a review of equitable factors (see IHO Decision at pp. 16-17). Thus, the IHO reasonably determined the amount of compensatory education based on the record before her, and I see no reason to disturb the IHO's findings.

**2. Direction for an Out-of-District Placement**

The district argues that the IHO improperly ordered the CSE to reconvene and recommend an out-of-district placement, alleging that this order improperly usurped the role of the CSE. The parent contends that the IHO's order for an out-of-district placement was not outside of the scope of her authority, but that the issue is now moot because the parties agreed on a new placement for the student.

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

At this point, the 2017-18 school year—the school year at issue in this matter—is over (and, in fact, it was already over as of the date of the parent's July 19, 2018 due process complaint notice) (see Dist. Ex. 1), and, in accordance with its obligation to review a student's IEP at least annually, the CSE did convene on August 24, 2018, to revise the student's program and develop an IEP for the 2018-19 school year (see Dist. Ex. 23), which is or was the subject of another impartial hearing (see IHO Ex. VII; see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). Moreover, according to the parent, the CSE has already convened to develop an IEP for the student for the 2019-20 school year, and the parent is in agreement with the IEP developed at

this meeting (Answer at p. 3). This course of events demonstrates why awards of prospective relief are often disfavored. As such, the more 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 and, based on the parties' apparent accord that the IHO's decision should be reversed—or, at least, is no longer necessary—the IHO's decision is modified on this point.

## VII. Conclusion

As discussed above, the evidence in the hearing record supports the IHO's determination that the district deprived the student of a FAPE for the 2017-18 school year and that the student was entitled to compensatory education in the amount calculated by the IHO; however, the IHO's direction that the CSE reconvene and recommend an out-of-district placement for the student is reversed.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that that the IHO's decision dated May 29, 2019, is modified by reversing that portion which ordered the CSE to reconvene and recommend an out-of-district placement for the student.

**Dated:** **Albany, New York**
**September 23, 2019**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**