The University of the State of New York

The State Education Department

State Review Officer

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No. 19-119

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

Appearances:

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

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

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the parent) appeals from that portion of the decision of an impartial hearing officer (IHO) which denied her request for an order directing respondent (the district) to modify its individualized education services program to continue providing special education services consistent with a prior individualized education program. 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 hearing record is sparse regarding the student's educational history. The evidence in the hearing record consists of seven exhibits, including two copies of the due process complaint notice and two copies of the student's April 2019 individualized education services program (IESP) (see Parent Exs. A-C; Dist. Exs. 1-4). At the time of the impartial hearing, the student was five years old and had been parentally placed in a nonpublic school.[1] A bilingual psychological

[1] According to the hearing record, the student was no longer attending the nonpublic school referenced in the due process complaint notice having been recently parentally placed in another nonpublic school with a smaller class size (Tr. pp. 8-9).

evaluation of the student was conducted on July 3, 2017, when the student was 2 years and 9 months old (Dist. Ex. 3 at p. 1).[2] According to the evaluation report, the student had received a diagnosis of autism spectrum disorder and had been referred for evaluation due to concerns related to speech-language development, gross and fine motor skills, sensory issues, cognitive functioning, social/emotional functioning and her overall functioning (id.). The evaluator administered the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) and conducted a clinical interview (id.). Additionally, the evaluator conducted a parent interview and obtained rating scales in the areas of adaptive behavior and autism with the parent as the reporter (id. at pp. 1, 4, 5, 6-7).

According to results from the SB-5, the student's receptive language skills presented as "questionable" with relative weaknesses and delays noted in most of the nonverbal/visual motor skill tasks, and some of the verbal skill tasks (id. at p. 7). The evaluator also found noteworthy the lack of clarity in the student's speech, as well as her sporadic eye contact during the testing session (id.).

The parent completed the Vineland Adaptive Behavior Scales, Interview Edition (Vineland-Interview), reporting that the student's socialization, communication, daily living and motor skills fell within the mild deficit ranges (Dist. Ex. 3 at p. 8). Parental responses to the Vineland-Interview described the student as a "'generally happy, yet quiet child who does not speak and tends to shut down within the public settings'" (id.). The parent further reported that the student was capable of following directions, however, she tended to withdraw and ignore other people, and also exhibited a poor attention span (id.). During group activities, the student reportedly failed to actively or verbally engage in tasks (id.). In the area of social functioning, the parent reported that the student did not know how to play with toys, "will simply stack items or will line up objects," and did not engage in any form of meaningful or imaginative play without 1:1 intervention from an adult, and often would not interact despite adult intervention (id.).

The parent also reported that the student had little interest in peers and did not know how to engage with them (Dist. Ex. 3 at p. 8). Of particular concern to the parent was the student's difficulty with expressive language, processing, intelligibility and her overall inability to communicate her needs either verbally or nonverbally (id.). According to the parent, the student would tantrum and was extremely difficult to calm when she was unable to communicate or was not understood by others (id.). The parent also indicated sensory needs such as sensitivity to clothing textures, noise, changes in environment, touching and biting items and other sensory seeking behavior (id.).

The student reportedly exhibited difficulty performing gross and fine motor skill tasks and was described as having overall low muscle tone, an awkward gait and as "bowlegged," a constant tendency to trip and fall while walking and while running, poor balance and posture, an inability to jump, significant difficulty ascending and descending the stairs and must be carried, an awkward

[2] In the heading of the July 3, 2017 evaluation, the student's chronological age is listed as 2 years and 9 months (Dist. Ex. 3 at p. 1). In the reason for referral section the student's age is listed as 2 years and 8 months (id.). The evaluation does not indicate any specific assessment dates, listing only an evaluation date of July 3, 2017; as of that date, the student was 2 years and 10 months old.

grasp of a crayon, difficulty coloring with a crayon, an inability to dress and to undress, and an inability to feed herself using utensils (Dist. Ex. 3 at p. 8).

According to the parent's responses to the Childhood Autism Rating Scale-Second Edition (CARS-2), the student exhibited moderate to severely abnormal relationships with others, moderate and severely abnormal use of imitation, moderately abnormal emotional response, and moderately abnormal body use, moderately abnormal interest in and use of toys and objects, moderate to severely abnormal adaptation to change, moderate to severely abnormal visual response, moderate to moderately abnormal response to taste, moderately abnormal use of verbal communication, moderate to severely abnormal and moderately abnormal activity levels, and moderate to severe features related to autism spectrum disorder were reported (Dist. Ex. 3 at p. 8; see also Parent Ex. B at p. 2).

In the summary section of the July 2017 evaluation report, the evaluator stated that further assessment was necessary to address the student's speech-language delays, sensory needs, and gross and fine motor difficulties (Dist. Ex. 3 at p. 9). The evaluator concluded that the student's failure to follow directions, weak basic concept formation, poor focusing abilities and play skills, lack of social reciprocity, and "failure to communicate and to socialize in the proper fashion with her teachers and her peers" severely impeded her ability to function effectively within the classroom setting (id.). The evaluator recommended a speech-language evaluation, educational evaluation, classroom observation, physical therapy (PT) evaluation, and an occupational therapy (OT) evaluation and noted that all recommendations were "pending CPSE review" (id.).

Little information is known related to the 2017-18 school year, which, chronologically speaking, would have been the student's first year to receive services as a preschool student with a disability. It appears that the student received special education itinerant teacher (SEIT) services of unknown frequency and duration, PT two times per week for 30 minutes and OT three times per week for 30 minutes, and there may or may not have been other programming (Parent Ex. C at pp. 4, 6, 8). A Committee on Preschool Special Education (CPSE) convened on August 31, 2018 and continued to find the student eligible for special education and related services as a preschool student with a disability (Parent Ex. C at p. 1).[3] The August 2018 CPSE recommended bilingual 12-month services consisting of ten hours per week of individual, direct SEIT services, two hours per week of indirect SEIT services, group speech-language therapy four times per week for 30 minutes per session, individual OT three times per week for 30 minutes per session, individual PT once per week for 30 minutes and parent "training" once per month for 60 minutes (id. at pp. 1, 17, 18).

In planning for the 2019-20 school year (kindergarten), a CSE convened on April 16, 2019 to develop an IESP for the student (Parent Ex. B at pp. 1, 16). The April 2019 IESP indicated that the CSE considered the July 2017 psychological evaluation (Dist. Ex. 3), a June 21, 2017 bilingual educational evaluation, a February 7, 2017 supplemental bilingual psychological evaluation, a

[3] Little of the student's educational history is available. The August 2018 IEP section on other programs considered reported a "[c]ontinuation of plan without changes"; this statement along with reports from the student's current providers would indicate that the August 31, 2018 CPSE meeting was not the result of an initial referral (Parent Ex. C at pp. 1, 3-8).

March 19, 2019 classroom observation, a March 14, 2019 SEIT progress report, a March 6, 2019 speech-language therapy progress report, a June 30, 2018 OT progress report, and a June 15, 2018 PT progress report (Parent Ex. B at pp. 1-2, 5).[4] According to assessment information included on the April 2019 IESP, the student's results on the Developmental Assessment of Young Children-Second Edition (DAYC-II) placed her within the average range in cognitive ability, the below average range in the area of communication, the very poor range in the social/emotional domain, and within the poor range in the area of adaptive behavior (id. at p. 2). The April 2019 IESP further reflects that the student's performance on the Adaptive Behavior Assessment System-Second Edition (ABAS-II) placed the student within the extremely low range in each domain (id.). Notes from the March 19, 2019 classroom observation indicated that the student demonstrated well-moderated behavior throughout the observation, appeared engaged and actively participated in the arts and crafts center (id.). The student reportedly exhibited adequate fine motor skills when drawing and cutting (id.). The observer also reported that the student demonstrated interest in interacting with a peer and a teacher's assistant (id.). The student's SEIT participated in the April 2019 CSE meeting and prepared a March 14, 2019 progress report (id.). According to the April 2019 IESP, the student's SEIT reported that the student had made a lot of progress since September and was receiving seven hours per week of SEIT services (id.).

The April 2019 CSE found the student eligible for special education and related services as a student with autism (Parent Ex. B at p. 1). The April 2019 CSE recommended 10-month services consisting of seven periods per week of group, direct special education teacher support services (SETSS), individual speech-language therapy three times per week for 30 minutes each session, group speech-language therapy one time per week for 30 minutes, individual OT three times per week for 30 minutes each session, individual PT two times per week for 30 minutes each session, parent counseling and training four times per year for 60 minutes each session, and group counseling services one time per week for 30 minutes (id. at p. 13).[5]

A. Due Process Complaint Notice

In a due process complaint notice dated August 8, 2019, the parent alleged that the student was denied a FAPE for the 2019-20 school year (Parent Ex. A p. 4). The parent contended that the district failed to recommend any individualized special education instruction for the student (id.). Specifically, the parent alleged that the student required individual 1:1 "SEIT/SETSS," 1:1 specialized instruction, and full or part time placement in a smaller class environment (id.). The parent also claimed that the district failed to properly evaluate the student prior to removing individual SEIT services and further failed to evaluate the student in all areas of disability, failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (id. at pp. 4-5). Additionally, the parent asserted that the April 16, 2019 CSE was not

[4] Other than the July 2017 psychological evaluation, none of the assessment material considered by the April 2019 CSE and included on the April 2019 IESP was admitted as an individual exhibit at the impartial hearing.

[5] There is no evidence describing the SETSS services that the April 2019 CSE contemplated the student was to receive as recommended in the April 2019 IESP. In the IESP the services are described as being provided in Yiddish as both a "direct service" and a "group service" and that it will be provided in a "separate location" (Parent Ex. B at p. 13). The term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]).

properly comprised and the April 2019 IESP failed to describe the student's needs, academic deficits, or abilities in any meaningful detail and that the goals in the IESP were not designed to effectively address the student's needs, were not measurable, and were too vague "to guide instruction and intervention, evaluate progress, or gauge the need for continuation or revision" (id.). The parent also alleged that the district failed to provide prior written notice or a procedural safeguards notice (id. at p. 5). As pendency, the parent requested provision of the services set forth in an August 31, 2018 IEP, which consisted of 10 hours per week of direct SEIT services, 2 hours per week of indirect SEIT services, individual OT three times per week for 30 minutes each session, individual PT once per week for 30 minutes, group speech-language therapy four times per week for 30 minutes each session, and one hour per month of parent training to be implemented at the student's NPS (id.). The parent further alleged violations of the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act of 1974 (section 504) and State law (id.).

As relief, the parent requested findings that the parent's right to participate in the development of the student's IESP was impeded and that the student was denied a FAPE and educational benefits for the 2019-20 school year (Parent Ex. A at pp. 5-6). The parent further requested an independent neuropsychological evaluation, an appropriate FBA and an appropriate BIP (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing was convened and concluded on September 17, 2019 (see Tr. pp. 1-58). On September 20, 2019, the IHO issued an interim decision which determined that the student's pendency placement was the program set forth in the student's August 31, 2018 IEP (Interim IHO Decision at p. 2). As pendency, the IHO ordered the district to provide 10 hours per week of direct individual SEIT services, two hours per week of indirect SEIT services, group speech-language therapy four times per week for 30-minute sessions each, individual OT three times per week for 30-minute sessions each, individual PT one time per week for a 30-minute session and four hours per year of parent training beginning on September 1, 2019 (id.).

In a final decision dated October 17, 2019, the IHO determined that the district failed to provide any proof that the student was offered a FAPE for the 2019-20 school year (IHO Decision at p. 4).[6] The IHO further found that the district failed to "present an affirmative case at hearing", failed to discredit the parent's witnesses through cross-examination, and failed to make a closing statement (id.). Next addressing the parent's requested relief, the IHO determined that the parent's two witnesses provided insufficient evidence of the student's unique needs and did not establish a basis to "award a continuation of [the student's] preschool IESP [sic] services" (id. at pp. 4-5). The IHO noted that the only evaluation in the hearing record was conducted in 2017, and that overall, the record was insufficiently developed "to decide upon an appropriate placement" (id. at p. 5). The IHO also indicated that there was no evidence that the student's preschool program would still be appropriate for the student and further that the student's placement had changed "since last year" with no evidence provided on the "impact of the change upon the formulation of a new IESP" (id.).

[6] The IHO's written decision is unpaginated and, for purposes of this decision, the cover page is treated as page one.

The IHO determined that updated testing needed to be conducted in order to develop an appropriate IESP (id.). Consistent with the parent's request in the due process complaint notice, the IHO ordered the district to fund an independent neuropsychological evaluation, develop an FBA and—if indicated by the FBA —develop a BIP, and to reconvene a CSE within 15 days of receipt of the results of the evaluations to develop an appropriate IESP (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by failing to order a continuation of the services set forth in the student's preschool IEP (August 2018 IEP), which the IHO had determined constituted the student's pendency placement.[7] The parent also contends that the IHO shifted the burden to the parent to demonstrate the appropriateness of her requested relief. The parent further alleges that the IHO's failure to order the continuation of services while the student was evaluated would result in the implementation of the April 2019 IESP, which the IHO had found inappropriate. As relief, the parent requested that the student continue to receive services in accordance with the August 2018 IEP until such time as the new evaluations are completed and the CSE reconvenes to develop an appropriate IESP.

In an answer, the district denies the material allegations of error in the IHO's decision and argues that the IHO's decision should be upheld in its entirety. The district also asserts that the amended request for review should be dismissed for failing to comply with the form requirements for pleading. The district contends that the parent's argument—that failing to award her requested relief would result in the implementation of the IESP that the IHO determined had been a denial of a FAPE—is irrelevant to whether any evidence supported the parent's request to continue the services set forth on the August 2018 IEP. The district next argues that the IHO correctly found that there was no evidence presented by the parent that the August 2018 IEP was appropriate given the age of the student and further that the student was no longer eligible to receive SEIT services having turned five at the beginning of the 2019-20 school year. The district alleges that the parent's claim that the IHO improperly shifted the burden of proof to the parent to demonstrate the appropriateness of her requested relief should be dismissed, arguing that the parent bears the burden of proof regarding the appropriateness of a unilateral placement. The district further argues that the parent's claim that the IHO's failure to order continuation of the August 2018 IEP would result in the implementation of the April 2019 IESP—which improperly changed the student's individual SEIT recommendation from 12 hours per week to seven hours per week of group SETSS—should be dismissed. The district contends that it was the parent's burden to demonstrate the appropriateness of their unilateral selection of services.

[7] In the due process complaint and the amended request for review, the parent references the student's April 2019 IEP, rather than IESP. The student was parentally placed in a nonpublic school for the 2019-20 school year at issue and the student's program recommendations were set forth on an IESP developed at the April 16, 2019 CSE meeting (see Parent Ex. B; Dist. Ex. 1).

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

As noted above, the IHO determined in her decision that the district failed to offer the parentally placed student a FAPE and referenced the provisions of IDEA (IHO Decision at p. 4). As further noted above, the student has no individual right to receive services or a due process hearing under federal law.[8] Instead, the IHO should have noted that this dispute arises under similar, but distinct provisions of the State's dual enrollment law and, consequently, for purposes of this decision I will refer to the student's right to "equitable services" under State law. A parent of a New York State resident student with a disability who is placed in a nonpublic school and who seeks to obtain educational "services" for his or her child may file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[9] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[10] Additionally, unlike the provisions of the IDEA, section 3602-c

[8] The State's dual enrollment statute does not explicitly state that district's offer students a FAPE, rather the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (Educ. Law § 3602-c[2][b][1]). During the hearing the IHO asserted that this matter was a "FAPE case", additionally the parties reference a FAPE standard, rather than equitable services in their pleadings (Tr. pp. 8, 9; see Parent Ex. A at pp. 4, 5, 6; Am. Req. for Rev. at pp. 1, 3; Ans. at pp. 5, 6; Parent Mem. of Law at pp. 2, 3, 7, 9, 10).

[9] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)] (Educ. Law § 3602-c[1][a], [d]).

[10] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter

provides that a parent may seek review of the recommendations of the CSE pursuant to the impartial hearing and State-level review provisions of Education Law § 4404 (id.).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the amended request for review must be dismissed for failing to comply with the form requirements for pleading (see 8 NYCRR 279.8[c][2]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

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

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

Moreover, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

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378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The district correctly contends that the parent's amended request for review does not comply with all of the form requirements for pleadings set forth in State regulation. In this matter, the parent was granted leave to amend her request for review, with the expectation that the parent would endeavor to comply with all of the pleading requirements given the additional time granted to her to do so. Instead, the amended request for review fails to contain any citations to the hearing record whereas the original pleading contained at least some minimal citations which were inexplicably removed in the amended version. Notwithstanding that deficiency, the parent's amended request for review does enumerate two issues which sufficiently specify the grounds on which the parent seeks reversal or modification of the IHO's decision and four enumerated requests for relief. Overall, while the amended request for review does not adhere to all of the technical aspects of the practice requirements, it sufficiently identifies the issues raised on appeal and the district was not prevented from timely preparing and filing an answer and there is no indication that it suffered any undue prejudice (see Application of a Student with a Disability, Appeal No. 18-029; Application of a Student with a Disability, Appeal No. 15-069).

Accordingly, in the exercise of my discretion, the deficiency in this appeal is insufficient to dismiss the parent's amended request for review for failure to adhere to the practice requirements. However, the parent is cautioned that in preparing future appeals, an SRO may be more inclined to dismiss a request for review if a party exhibits a pattern of failing to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-029; Application of a Student with a Disability, Appeal No. 17-015). Additionally, there would also be little reason to grant a party leave to amend a request for review if counsel falls into pattern of submitting amended pleadings that are noncompliant. This appears to be an aberration from an otherwise strong history of compliance.

2. Burden of Proof

As noted briefly above, the parent argues that the IHO improperly shifted the burden of proof from the district to the parent with respect to establishing the appropriateness of her requested relief. Specifically, the parent alleges that the IHO erred by requiring her to demonstrate the appropriateness of her request for the continued provision of the services set forth on the August 2018 IEP. In support of this contention, the parent points to specific language in the IHO's decision indicating that the parent "did not adequately provide a basis to award a continuation of [the student's] preschool services" (IHO Decision at p. 5). The parent contends that she bore no burden of proof at the impartial hearing and the district failed to sustain its own burden of proof. The district, in response, asserts that in the case of a unilateral placement, it is the parents' burden to demonstrate the appropriateness of their unilateral selection of services and that the IHO

properly concluded that the parent failed to present sufficient evidence that the student required the services set forth on the August 2018 IEP.

The IHO's decision indicates in one part that the burden of proof is on the district (IHO Decision at p. 4), but elsewhere in her decision the IHO attributed the lack of evidence in the hearing record to the parent. This was error. The IHO found that the district failed to present an affirmative case at the hearing, failed to discredit the parent's witnesses through cross examination, failed to make a closing statement, "or to provide any proof that they had offered [the student equitable services] for the year at issue" (id. at p. 4). The IHO also correctly found that the district's failure to meet its burden "trigger[ed] [the] [p]arent's right to relief" (id.). Nevertheless in her decision, the IHO found the parent's witness' inability to adequately describe the student's educational and behavioral needs outcome determinative, rather than addressing the district's failure to present an adequate record and articulate any form of relief to which the parent would be entitled, should the IHO find for the parent (IHO Decision at pp. 4-5). Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85; see also Application of a Student with a Disability, Appeal No. 19-061;Application of a Student with a Disability, Appeal No. 18-015; Application of a Student with a Disability, Appeal No. 18-058; Application of a Student with a Disability, Appeal No. 16-028). Additionally, the district's assertion of the Burlington/Carter burdens of proof, as well as their reliance on Application of a Student with a Disability, Appeal No. 19-054 are misplaced.[11] It is undisputed that the student in this matter has been parentally enrolled in a nonpublic school pursuant to Education Law section 3602-c (Tr. pp. 45-46). The student has not been unilaterally placed by the parent, nor has the parent requested tuition reimbursement from the district. Insofar as the district cites Application of a Student with a Disability, Appeal No. 19-054, which addressed a student with an IESP, that proceeding was not a unilateral placement case, the parent was not seeking reimbursement, and the SRO carefully explained that the IHO's use of language that appeared to place the burden of proof on the parent was not ultimately fatal to the district's argument that the IESP was appropriate due to evidence that it was appropriate.[12] Rather than argue that the relief awarded by the IHO was sufficient to

[11] A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

[12] The district's citation to Application of a Student with a Disability, Appeal No. 19-054 supports the proposition

mitigate any deficiency in a substantial way (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]), or take a position on an appropriate remedy, the district propounds an untenable Burlington/Carter defense that is inapplicable as the parent did not unilaterally obtain any services and is not seeking reimbursement from the district. The student in this matter has only received services recommended by the district. The parent's request for relief in the form of services offered in a prior IEP is not synonymous with a request for tuition reimbursement from the district.

In this case, the IHO's misallocation of the burden of proof clearly informed her decision to deny the parent's request for the provision of services set forth in the August 2018 IEP as relief for the district's failure to provide the student with equitable services for the 2019-20 school year. In the context of this case, the parent successfully argued that further evaluative information was necessary in order to formulate an appropriate IESP, and consequently, I will treat the relief sought by the parent in the form of a continuation of the services that the student was receiving in preschool as a request for compensatory education rather than a request for reimbursement for unilaterally-obtained services. Keeping the burden of proof on the district, I will address that request below.

B. Compensatory Education Relief

As noted above the district does not challenge the IHO's determination that it failed to offer the student equitable services due to its failure to sufficiently assess the student prior to removing individual instruction by a special education teacher, or the IHO's order of an independent neuropsychological evaluation, an FBA and if indicated, a BIP, and the district correctly notes that the IHO's decision has become final and binding with respect to those matters (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]).

Although improperly blaming the parent for the evidentiary deficiency, the IHO nevertheless faced a very real, practical problem in fashioning equitable relief, namely that the record was "insufficiently developed to decide upon an appropriate placement for the student" going forward, citing the lack of recent evaluative data available and that the student had changed schools for the 2019-20 school year (IHO Decision at p. 5). Accordingly, the IHO further ordered the district to reconvene a "CSE within 15 days of receipt of results of the new evaluations to formulate an appropriate IESP" (IHO Decision at p. 5).

However, the relief granted by the IHO was vague in that the determination contemplated that the student's IESP would be revised at some point in light of the decision but did not direct the completion of any of the evaluations within a specified, reasonable time period. Given the timespan with which this matter has proceeded through the administrative hearing process, the parent's request for an order of the continuation of the services, the district's failure to sufficiently evaluate the student, or develop a sufficient evidentiary record at the impartial hearing, a brief period of compensatory education is warranted as equitable relief for the district's failures when

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that the parent does not have a burden in this case, and unlike that case, the district failed in this case to show that it had offered the student an appropriate IESP.

combined with a timeline for establishing a new IESP for the student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"].[13]

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[14] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE or, in this case, equitable services (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123

[13] To the extent that the parent's request for relief, although styled as a request for a continuation of services, can be read as a request to prospectively extend the student's stay put placement beyond the pendency of the proceedings, that request is explicitly denied as violative of the statutory pendency provisions. The IDEA and New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency does not extend past the administrative proceedings and appeals therefrom.

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

[stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory 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"]).

In this case, a remedy for a deficiency in equitable services under State law should be similar to a remedy for a deficient service under IDEA. While the evidence does not include updated assessment information for planning on a going forward basis, there is some limited information regarding the progress that the student was receiving from his educational programing to support an award of compensatory education (Doe v. E. Lyme Bd. of Educ., 262 F. Supp. 3d 11, 27 [D. Conn. 2017] [outlining variety of forms that compensatory education may take as an equitable form of relief in order to address different circumstances]). The student's April 2019 IESP reflected input from the student's SEIT at the April 2019 CSE meeting, who indicated that the student was receiving seven hours per week of SEIT instruction (Parent Ex. B at p. 2). The student's SEIT reported to the CSE that the student had made a lot of progress since September [2018] (id. at p. 2). Cognitively, the student reportedly had a difficult time with pre-reading and reading, struggled with "wh" questions, making inferences, sequencing three steps, and with phonemic awareness (id.). The student was beginning to identify letter sounds in Hebrew, could identify 7-10 Hebrew letters out of 20 that she had been taught, and was able to write her full name (id.). The student was working on retelling a story familiar to her, repeating rhyming words, and making inferences (id.). The student reportedly displayed poor phonemic awareness skills and had trouble isolating sounds in words and identifying and matching sounds of letters and words (id.). The student had good awareness of syllables and was able to count syllables in words (id. at p. 3). The student reportedly enjoyed listening to stories, enjoyed drawing pictures and writing letters

(id.). The SEIT noted that the student could independently write her first name and draw basic pictures (id.).

In math, the SEIT indicated the student was able to perform basic patterning but had difficulty with complex patterning (Parent Ex. B at p. 2). The student could identify numbers 1-5, count 1-20, identify colors and shapes, sort and describe items based on quantity, size and length (id.). In writing, the student reportedly had difficulty drawing shapes and letters legibly (id.). The student could trace but needed prompting to use the correct grasp, and also enjoyed coloring and drawing (id.). The SEIT indicated that the student usually chooses writing or drawing center activities rather than the play center (id.). Socially, the SEIT reported the student could interact with prompting but did not have friends in class (id. at p. 4). The SEIT indicated that the student could be stubborn at times and "opening up to adults can be a struggle" (id.). The student struggled to join a conversation or group conversations during meal times and was working on initiating conversation on her own (id.). The student exhibited repetitive play skills, functional play skills with prompting, and did not have pretend play skills (id.). The SEIT reported that the student could respond to greetings but did not initiate an exchange, had very poor eye contact and needed gestural prompts to say the name of a child and to make eye contact to get the child's attention (id.). The student struggled with sharing and taking turns, with handling frustrations and with changes in routine (id.). The student reportedly often engaged in power struggles with both peers and teachers and the SEIT recommended "a lot of adult intervention for September" (id.).

The SEIT noted that the student exhibited weak fine motor skills and needed to work on her grasp (Parent Ex. B at p. 5). The student reportedly was "lagging behind her peers" in the area of gross motor skills (id.). The student was described as struggling with running, climbing, and negotiating stairs (id.). The student could reportedly alternate her feet when negotiating stairs when prompted (id.).

Given the district's concession that the IHO's determination that it failed to adequately assess the student to support its offer of equitable services in the student's IESP for the 2019-20 school year and the directives to reevaluate the student and offer a new IESP, which became final and binding in the absence of an appeal, the IHO should have awarded compensatory education services as an additional remedy to address the parent's request to continue the student's preschool services. As described above, one objective of compensatory education is to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA, but as the IHO noted the record is weak with regard to the student's current needs. Accordingly, I find that while the student is being reassessed by both the independent evaluator and the district staff, the student should receive services similar to those with which he was reportedly making progress which is, in essence, individual instruction provided by a certified special education teacher. Accordingly, I will require the reevaluation of the student to be completed within 90 days from the date of this decision to allow the parent additional time for the independent neuropsychological evaluation to be completed in addition to the other evaluations ordered by the IHO, but that in no circumstance shall the district further delay in convening the CSE to develop a new IESP for the student thereafter.[15] As described above, the student was

[15] If the parent does not obtain a completed independent neuropsychological evaluation within the 90-day time frame, the CSE is nevertheless responsible to convene and consider adequate updated evaluations of the student and develop a new IESP (or an IEP should the student no longer be dually enrolled).

making some progress with seven hours of individual instruction per week and, consequently, the available evidence in hearing record supports a compensatory award of 91 hours of individual instruction by a special education teacher to allow time for the reassessment of the student. However, the parent is not entitled to an indefinite continuation of the student's preschool services in the August 2018 IEP beyond the pendency of the proceedings.

VII. Conclusion

Based on the foregoing, I find that the IHO erred by failing to award compensatory educational services among the forms of relief for the district's failure to offer the student equitable services for the 2019-20 school year.

I have considered the parent's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 17, 2019 is modified by reversing those portions which placed the burden of proof on the parent and failed to award compensatory education relief; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the student shall immediately be provided with 91 hours of compensatory individual instruction by a special education teacher to be delivered in school in the amount of seven hours per week until the 91 hours are exhausted; and

IT IS FURTHER ORDERED that the parent shall obtain the independent neuropsychological evaluation in accordance with the IHO's decision dated October 17, 2019 within 90 calendar days of the date of this decision; and

IT IS FURTHER ORDERED that the district shall complete a functional behavioral assessment and if needed a behavioral intervention plan in accordance with the IHO's decision dated October 17, 2019 within 45 calendar days of the date of this decision; and

IT IS FURTHER ORDERED that the district shall reconvene the CSE within 15 calendar days after the completion of the functional behavioral assessment and independent neuropsychological evaluation to develop a new IESP; provided however that in no event shall the CSE reconvene later than 105 calendar days from the date of this decision.

Dated: **Albany, New York**
January 21, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER