The University of the State of New York

The State Education Department
State Review Officer
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No. 19-120

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

Appearances:
Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Chrystal O'Connor, Esq.

DECISION

I. Introduction

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

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

According to evaluations conducted in April 2015 (psychological evaluation) and March 2018 (neuropsychological evaluation), the student has received diagnoses of an autism spectrum disorder – Level 2, an attention deficit hyperactivity disorder – predominantly inattentive type, a mild intellectual disability, and a developmental disorder of scholastic skills – processing speed (Parent Exs. C at pp. 1-2, 13; E at p. 4). Assessments of the student's cognitive ability yielded scores in the extremely low range, and the student exhibited scripted speech, a short attention span, and tantrum behaviors, such as screaming and crying (Parent Ex. C at pp. 2-3; see Parent Ex. E at p. 2). Notably, the student exhibited "an inability to focus consistently," especially when time constraints were presented to him, as well as executive functioning deficits (Parent Ex. C at pp. 3, 8-9). He also demonstrated underdeveloped "receptive and language abilities," insight, and

judgment (Parent Ex. C at p. 2; see Parent Ex. E at p. 2). Within the area of academic achievement, the student exhibited average skills in basic reading, below average skills in oral language, total reading, reading comprehension and fluency, and written expression, as well as low skills in mathematics, math fluency, and total achievement (Parent Ex. C at p. 5). Measures of the student's adaptive functioning yielded communication scores in the adequate range, and daily living skills and social ability scores in the moderately low range of functioning (Parent Ex. C at p. 9; see Parent Ex. E at p. 3).

The student received special education services from a young age (Parent Ex. C at p. 1). During the 10-month portion of the 2016-17 school year (seventh grade) the student was found eligible for special education and attended a district inclusion program (Tr. pp. 102-03; see Parent Ex. M at pp. 10-11). According to the parent, in the inclusion program the student received instruction in a general education classroom consisting of 25 to 30 general education students and a paraprofessional for approximately 65 percent of his school day (Tr. pp. 103-04, 111-12, 119-20). The student's January 2017 IEP reflected that the CSE recommended special education teacher support services (SETSS); specifically, two periods per week of SETSS for both English language arts (ELA) and mathematics in the general education classroom, four periods per week of SETSS for "adaptation of materials" in a separate location, and five periods of SETSS per week for "[s]kills to master IEP goals," also in a separate location (Parent Ex. M at pp. 10-11, 16; see Tr. pp. 103-04). During the 2016-17 school year, the student also received two 30-minute sessions per week of occupational therapy (OT) in a group, two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group (Tr. p. 107; Parent Ex. M at p. 11).[1] At that time, the student functioned at a third grade level for math and a fourth grade level for reading (Tr. p. 116; Parent Ex. M at p. 16). For summer 2017, the CSE recommended that the student attend a 12:1+1 special class placement and receive counseling, OT, and speech-language therapy services (Parent Ex. M at pp. 12-13).

The student continued in the district's inclusion program for the 10-month portion of the 2017-18 school year (eighth grade) (Tr. pp. 102-03). On January 18, 2018 the CSE convened for the student's annual review (Parent Ex. G at p. 18; see Parent Ex. R at p. 1). In addition to two periods per week of SETSS for both ELA and math, the January 2018 IEP provided that the student receive three periods per week of SETSS focusing on skills to master IEP goals in a separate location (Parent Ex. G at p. 12). The IEP also provided that the student would receive two 30-minute sessions per week of speech-language therapy in a group, and one 30-minute session each of individual and group counseling services (id. at p. 13).[2]

Over two dates in March 2018 a licensed clinical psychologist conducted a private neuropsychological evaluation of the student (Parent Ex. C; see Tr. p. 134). Test results indicated that the student's cognitive abilities were in the extremely low range, and that his slow processing speed was directly related to his difficulty paying attention and need for constant redirection (Parent Ex. C at p. 12). The psychologist reported that the student's achievement skills were "on

[1] The January 2017 IEP also provided for one 60-minute session of group parent counseling and training per week for a period of five weeks (Parent Ex. M at p. 11).

[2] The January 2018 IEP also provided for one 60-minute session of group (sign language and communication) parent counseling and training per month (Parent Ex. G at p. 13).

par with his cognitive abilities," and achievement test scores indicated that the student was "capable of learning in a proper setting and environment" (id.). The student also exhibited a short attention span requiring constant redirection to remain on task and reduce scripting, and measures of his adaptive and behavioral functioning indicated difficulties with communication, daily living skills, and socialization (id.). The psychologist recommended that the student receive accommodations, coaching, medication, and therapy (id. at p. 13). Specifically, the psychologist recommended that the student attend a particular nonpublic school that used a multisensory approach in a classroom of 12 students designed for children with autism (id.). Accommodations recommended included extended time (times two) on tests and classroom assignments as well as assistive technologies throughout the school day (id.). The psychologist also recommended that the student receive individual and group speech therapy to improve peer socialization skills, counseling to build coping strategies and regulatory techniques for his sadness, and OT to assist the student with acclimation to sensory stimuli (id. at p. 14).

In March 2018 district staff corresponded by email with the parent regarding scheduling a CSE meeting "for a re-evaluation to determine the appropriate setting based upon new information that has come about after [the student's] annual [review]" (Parent Ex. R at pp. 1-5). On March 29, 2018 the CSE convened without the parent in attendance and discussed that, since the January 2018 CSE meeting, the student had often exhibited inappropriate behaviors in the general education classroom such as gaining attention of peers from across the room by yelling, making rude comments to other students, intentionally bumping into other students, and exhibiting agitated and upset behaviors such as crying, yelling, vigorously jumping up and down, and "flaring" his arms while surrounded by other peers (Parent Ex. J at pp. 2-3, 20). The March 2018 CSE determined that the student's "behavior ha[d] precluded him from progressing in a SETSS classroom as well as in his [g]eneral [e]ducation [c]lasses" and therefore recommended a 12-month program in a 12:1+1 special class placement in math, ELA, social studies, and science in a specialized school together with one 30-minute session per week of OT in a group, two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group to be implemented beginning April 16, 2018 (id. at pp. 15-17, 20, 22).[3]

In a prior written notice dated April 9, 2018, the district informed the parent that the "SETSS program" the student had been attending was no longer appropriate because the student engaged in problem behaviors (Parent Ex. I at p. 1). The letter informed the parent that the strategies and interventions put in place by district staff were "not working" and that the CSE had reviewed existing information from evaluations together with teacher and support staff reports and recommended that the student attend a 12:1+1 program in a specialized school (id. at pp. 1-2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated April 30, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2016-17 and 2017-18 school years (Parent Ex. B at p. 1).[4] The parent contended that the IEPs developed

[3] The March 2018 IEP also provided for one 60-minute session of group and individual parent counseling and training per month (Parent Ex. G at p. 13).

[4] The parent's original due process complaint notice was dated March 28, 2018 (see Parent Ex. A at p. 1).

for the student during those school years did not address the student's academic, social/emotional, cognitive, or speech-language needs, including his needs relating to his autism spectrum disorder (id.). The parent alleged that the CSEs lacked sufficient evaluative information in that the IEPs were not based on information about the student's progress (id. at p. 2). Further, the parent asserted that the IEP annual goals were inappropriate and that the IEPs inappropriately provided that the student be alternately assessed (id. at p. 1). The parent also averred that, due to the inappropriate IEPs in effect during the 2016-17 and 2017-18 school years, the student lost educational benefits and "made minimal and trivial educational gains, if any at all" (id.).

Specific to the January 2018 CSE meeting, the parent alleged that the district denied the parent participation and predetermined the manner of addressing the student's behavioral needs by developing a behavioral intervention plan for the student prior to the meeting without the "knowledge, consent or participation" of the parent (Parent Ex. B at p. 2). As for the March 2018 CSE meeting, the parent described that, despite her request that the district state why another CSE meeting was required, the district did not explain the reason and scheduled the meeting on a date on which the district was aware the parent was unavailable and notwithstanding the parent's request that any new meeting should include the private evaluation of the student, which was underway at that time (id. at pp. 2-3). The parent further alleged that the March 2018 CSE took place without her participation and "changed [the student's] IEP to hi[s] detriment" (id. at p. 3). Specific to the 2017-18 school year, the parent also alleged that the student experienced bullying by his peers and that district staff "acquiesced to the bullying" (id.).

For relief, the parent sought an order directing the district to place the student in an approved nonpublic school (Parent Ex. B at p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on June 19, 2018, which concluded on March 27, 2019, after four days of proceedings (Tr. pp. 1-185). On the first hearing date, the IHO conducted a brief prehearing conference (Tr. pp. 1-6).[5] On the second hearing date, a representative for the district conceded that the district had not offered the student a FAPE during the 2016-17 and 2017-18 school years and stated that the district "would not be putting on a case in defense of the program offered for those school years" (Tr. p. 9). Also at the second hearing date, the IHO noted that, because the 2017-18 school year had ended, the parent's request for a nonpublic school placement for the student was no longer live, and only the remedy of compensatory education remained as an issue to be addressed (Tr. pp. 13-16).

[5] For reasons unknown, neither counsel for the parent nor the district representative assigned to the matter appeared at the prehearing conference, although the IHO indicated that he confirmed the conference by email to the parties the day prior (see Tr. pp. 2-3). A district representative who was not assigned to the matter appeared on the district's behalf but was not familiar with the matter beyond "the case number" (Tr. p. 3).

In a decision dated October 19, 2019, the IHO determined that the district failed to offer the student a FAPE during the 2016-17 and 2017-18 school years (IHO Decision at pp. 4, 8).[6, 7] The IHO determined that the "SETSS program was inconsistent with the 12-student class recommended in the Neuropsychological Evaluation" and that "the supportive multisensory remedial instruction provided by EBL Coaching" was appropriate compensation for the district's failure to provide the student with a FAPE (id. at pp. 8, 9). However, the IHO found insufficient support in the hearing record for the parent's request for 720 hours, noting that the recommendation was apparently aimed at the student attaining grade level functioning, which the IHO opined was not a goal supported by the legal authority or aligned with the student's potential as reflected by cognitive testing results (id. at pp. 9, 10).[8] Instead, the IHO calculated a compensatory education remedy for the district's denial of a FAPE based on his determination that the student was entitled to five sessions of remedial instruction per week for both of the school years in question, totaling 420 sessions (id. at pp. 9-10). However, the IHO adjusted this total based on equitable considerations; specifically, the IHO found that, because the parent had "declined to follow the recommendation for a 12 student class addressing the needs of student's with autism" set out in the March 2018 IEP, a 10 percent reduction in the number of remedial instruction hours was warranted (id. at p. 10). Thus, the IHO concluded that the student was entitled to receive 370 hours of remedial instruction at the rate of $125 per hour to be utilized within three years from the date of the decision (id. at pp. 10-11).[9, 10]

[6] The hearing record also contains an interim order dated June 11, 2019 wherein the IHO denied the parent's request to consolidate the instant matter with one alleging that the student was denied a FAPE for the 2018-19 school year (Interim IHO Decision at pp. 1-3).

[7] With respect to the 2017-18 school year, it appears, on the one hand, that the IHO understood the district's concession to apply only for that time period until a CSE recommended a 12:1+1 special class for the student (IHO Decision at p. 4). Moreover, the IHO "decline[d] to find that the record supports a bullying claim," noting a lack of evidence of "reports filed or evidence of investigations" as well as evidence of the student's own behaviors in school (id. at p. 8). On the other hand, it appears that the IHO calculated his award of compensatory education based on the district's denial of a FAPE for two school years (id. at p. 10). In light of the allegations in the parent's amended due process complaint notice unaddressed by the IHO—including the claim pertaining to the district's failure to ensure the parent's attendance at the March 2018 CSE meeting (see Parent Ex. B at p. 3), which on its own would support a finding that the district significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and would thus constitute a procedural denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii])—and the district's concession that it failed to provide the student with a FAPE for both school years as well as the district's failure to present evidence during the impartial hearing on any allegation, the IHO's decision is read as having found that the district denied the student a FAPE for both school years without limitation.

[8] The IHO noted that it was relevant to a compensatory education award that the student "passed virtually all his academic classes" during the school years in question (id. at pp. 9-10).

[9] A reduction of 10 percent from the 420 hours of remedial instruction calculated by the IHO would have equaled 378 hours of remedial instruction.

[10] The IHO also found the student was entitled to a metro card for transportation to and from the compensatory services, if necessary (IHO Decision at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in awarding 370 hours of compensatory remedial instruction at EBL Coaching. First, the parent argues that the IHO erred by failing to make factual and legal findings regarding the challenged IEPs. Because the IHO did not identify how FAPE was violated, the parent asserts that the IHO overlooked the student's "minimal and trivial progress in fashioning . . . a tutoring award." Further, the parent asserts that the IHO erred in reducing the awarded compensatory services based on equitable considerations related to the parent's purported failure to agree with or try the program and placement recommended in the March 2018 IEP. As a remedy, the parent requests an increase in the compensatory education award to 720 hours at the rate of $125 per hour.

In an answer, the district generally responds to the parent's allegations with admissions and denials and asserts that the IHO's decision should be upheld in its entirety. In addition, the district argues that the parent's appeal should be dismissed for failure to comply with the practice regulations governing appeals to the Office of State Review.

V. Applicable Standards

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

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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

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 district contends that the parent's appeal should be dismissed because her pleading and accompanying papers do not comport with applicable practice regulations. As the district argues, the parent's filing, which consists of a "Notice of Intention to Seek Review," a "Notice of Petition" and a pleading denominated as a "Verified Petition," does not comply with the current form requirements of Part 279 of the practice regulations. The regulations governing practice before the Office of State Review were amended over three years ago (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]). In addition, the parent served a notice of intention to seek review upon the district, but the notice of intention to seek review was not accompanied by a case information statement as required by State regulation, nor does it contain the language explicitly required by State regulation (8 NYCRR 279.2[a], [e]). Further, the notice of request for review accompanying the parent's pleading (incorrectly denominated as a "Notice of Petition") does not comply with 8 NYCRR 279.3 but instead contains the incorrect language from the old notice requirements under State regulation in effect prior to January 1, 2017, including a statement of the wrong time frame for the district to respond to the parent's pleading.

Generally, 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]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; 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]). While a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

The parent's attorney has previously been cautioned regarding her noncompliance with current practice regulations on several occasions. In Application of a Student with a Disability, Appeal 18-131 at p. 6, n.4, an SRO urged the parent's attorney, "as counsel . . . who appears regularly in this forum" to review Part 279, as amended and effective January 1, 2017, and to conform her practice to the regulations currently in effect. The SRO noted that counsel "ha[d] previously been alerted to this particular nonconformance in pleadings submitted on her clients' behalf," specifically referencing Application of a Student with a Disability, Appeal No. 18-079 and Application of a Student with a Disability, Appeal No. 18-055, and further cautioned parent's counsel that "repeated failures to comply with the practice requirements" could result in an SRO's exercise of his or her discretion to reject a request for review (Application of a Student with a Disability, Appeal 18-131 at p. 6, n.4).

Similarly, in Application of a Student with a Disability, Appeal No. 19-097 at p. 7, n.9, and Application of a Student with a Disability, Appeal No. 19-111 at p. 9, parent's counsel was admonished for her noncompliance. The SRO in Application of a Student with a Disability, Appeal No. 19-111 noted that "repeated excusal of practice regulation violations without prejudice is not tenable indefinitely." These two decisions were issued just prior to or subsequent to the date of the service and filing of the appeal papers in the present matter and, accordingly, parent's counsel may not have known of these most recent admonitions when preparing her appeal in the present matter. Nevertheless, upon receipt of the current decision in combination with Application of a Student with a Disability, Appeal No. 19-097 and Application of a Student with a Disability, Appeal No. 19-111, parent's counsel should be sufficiently warned of the potential (now likely) consequence of her repeated failures to conform papers submitted to the Office of State Review with the regulations currently in effect.[12]

Under the circumstances, I will refrain from rejecting the parent's pleading for failure to comply with practice regulations but strongly caution parent's counsel to prepare her submissions with more care in any future matters filed with the Office of State Review. To this end, counsel for the parent is urged to carefully review and comply with the current requirements of Part 279 of State regulations and examine the requests for review and model forms that have been published as guidance by the Office of State Review (see https://www.sro.nysed.gov/book/prepare-appeal).

B. Compensatory Education

To the extent that neither party challenges the IHO's conclusion that the district failed to provide the student with a FAPE during the 2016-17 and 2017-18 school years, the IHO's determinations on these issues have become final and binding on both parties and they will not be 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]). Moreover, in light of the district's concession that it denied the student a FAPE for both school years, the parent's

[12] In the event appeal papers are rejected, given the strong policy considerations favoring a determination of matters on the merits wherever possible, an SRO may, within the SRO's discretion, provide a parent with an opportunity to correct particular oversights by granting leave to serve and file a notice of intention to seek review, a case information statement, a notice of request for review, and a request for review that meet the form requirements of Part 279.

allegations with respect to that denial are deemed to be true.[13] Therefore, the only issue remaining at hand is the IHO's compensatory education award.

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 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 & n.12 [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, 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]). 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"]).

The report from the March 2018 neuropsychological evaluation indicated that administration of the Wechsler Intelligence Scale for Children - Fourth Edition to the student yielded a verbal comprehension index composite score (percentile rank) of 69 (2), a perceptual reasoning index composite score of 69 (2), a working memory index composite score of 65 (1), a processing speed index of 53 (0.1), and a full scale IQ of 57 (0.2); all scores were qualitatively described as "extremely low" (Parent Ex. C at p. 3). Administration of the Wechsler Individual Achievement Test – Third Edition to the student resulted in "some variability" of subtest scores: a basic reading composite standard score in the average range; oral language, total reading, reading comprehension and fluency, and written expression composite standard scores in the below average range; and mathematics, math fluency, and total achievement composite standard scores in the low range of functioning (id. at p. 5). The student's overall performance on the Test of Word Reading Efficiency – Second Edition, a timed assessment that measured the efficacy of sight word recognition and phonemic decoding, fell in the below average range of functioning (total word

[13] The exception in this case may be the IHO's limited findings in the district's favor related to some of the parent's allegations pertaining to the 2017-18 school year (see IHO Decision at pp. 4, 8), which the parent has not specifically appealed.

reading efficiency index), but was in the normal range of functioning for his age and gender on a subtest measuring his ability to read "made up words" (phonemic decoding efficiency subtest) (id. at pp. 5-6). Regarding results from administration of the Wide Range Assessment of Memory and Learning - Second Edition to the student, scores indicated performance in the borderline/low average range for recall of verbal information presented orally and in the impaired range of functioning for recall of non-contextual visual information (id. at p. 7). According to an administration of the Conners' Continuous Performance Test, Second Edition—a measure of inattention and impulsivity—to the student "[o]verall, the results of this assessment indicate the presence of inattention, impulsivity and poor vigilance" (id. at p. 8).

In an October 9, 2018 letter, the director of EBL Coaching (director) indicated that she had assessed the student the previous day "to determine his academic areas of strength and weakness and his specific instructional needs" using the Wide Range Achievement Test, the Test of Written Language, and the Qualitative Reading Inventory (Parent Ex. N at p. 1). The director indicated that, while the student "tested at an upper tenth grade level for spelling, he tested at a low eighth grade level for decoding and a mid-second grade level for mathematics," adding that the student "also tested at a mid-third grade level for written language and a second grade level for reading comprehension, well below the expected levels for his grade" (id.). Therefore, based upon the results of the March 2018 neuropsychological evaluation and her assessment, the director reported that it was "clear that [the student] is in critical need of specific multi-sensory instruction in reading and spelling, particularly using an Orton Gillingham approach" (id.). She further indicated the importance of the student receiving "structured, multi-sensory instruction to build his reading comprehension, mathematics, and written language skills" (id.). The director reported that she "highly recommend that [the student] receive 720 hours of intensive one-on-one instruction using the Orton Gillingham methodology as well as specific multi-sensory tools to build his reading comprehension, mathematics, and written language skills," noting that she felt "confident that this type of instruction will help him tremendously" (id.).

The IHO determined that "the supportive multisensory remedial instruction provided by EBL Coaching" was appropriate as compensation because it was "consistent with the student's needs" described in the March 2018 neuropsychological evaluation, and that finding has not been appealed (IHO Decision at p. 8). However, the IHO's finding that the hearing record did not include any evidence that the director of EBL Coaching considered the student's low cognitive functioning in recommending 720 hours of remedial instruction is not entirely accurate as the October 9, 2018 letter signed by the director specifically indicated that her conclusion that the student was in critical need of multisensory instruction was, in part, based on the results of the March 2018 neuropsychological evaluation (Parent Ex. N at p. 1). Further, in the March 2018 neuropsychological evaluation report, the psychologist reported that the student's achievement skills were "on par with his cognitive abilities" and concluded that the achievement test scores indicated that the student was "capable of learning in a proper setting and environment," which is to a degree contrary to the IHO's suggestion regarding the student's potential (compare Parent Ex. C at p. 12, with IHO Decision at p. 9).

The IHO also found fault with the director's testimony that described the student's academic functioning as below grade level, "implying" that her recommendation was "aimed at a grade level goal," which the IHO found was "an inappropriate standard for compensatory relief" (IHO Decision at p. 9; see Tr. pp. 38-45). The IHO is correct that, generally, compensatory services are

not designed for the purpose of maximizing the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). However, a plain reading of the testimony cited by the IHO shows that it reflected the student's then-current status as a ninth grader, who was at that time, according to the director's test results, functioning at a low eighth grade level in reading decoding, an upper tenth grade level in spelling, a mid-second grade level in math, a mid-third grade level for written language, and a second grade level for reading comprehension (Tr. pp. 38-40). The director concluded that the student was "lacking many foundations" in math that required "intensive remediation," and that reading comprehension and writing were areas of "significant" weakness for the student (Tr. pp. 41-44). Although the director was asked how important it was for a middle school student to be able to demonstrate the written language, reading comprehension, and math skills that the student in this matter lacked, the overall focus of this testimony described the student's needs in specific academic areas in relation to his current grade level, rather than directly indicating that the recommended amount of remedial instruction was linked to achieving grade level performance in those areas (see Tr. pp. 38-45).

The district conceded that it failed to offer the student a FAPE for the two school years in question and provided no argument during the hearing as to why the director's recommendation for 720 hours of remedial instruction was inappropriate (see Tr. pp. 48-51). In his decision, the IHO expressed his understandable frustration with the lack of evidence upon which to base a reasoned award of compensatory education, as well as with the parties' failure to provide written submissions to the IHO detailing their "perspective of the appropriate application of law to the facts in this case," despite the IHO's explicit attempts to elicit the same from the parties (IHO Decision at p. 3; see Tr. pp. 181-82). In particular, the IHO encouraged the district to come forward with evidence, such as "records" showing "what happened in the past," "report cards [and] progress reports," attendance records, and/or testimony from "a teacher" to establish what benefit the student received and what areas of the student's needs were insufficiently addressed in the district program, in order to show "what the student got," so that a compensatory award could take into account the student's receipt of benefits from the program and services delivered by the district (Tr. pp. 17-21, 25-26, 51-55, 156-58, 180). The district representative appeared to be in agreement that the district would make such a presentation (see Tr. pp. 20-21, 26, 53-55); however, without explanation, the district offered no documentary or testimonial evidence to develop the hearing record with respect to an appropriate remedy.[14] As such, the deficiencies in the hearing record are

[14] A different district representative appeared on the district's behalf on the last hearing date on March 27, 2019, and also represented that the district could provide certain documents if the IHO needed them (see Tr. pp. 165, 181; compare Tr. pp. 7, 29, with Tr. p. 58). Towards the end of the impartial hearing, the IHO requested copies of a classroom observation and a social history (Tr. p. 180). These documents were not offered into evidence at the impartial hearing; however, the parent submits them as additional evidence with her request for review (Req. for Rev. Ex. A). The district objects to these documents being considered on appeal (see Answer ¶ 23). While I find the district's position about the additional evidence in this instance frustrating given the IHO's specific requests for the evidence and the district's failure to produce the same despite its statutory burden of proof in this matter, ultimately the additional evidence is not necessary in order for me to render a decision in this instance (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Accordingly, the parent's request for the consideration of additional evidence is denied.

the fault of the district, which was the party 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 (Educ. Law § 4404[1][c]; E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). In the absence of an articulation of the district's view and given the lack of evidence to rebut or call into question the propriety of the parent's proposed remedy, the evidence in the hearing record supports the parent's requested relief.

The only evidence in the hearing record responsive to the IHO's request was introduced by the parent (see Parent Exs. K; O; P; Q). The IHO found some relevance to the evidence that the student "passed virtually all his academic classes during the period" (IHO Decision at p. 10). However, the report cards, exam history, and transcript in evidence offer no information regarding how the grades were determined or how the student was progressing vis-à-vis his IEP annual goals (see Parent Exs. K; O; P; Q; see also Tr. pp. 82-84, 133-34).[15] Ultimately, in the absence of other, more specific and detailed reports of the student's progress, the student's reported grades, without more, are insufficient to undermine the parent's evidence about the appropriateness of the proposed compensatory education award.

In conclusion, the hearing record shows that the director of EBL Coaching conducted an evaluation—the results of which are consistent with the March 2018 neuropsychological evaluation report—and made specific recommendations aimed at building the student's reading comprehension, mathematics, and written language skills (compare Parent Ex. C, with Parent Ex. N). The IHO's attempt to approximate a compensatory award, by assessing what he considered to be the more glaring deficiencies in the program delivered by the district (i.e., five hours per week of remedial instruction to remedy the inappropriateness of the SETSS inclusion program), would have been a sensible approach if the hearing record lacked a reasonable proposal for compensatory relief. However, in this instance, the parent's request for compensatory education was based on the evidence included in the hearing record and the evidence presented by the parent in relation to the compensatory education request was not rebutted by the district. Accordingly, in light of the evidentiary record, the IHO's decision is modified to reflect an award of 720 hours of compensatory remedial instruction to be provided by EBL coaching or a comparable provider.

C. Equitable Considerations

The IHO found that, because the parent had "declined to follow the recommendation for a 12 student class addressing the needs of student's with autism" set out in the March 2018 IEP, a 10 percent reduction in the number of remedial instruction hours was warranted (IHO Decision at p. 10). The IHO noted that parental conduct interfering with a district's provision of FAPE is an equitable basis to limit tuition reimbursement, and that the same reasoning was "applicable here" (id.). Setting aside the question of whether equitable considerations are relevant in a matter where the district has conceded it denied the student a FAPE, the IHO's equitable basis is not supported

[15] For example, the hearing record lacks evidence regarding how the student's SETSS periods that focused on "adaptation of materials" affected how his grades in the general education classes were determined (see Parent Ex. M at p. 10).

by the hearing record because the record does not suggest that the parent "declined to follow" the recommendation for a 12:1+1 special class placement in the March 2018 IEP.

In a tuition reimbursement case, equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations in the tuition reimbursement context, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M., 758 F.3d at 461 [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

As noted above, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger, 979 F. Supp. at 151). As such, it may be similarly appropriate to consider the conduct of both parties in fashioning equitable compensatory education relief (see Reid 401 F.3d at 524; Puyallup Sch. Dist., 31 F.3d at 1496-97; Application of a Student with a Disability, Appeal No. 18-002).

The parent's initial due process complaint notice was dated March 28, 2018 and it challenged the January 2018 IEP, which recommended continuing the student's placement in an "inclusion program" (see Parent Exs. A at pp. 1-2; G at pp. 2, 12-13). Then, the CSE met on March 29, 2018 without the parent in attendance and developed an IEP recommending a change in placement to a full-time special class with a 12:1+1 student/teacher/aide ratio (Parent Exs. I; J at pp. 2, 15-16). The March 2018 IEP was to be implemented April 16, 2018, thereby changing the student's placement during the course of the 2017-18 school year (Parent Ex. J at pp. 1, 15-16). Thereafter, the parent amended her due process complaint notice on April 30, 2018 to challenge the March 2018 CSE meeting process and add a claim that the student had been bullied during the 2017-18 school year in the inclusion program (Parent Ex. B at pp. 1, 3; see Tr. pp. 122-23).

During the second hearing date in this matter (on October 5, 2018) the IHO and the parent's counsel briefly discussed the student's placement at that time (i.e., during the 2018-19 school year), as well as availability of a pendency (stay put) placement (see Tr. pp. 10-17). Parent's counsel stated that the student was attending "the public school" in a "District 75 program that [the parent] deems to be inappropriate" (Tr. p. 10). The IHO stated "[b]ut apparently the parent consented to the 12:1:1" (Tr. p. 13). The parent's counsel stated "[n]o, the parent is, at this time, looking for another placement for the student" (id.). The IHO stated "[b]ut to the extent that the child's in

there" (id.). The parent's counsel responded "[t]he child has to be in a school, so the parent has the child in the school. She's not in agreement with the IEP" (id.). Discussing the parent's decision not to invoke pendency, the IHO stated, "if the parent did not want to put the child in the 12:1, . . . pendency would have kept the child right where the child was" (Tr. pp. 13-14). The parent's counsel responded, "[t]he parent did not want to do that . . . because the child was being bullied in the program that he was in" (Tr. p. 14).

During the impartial hearing, the parent provided testimony about the March 2018 CSE meeting; however, nowhere in the hearing record is there mention of the district attempting to implement the 12:1+1 special class placement during the 2017-18 school year. Rather, the parent's testimony suggested that the student "graduated" from the inclusion program middle school in June 2018 at the close of the 2017-18 school year (see Tr. pp. 137-39). The parent stated that she "wasn't contacted for anything, not even this new school that he was supposed to be attending" (Tr. pp. 139-40). Although the parent was questioned about the conduct of the March 2018 CSE meeting in cross-examination and IHO questioning, there was no discussion of the parent interfering in any way with an attempt to implement that IEP during the 2017-18 school year (see Tr. pp. 154-84). Thus, it appears the parent did not "decline[] to follow the recommendation for a 12 student class addressing the needs of student's with autism" set out in the March 2018 IEP, which was the sole basis for the IHO's 10 percent equitable reduction in hours of compensatory services. Moreover, even if the parent had resisted implementation of the March 2018 IEP, given the circumstances of the development of that IEP without the parent's participation at the March 2018 CSE meeting and the district's failure to document its attempts to arrange a mutually agreed on time and place for the CSE meeting,[16] any such resistance should not be an equitable consideration warranting a reduction in the amount of relief owed by the district. Accordingly, the hearing record does not

[16] The IHO did not make a specific finding regarding the March 2018 CSE process; however, given the IHO's finding as to the parent's purported refusal to accept the program in the March 2018 IEP, it is necessary to briefly address the parent's allegation that she was denied participation in the IEP development process. First, as to the scheduling of the CSE meeting and the requirements regarding a parent's participation, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]). Based on the limited evidence in the hearing record, the district failed to present documentation that it made sufficient attempts to secure the parent's attendance at the March 2018 CSE meeting, particularly in light of the parent's statement of her unavailability due to scheduling concerns and the lack of any evidence that the parent refused to attend a CSE meeting on a rescheduled date (see Tr. pp. 137-38, 141-47, 169-72; Parent Exs. I at p. 2; R at pp. 1-5; see also Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010] [discussing the difference between an affirmative refusal to attend versus a request to reschedule a meeting]; see also Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044 [9th Cir. 2013] [noting that parental involvement requires the agency to include the parents in a CSE meeting unless they affirmatively refused to attend]). Even assuming the district had some sort of procedural deadline within which it needed to schedule the meeting (see Tr. pp. 137, 171-72; Parent Ex. R at p. 4), in assessing multiple competing procedural requirements, courts have generally rejected a school district's respective argument that parental participation was the less important requirement in those circumstances (see Doug C., 720 F.3d at 1045-47; Horen, 2010 WL 3522373, at *15-*18; but see A.L. v. Jackson Cnty. Sch. Bd., 635 Fed. App'x 774, 780 [11th Cir. Dec. 30, 2015]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 392, 396 [S.D.N.Y. 2010]).

support the IHO's reduction of the compensatory services on the basis of equitable considerations and, therefore, that portion of the IHO's decision is reversed.

VII. Conclusion

Based on the foregoing, the hearing record supports the parent's request for additional compensatory services. I have considered the parent's remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 19, 2019, is modified by reversing that portion which ordered the district to provide the student with compensatory education services consisting of 370 hours of remedial instruction; and

IT IS FURTHER ORDERED that the district shall provide the student with compensatory education services in the form of 720 hours of remedial instruction at a rate not to exceed $125 per hour, to be used within three years of the date of this decision.

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

STEVEN KROLAK
STATE REVIEW OFFICER