



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-124

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:

Advocates for Children of New York, attorneys for petitioner, by Michael Athy, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Amy Fellenbaum, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory services and a developmental pediatric evaluation for her son for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student in this matter was initially eligible to receive special education programming as a student with a speech or language impairment, and attended a charter school for kindergarten and first grade where he received integrated co-teaching (ICT) services, speech-language therapy, and counseling services (Dist. Ex. 10 at p. 2). During first grade, a functional behavioral assessment (FBA) was conducted and a behavioral intervention plan (BIP) was developed to target the student's daily aggressive behaviors (id.). In May 2019 the student left the charter school and he completed second grade in a general education classroom in one of the district's public schools with special transportation added to his IEP (id.). The student began attending a different charter school, Success Academy (Success) at the start of the 2019-20 school year (third grade) (id.).

A CSE convened on September 19, 2019 for the student's annual review (see Dist. Ex. 22). The CSE determined that the student remained eligible for services as a student with a speech or language impairment and recommended that he receive ICT services for math and English

language arts (ELA) (*id.* at pp. 1, 9). The September 2019 CSE also recommended related services for the student consisting of one 30-minute session per week of counseling in a group, one 30-minute session per week of individual counseling, and two 30-minute sessions per week of speech-language therapy in a group (*id.* at p. 9). In addition, the September 2019 CSE recommended full time individual paraprofessional services for behavior support, as well as a BIP (*id.* at pp. 3, 9).

The student began exhibiting behavioral difficulties in fall 2019 that led to suspensions from Success, and manifestation determination reviews (MDRs) were held on November 14, 20, and 21, 2019, that determined the behaviors for which the student was suspended were a manifestation of his disability (*see* Tr. p. 32; Parent Exs. D; G; H). The managing director of the charter school informed the parent that the student was a "safety risk" to himself and others and that a request was filed with the district for a hearing to pursue a 6:1+1 special class placement that could "more appropriately handle" the student's needs (*see* Parent Ex. F at p. 1). In the meantime, the managing director indicated that the student could not return to Success, instead the school would "arrange for two hours of tutoring each day" for the student to be provided in the community (*id.*).

A CSE convened on January 6, 2020 (*see* Dist. Ex. 3). According to the resultant IEP the student had been receiving instruction from a tutor at a local library and was not attending Success (*id.* at p. 1). Following review of recent evaluative information, the January 2020 CSE changed the student's eligibility classification to a student with an emotional disturbance, and recommended a 12:1+1 special class placement in an approved nonpublic school (NPS), with both individual and group speech-language therapy and counseling services (*id.* at pp. 1, 7; *see* Dist. Ex. 5). As an interim placement, the CSE recommended a 12:1+1 special class placement in a district school which the parent declined (Tr. p. 40; Dist. Exs. 3 at p. 7; 5 at p. 6).

A. Due Process Complaint Notice

In a February 7, 2020 due process complaint notice, the parent asserted that the district failed to provide the student with a free appropriate public education (FAPE) for the 2019-20 school year by improperly removing him "from his regular classroom instruction in November 2019" and failing to offer him "an appropriate program or placement from November 2019 through the present" (Parent Ex. A at p. 2).¹ According to the complaint, the student was removed from

¹ The hearing record contains a January 27, 2020 IHO decision which indicated that the parent and the charter school had previously filed due process complaint notices (Parent Ex. C at p. 2). According to that decision, two of the three due process complaint notices had been withdrawn, and the IHO dismissed the third due to the charter school's lack of standing (*id.*; *see* IHO Decision at p. 3). When it comes to the IDEA's procedural safeguards, the public school district is responsible for compliance with the due process procedures, but "[c]harter schools must cooperate with school district personnel and school district attorneys in the conduct of due process proceedings, by making charter school personnel available to testify and providing documentary evidence upon request. ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at <http://www.p12.nysed.gov/psc/Footer/specialeduc.html>). State guidance provides that "[a]s the local educational agency (LEA), the school district of residence is generally responsible for due process procedures relating to the evaluation, identification, educational placement and the provision of a [FAPE] to charter school students" ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at <http://www.p12.nysed.gov/psc/Footer/specialeduc.html>). While charter schools may be considered LEAs for other statutory purposes, it has been made clear that the public school district remains the LEA for purposes of implementing the IDEA ("Charter Schools as Local Educational Agencies (LEAs)," Office Of School Innovation [July 23, 2012], available at http://www.p12.nysed.gov/psc/documents/CharterSchools-LEAsmemo_1.pdf).

his classroom for disciplinary reasons "almost daily" from September through November 2019, and was "suspended 12 times, resulting in numerous days of lost instruction" (id. at p. 3). Although at the conclusion of all three MDRs conducted by the CSE, the district concluded that the behaviors subject to review were a manifestation of the student's disability, the parent alleged that on November 22, 2019, he was removed from school without a hearing and placed at a library where he began receiving tutoring for two hours per day, but eventually in December the tutoring was increased to four hours per day (id.). The parent further asserted that after his removal from Success, the student did not receive the counseling and speech-language therapy services mandated by his IEP (id.).

In addition, the parent argued that the district failed to offer the student a State-approved NPS placement as required by his IEP (Parent Ex. A at pp. 4, 5). Further, the parent asserted that the interim placement the district offered pending the NPS placement would not be able to meet the student's educational needs for a number of reasons including that the student would be placed in a school without a stable experienced teacher or appropriate learning peer group, and that the placement did not have any available speech-language therapists or was able to provide a therapeutic school environment with staff trained in therapeutic strategies (id. at pp. 4-5).

The parent requested the following relief:

1. immediate placement of the student at an appropriate approved NPS;
2. payment of tuition, either directly or through direct payment, for an appropriate non-State-approved private school if the district has not provided the student with an appropriate approved NPS placement within 30 days;
3. compensatory education services equivalent to the number of hours of instruction the student has missed since he was removed from the classroom;
4. compensatory individual and group counseling services equivalent to the number of hours of counseling the student has missed during the 2019-2020 school year;
5. compensatory individual and group speech-language therapy equivalent to the number of hours of therapy the student has missed during the 2019-2020 school year; and
6. a change in the student's classification from emotional disturbance to other health impairment, learning disability, or speech-language impairment (Parent Ex. A at pp. 5-6).

B. IHO Decision

An impartial hearing convened on May 12, 2020 and concluded on June 1, 2020 after two days of proceedings (Tr. pp. 1-209). While the impartial hearing was pending, the district located an approved NPS that would accept the student (Tr. pp. 190). In a decision dated June 11, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year because it had "conceded that the suspensions and change in placement were illegal" (IHO Decision at p. 12). According to the IHO, since the student's removal from Success, he had received four hours of tutoring per day (id.). The IHO found that the charter school's special education director credibly testified that the student had made enough progress to pass third grade, and that he followed the same curriculum as his peers during tutoring sessions (id. at pp. 12-13).

With regard to relief and the parent's request for compensatory education services, the IHO determined that the parent "would not accept any interim placement," and that "[i]ndividual tutoring was the only option and it advanced [the student's] academic skills" (*id.* at p. 13). Therefore, the IHO determined that "no harm resulted from the denial of a FAPE" and the student was "not entitled to compensatory education services" (*id.*). Finally, the IHO found that the parent's request for an independent developmental pediatric evaluation (IEE) of the student did not occur "until the hearing started" and that the district "was not given ample notice to present a defense" (*id.* at pp. 13-14).² As such, the IHO denied the parent's IEE request (*id.* at p. 14).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this matter. The parent argues that the IHO failed to make any findings of fact as to the denial of a FAPE in the least restrictive environment (LRE) regarding:

1. the alleged failure of the district to provide the program mandated on the student's September 2019 IEP from November 22, 2019 to January 6, 2020,
2. the alleged failure of the district to provide the related services mandated on the student's September 2019 IEP from November 22, 2019 to January 6, 2020,
3. the alleged failure of the district to provide the program mandated on the student's January 2020 IEP from January 6, 2020 to May 19, 2020,
4. the alleged failure of the district to provide the related services mandated on the student's January 2020 IEP from January 6, 2020 to May 19, 2020,
5. the alleged change in the student's program and placement without an IEP meeting, and
6. the alleged provision of services for the student in the "most restrictive setting of 1:1 tutoring."

Additionally, the parent contends on appeal that the IHO erred in determining that the parent would not accept any interim placement, that no educational harm resulted from the denial of a FAPE that warranted compensatory services, and that the IEE was not necessary. The parent requests that the undersigned reverse the IHO's decision and require the district to provide compensatory services in the form of 600 hours of individualized, special education instruction, 50 hours of counseling, 35 hours of speech-language therapy, and an IEE.

In an answer, the district responds to the parent's allegations, and asserts that the parties limited the scope of the impartial hearing to the issues of: compensatory special education instruction, placement at an NPS, change in the student's classification, and the request for an IEE. The district admits that that the student had been improperly removed from the charter school, which denied him a FAPE during the 2019-20 school year, and asserts that the district has offered

² The IHO additionally determined that the district had arranged for psychiatric and neuropsychological evaluations and therefore the IEE "seems unnecessary as it would not provide more information than the [evaluations] which were granted" (*id.* at p. 14).

the parent authorizations to obtain the counseling and speech-language therapy services the student missed during that school year. The district notes that as of May 2020, the student had been enrolled at the Biondi School - Rising Ground (Biondi), the approved NPS located for the student during the impartial hearing. The district argues that the IHO properly denied the parent's request for compensatory education and an IEE, and requests that the parent's appeal be dismissed.

In a reply, the parent argues against the positions set forth in the district's answer and asks that an SRO consider the issues raised in the request for review and grant the requested relief.³

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.

³ Much of the parent's reply merely reiterates what is already set forth in her request for review and, therefore, exceeds the scope of a permissible reply under Part 279 of State regulations (8 NYCRR 279.6[a]). The district attempts to file additional evidence in a response to the parent's reply, which is equally impermissible and not necessary to reach a decision in this case in any event.

§ 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" (Andrew 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 Andrew 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 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]).⁴

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).

⁴ 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" (Andrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters—Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "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 further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

On appeal the parent asserts that the IHO erred by not making additional findings regarding the district's failure to provide the student with a FAPE. In its answer, the district does not put forth a cross-appeal challenging the IHO's finding that the district denied the student a FAPE for the 2019-20 school year. As such, the IHO's denial of a FAPE determination has become final and binding on the parties and will not be further discussed (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]).

In addition, the parent's request for review reveals that the parent has not pursued the issue of "[c]hanging the student's classification from ED to OHI, LD, or SLI" as identified in her due process complaint notice (compare Parent Ex. A at pp. 1-6, with Req. for Rev.) and despite the parent's request at the hearing that the student's "classification be changed from ED to other health impairment" (Tr. p. 27). Therefore, this issue is deemed abandoned pursuant to State regulation and will not be further addressed below (8 NYCRR 279.8[c][4]).

1. Additional Evidence – Related Services

In their request for review, the parent accuses the IHO of failing to address claims that the district failed to provide the student with related services under the September 2019 and January 2020 IEPs. In its answer, the district requests that an SRO accept the attached SRO Exhibit 1, which consists of the related services authorizations (RSAs) the district prepared for the student to obtain the counseling and speech-language therapy services that he did not receive during the 2019-20 school year. The district also asserts that during the hearing the parent explicitly abandoned the claim about the student's missed related services because it had been resolved by the parties and therefore was no longer an issue in dispute during the hearing (see Tr. pp. 7-9, 23-24, 27; Answer at pp. 6-7). Further, the district alleges that during the hearing the parent specifically objected to the IHO entering the RSAs into the hearing record, and therefore the IHO did not enter that exhibit into evidence (Tr. pp. 7-9; Answer at p. 6). Therefore, as it relates to the parent's allegation on appeal that the IHO erred by not ordering the district to provide compensatory related services for those the student missed, the district requests that an SRO accept this additional evidence because it did not have the opportunity to present evidence on this issue during the hearing.

Here, although the February 2020 due process complaint notice sought relief for the student's missed related services, review of the hearing record reveals that counsel for the parent stated that he objected to the district's attempt to enter an exhibit containing the RSAs into evidence on the basis that "we have agreed to settle on the related services issue" (Tr. p. 8). The parent's counsel asked the IHO if she would "note the agreement on the record" and when the IHO asked for clarification, the attorney replied "[r]elated to the related services" (Tr. p. 18). During his opening statement, counsel for the parent also "stopped" himself from discussing the student's related services, agreeing with the district's counsel that "we've already resolved that" (Tr. p. 24). Further, counsel for the parent expressly limited the relief sought at the hearing to 600 hours of compensatory education services, placement at an appropriate NPS, a developmental pediatric IEE, and a change in classification from emotional disturbance to other health impairment (see Tr. p. 27). Although the parent asserts that the related services issue was not withdrawn, given counsel for the parent's objections to the district's evidence and representations on the record at the outset of the impartial hearing, it was not improper for the IHO to treat the parent's related services claims as withdrawn at the request of the parent and discontinue any further compensatory education inquiry associated with related services in her decision. Accordingly, I find that the parents' position must be rejected and that the parties agreed that claims with respect to related services were withdrawn by the parent due to representations that the parties had settled them by agreement and, therefore, they will not be discussed further here.

2. IEE

Turning to the parent's allegation that the IHO erred in failing to grant her request for an independent developmental pediatric evaluation, a review of the parent's February 2020 due process complaint notice reflects that it does not include a claim that the student required an evaluation conducted by a developmental pediatrician, or that the district failed to grant a request for an IEE at public expense (see Parent Ex. A). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Because the parent did not include these claims among the issues in the due process complaint notice, they were not properly raised.

On appeal the parent also asserts that the IEE "is necessary to determine whether [the student] has autism;" however, even if I were to reach this issue, the parent's claim would not be particularly persuasive insofar as the licensed psychologist who conducted the December 2019 neuropsychological evaluation had already offered the student a diagnosis of an autism spectrum disorder, and this evaluation was an IEE previously granted by the district at public expense to the parent (Parent Ex. E at pp. 1, 16; see Tr. pp. 83, 157). Federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]), and the parent would not be able to obtain multiples IEEs at public expense from the district.

B. Compensatory Education

Turning next to the parent's challenge to the IHO's determination that the student was not educationally harmed by the denial of a FAPE and the parties' dispute over whether the student should be awarded compensatory education services, review of the evidence in the hearing record regarding the student's needs and the services provided to him during the 2019-20 school year supports the IHO's determination regarding the appropriate remedy under the circumstances.

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];⁵ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], *aff'd on reconsideration sub nom. Burr v. Sobol*, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

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

⁵ 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]).

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, the hearing record shows that the student began attending third grade at Success in August 2019 and a CSE convened on September 19, 2019 for the student's annual review (Tr. pp. 77, 119; see Dist. Ex. 22).⁶ Participants during the September 2019 CSE meeting included two school psychologists, a special education teacher who also served as the district representative, the charter school's special education coordinator, and the parent (Tr. p. 78; Dist. Ex. 22 at p. 14).⁷ In order to determine the student's educational needs at that time, according to the school psychologist the September 2019 CSE reviewed and relied upon a teacher report, related services reports, and an FBA and a BIP from the student's former school placement (Tr. pp. 77-78). The CSE determined that the student remained eligible for services as a student with a speech or language impairment and recommended that the student receive ICT services for math and ELA (Dist. Ex. 22 at pp. 1, 9). The September 2019 CSE also recommended related services for the student consisting of one 30-minute session per week of counseling in a group, one 30-minute session per week of individual counseling, and two 30-minute sessions per week of speech-language therapy in a group (id. at p. 9). In addition, the September 2019 CSE recommended that

⁶ The September 2019 IEP indicated the purpose of the meeting was a "reconvene" (Dist. Ex. 22 at p. 12).

⁷ In New York, both the public school district of residence—as the local educational agency (LEA) under the IDEA and State law—and the charter school are assigned responsibilities to ensure the provision of a FAPE to a student with a disability who attends a charter school, with the public school having the initial responsibility for creating a student's IEP. The Education Law provides that a charter school shall be deemed a nonpublic school in the school district within which the charter school is located. Special education programs and services shall be provided to students with a disability attending a charter school in accordance with the [IEP] recommended by the [CSE] of the student's school district of residence. The charter school may arrange to have such services provided by such school district of residence or by the charter school directly or by contract with another provider. Where the charter school arranges to have the school district of residence provide such special education programs or services, such school district shall provide services in the same manner as it serves students with disabilities in other public schools in the school district, including the provision of supplementary and related services on site to the same extent to which it has a policy or practice of providing such services on the site of such other public schools.

(Educ. Law § 2853[4][a]).

the student receive fulltime individual paraprofessional services for behavior support, as well as a BIP (id. at pp. 3, 9). The September 2019 CSE identified the student's management needs which included predetermined breaks, chunking his work, visual charts, frequent check ins, constant reminders to follow directions and stay focused, previewing new content and vocabulary, and preferential seating (id. at p. 2). The IEP also indicated that the student benefitted from practicing the behavioral skills outlined in his BIP throughout the school day, in order to build a habit of engaging in replacement behaviors when he became frustrated (id. at p. 3). According to the school psychologist, everyone including the parent agreed on the student's needs and the September 2019 CSE recommendations (Tr. pp. 79-80).

The parent testified that during the first week of school the student did well, but then the parent began to receive "constant calls" due to behavioral issues (Tr. p. 122). In the classroom the student reportedly struggled with impulse control, keeping his body still, following rules and routines, and coping with frustration, which led to him spending "a significant amount of time out of class" due to the number of breaks he required (Dist. Ex. 10 at p. 3). The student was also removed from his classroom multiple times in the beginning of the 2019-20 school year due to aggressive and self-injurious behaviors (Tr. pp. 122-25; see Dist. Ex. 19). Additionally, the student was suspended "over 15 times," taken to the emergency room, and restrained by police officers (Tr. pp. 122, 124, 129; Dist. Ex. 5 at p. 5; see Dist. Ex. 19).

In October 2019, the charter school conducted a psychoeducational evaluation of the student due to parent and school concerns in the areas of "academics, behavior and lack of peer connections" (Dist. Ex. 10 at p. 1). According to the report, the student's teachers described him as "sweet" and "smart," but relayed that he struggled with focusing and controlling his behavior (id. at p. 2). The student reportedly benefitted from rewards and classroom incentives (id.). The psychoeducational evaluation report included results of measures of the student's cognitive ability, academic achievement, and social/emotional functioning (id. at pp. 3-18). The student's overall cognitive functioning fell in the very low range (full scale IQ 77) as assessed by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) when compared to a national sample of same-age peers (id. at pp. 3, 18). He performed in the average range in the area of working memory, in the low average range in the areas of verbal comprehension and processing speed, and in the very low range in the areas of fluid reasoning and visual spatial reasoning (id. at p. 18).

Teacher reports reflected in the psychoeducational evaluation report indicated that the student was reading at a Fountas and Pinnell Level J (end-of-year first-grade) (Dist. Ex. 10 at p. 2). His teachers reported that the student was able to read fluently but with errors, and that he struggled with reading comprehension (id.). The student's writing was "not fluent" and lacked a logical flow from sentence to sentence although he benefitted from pre-planning writing tasks (id.). According to the report, the student exhibited better focus during math activities than other academic areas, and was able to identify the correct operations and solve addition, subtraction, and multiplication problems successfully although he exhibited difficulty with word and multistep problems (id. at pp. 2-3). The student had difficulty with impulse control, keeping his body still, and following school rules and routines (id. at p. 3). The student benefitted from an individual paraprofessional, predetermined breaks, check-ins, and visual aids (id.). The student's overall academic achievement, as assessed by the Kaufman Tests of Educational Achievement-Third Edition (KTEA-3), fell in the average range across measures of reading, writing, and math compared to a national sample of same-age peers (id. at pp. 3, 18). The student exhibited academic strengths in spelling and mathematical equations, and weakness in written expression (id. at p. 18).

Socially, the psychoeducational evaluation report reflected teacher reports that the student struggled to have positive social interactions with his peers and was often observed alone during unstructured times (Dist. Ex. 10 at p. 3). Additionally, the student had not been observed to initiate cooperative play with peers, and teacher reports reflected that he had "trouble" sharing and taking turns (id.). The student exhibited difficulty communicating and coping with frustration, and ignored adult directions when upset (id.). The report indicated that the student was suspended several times during his first two months at Success and was frequently removed from his class to take breaks (id.). The student's social/emotional functioning was assessed through parent and teacher rating using the Behavior Assessment System for Children-Third Edition (BASC-3) (id. at pp. 3, 18). Parent ratings of the student's behavior fell between the average and clinically significant range, and revealed concerns at home related to hyperactivity, aggression, conduct problems, and atypicality (id. at p. 18). Teacher ratings of the student's behavior at school all fell within the clinically significant range; including difficulties with hyperactivity, aggression, conduct problems, anxiety, depression, somatization, atypicality, withdrawal, attention problems, learning problems, adaptability, leadership, and functional communication (id.). Results of the Conners-3 behavioral rating scales indicated that the student exhibited hyperactivity, inattentiveness, defiance, and difficulty with learning and relating to his peers at school (id.). The results of an administration of the Autism Spectrum Rating Scales (ASRS) indicated that within the school setting the student exhibited "many behaviors" indicative of an autism spectrum disorder (id. at pp. 3, 18). The report provided recommendations for the CSE to consider, including maintaining paraprofessional support and counseling; noting that the student may benefit from increased academic support and a high level of adult monitoring to ensure safety (id. at p. 18).

The district authorized an independent psychiatric evaluation that was conducted on October 11, 2019 to assess the student's behavior and determine how to best meet his educational needs (Tr. p. 82; Dist. Ex. 12 at p. 1). According to the report, the student's problem behaviors had escalated since the start of the school year, as the student engaged in aggressive behaviors towards adults, peers, and himself when he was frustrated (Dist. Ex. 12 at p. 1). The parent reported that the student had difficulty sharing, got upset easily, and misinterpreted others' behavior inaccurately as being against him or making fun of him (id.). The student reportedly did not have friends and had been suspended several times from school due to problem behaviors (id.). According to his school, the student engaged in negative self-talk and self-harm when he was frustrated (id. at p. 2). During the evaluation, the psychiatrist reported that the student appeared sad and anxious (id. at p. 3). The psychiatrist concluded that the student's academic and social functioning was impacted by his difficulty with paying attention, distractibility, hyperactivity, and poor impulse control (id. at p. 3). According to the psychiatrist, the student struggled with anxiety, depressive symptoms, and poor self-image and was easily frustrated, had poor coping skills, poor social skills, and sometimes felt overwhelmed (id. at pp. 3-4). The psychiatrist noted that in the home environment, the student encountered fewer frustrations, social challenges, distractions and demands which resulted in fewer and less severe problem behaviors than in school (id. at p. 4). The student exhibited inflexible adherence to routines, became distressed over small changes, had difficulty with transitions and was rigid in his thinking (id.). These difficulties were in addition to the student's deficits in social/emotional reciprocity, social interaction and communication skills (id.). The October 2019 psychiatric evaluation report indicated diagnoses of attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), major depressive disorder, unspecified anxiety disorder, specific learning disorder with impairments in reading, written expression and mathematics, and "[r]ule [o]ut – [a]utism [s]pectrum [d]isorder, mild" (Dist. Ex.

12 at pp. 4-5). The psychiatrist recommended interventions for the student including psychotherapy, consideration of medication, and "placement in a small classroom setting" that provided "intensive support" for academic skills, social/emotional development, and behavior management (id. at p. 5).

In early November 2019, the parent and charter school requested a reevaluation and CSE meeting due to an escalation in the student's behaviors and parent concerns about the need for a different educational setting (Tr. pp. 81-82). On November 13, 2019, a district social worker observed the student in the charter school classroom (see Dist. Ex. 8). The class consisted of two teachers, one paraprofessional, and eighteen students (id. at p. 1). At the start of the observation, the student was picked up by his school counselor, but he was brought back because the observation was being conducted (id.). When he came back, the student appeared frustrated and left the classroom, followed by his paraprofessional (id.). When they returned the student sat at a table in the back of the carpet and quietly watched the class (id.). The student's paraprofessional reminded him that he would lose points if he did not sit with his classmates, but the student did not respond, and sat at the table playing with his pencil (id.). His teacher asked him to put down the pencil and get a book, with which he complied (id.). The social worker noted that the student did not engage with other students and appeared to have difficulty remaining still during the observation (id. at pp. 1-2).

On November 14, 2019, a social history update was conducted, for which the parent served as the sole informant (Dist. Ex. 11 at p. 1). During the update, the parent requested an independent psychiatric evaluation of the student as she disagreed with the evaluation arranged by the charter school (id.). The parent expressed concerns relating to the student's current academic setting, which she felt was not supportive of the student's emotional needs and her belief that he would benefit from more individualized support (id.). According to the parent, the student functioned better in a structured setting with a consistent routine due to his difficulty with transitions (id.). The student reportedly did not trust adults and could be disobedient and stubborn (id. at pp. 1-2). In addition, the parent stated that the student disliked both positive and negative attention and struggled with poor self-regulation and low self-esteem (id. at p. 2). Additionally, the parent reported that the student was receiving "psychotherapy" from a private provider (id.).

The student's November 14, 2019 FBA and November 19, 2019 BIP were "updated and submitted" by Success (Tr. pp. 88-89; Dist. Exs. 17; 18). The November 2019 FBA targeted "off-task behavior" and improper use of class time such as talking during instruction, leaving his seat, and refusing to complete work (Dist. Ex. 17 at p. 1). The student exhibited those behaviors "throughout the day and across settings," which were often influenced by factors such as being asked to complete group or academically challenging work, having a lack of supervision, being with specific peers, thinking he was "in trouble," or that his peers were "judging him" (id. at pp. 1-2). The function of the behaviors was to obtain adult attention, sensory stimulation, and breaks, and avoid negative peer attention or difficult tasks (id. at pp. 3-4).

The student's November 2019 BIP targeted his aggressive and unsafe behaviors "including, but not limited to" hitting, kicking, and pushing other people or objects, throwing objects, and threatening and cursing at others (Dist. Ex. 18 at p. 1). The baseline data for this targeted behavior had been "collected in the spring of the 2018-2019 school year" when the student was attending the previous charter school (id.). Nonetheless, the baseline data reflected in the "updated" BIP indicated that the student engaged in the behavior five to seven times per day, for 30-45 minutes

per behavior, with a latency period of under 30 seconds, and an intensity of five out of five "due to violent behavior" (*id.*). The replacement behaviors the student was expected to use were to raise his hand and ask for help with academic activities or if he was upset and needed a break (*id.* at p. 4). The student was also expected to use language to articulate feelings and the coping skills he had learned in counseling (*id.*). The BIP included interventions such as receiving attention from his paraprofessional, transitioning from the classroom separately from his classmates, and providing alternative seating options, a visual schedule, sensory tools, predetermined breaks, a point system, and scheduled check-ins by phone with his mother (*id.*).

The school psychologist testified that the parent disagreed with the psychiatric evaluation that had been conducted, and requested both an independent psychiatric evaluation and an independent neuropsychological evaluation conducted by a specific evaluator which the district authorized (Tr. pp. 82-83). A CSE meeting was scheduled to occur on November 18, 2019, however the parent reportedly agreed to delay the CSE meeting pending completion of the IEEs (Tr. pp. 69, 82-83, 99; 111). On or about November 22, 2019, Success notified the parent in an email that it had recently attempted to schedule a meeting with the parent to discuss "very serious concerns" regarding the student (Tr. pp. 99-101; Parent Ex. F at p. 1). The email stated that the charter school was unable "to keep [the student] safe," that he needed a more supportive setting, and was a safety risk to himself and others at school (Parent Ex. F at p. 1). According to the email, Success had filed a request with the district for an interim alternative education setting (IAES) to provide the student with "a more supportive setting" while the parent pursued the IEEs and a CSE meeting could convene to change the placement on the student's IEP (*id.*). Success notified the parent that the student could not return to the charter school until an impartial hearing officer reached a decision (*id.*). The email informed the parent that the school would arrange for two hours of tutoring each day at another location, and that the school would recommend a 6:1+1 special class placement for the student's IAES (*id.*). Around this time the district offered the student a community school placement, which the parent rejected (Tr. pp. 85-86).

In a report dated December 12, 2019 the psychologist who conducted the neuropsychological IEE described the student as "alert and cooperative," but restless and hyperactive (Parent Ex. E at pp. 1, 3). The student needed frequent redirection, his expressive and receptive language appeared adequate, and his mood was "neutral" (*id.* at p. 3). According to the report, the student's attention and memory skills appeared "mildly deficient" (*id.*). The student was cooperative, understood instructions, and worked diligently, but exhibited "frequent distractibility and bouts of impatience" (*id.*). Following the administration of various assessments, the independent psychologist reported that the student's performance on intelligence measures ranged from low average to average and on academic achievement measures ranged from average to superior, with "grade-expected performance on spelling, reading, and math tasks" (*id.* at pp. 4, 16). In addition, the independent psychologist noted that student exhibited "autism disorder symptoms," attention and hyperactivity deficits, language deficiencies, behavior, mood and anxiety, adaptive functioning, and social skills difficulties, as well as family adjustment concerns (*id.* at p. 16). In the IEE report, the student received diagnoses including an autism spectrum disorder, ADHD, combined presentation, and an adjustment disorder with mixed disturbance of emotions and conduct (*id.*). The independent psychologist provided numerous recommendations for the student regarding school placement and support services (*id.* at pp. 17-19).

An undated third-grade charter school teacher progress report indicated that the student was performing below grade level in reading, writing, and math (Dist. Ex. 14 at p. 1). According

to the report, the student was unable to maintain focus during guided reading and an ELA assessment as he exhibited task avoidant and disruptive behaviors (id.). Because of his lack of focus and self-regulation, the student was unable to access grade level text and his answers to comprehension questions did not reflect understanding of text (id.). The report indicated that the student was able to focus for longer periods of time during math tasks, but still struggled with multi-step and word problems (id. at pp. 1-2). In the area of social/emotional development, the report reflected that the student exhibited a lack of impulse control, increased aggression and self-harm, and "multiple inappropriate, unsafe and unsanitary behaviors" (id. at pp. 2-3). The December 2019 charter school counseling progress report indicated that the student was an "eager participant" in counseling sessions; however, he struggled to apply learned coping strategies when he was "escalated" (Dist. Ex. 16 at p. 1). The December 2019 charter school speech therapy progress report indicated that the student was "highly distractible" and benefitted from redirection (Dist. Ex. 15 at p. 1). The report stated that the student struggled to engage in conversations that required turn taking and topic maintenance (id.). The speech therapist recommended a change in the student's sessions from all group to one individual and two group sessions as he "worked best when provided with periods of individualized 1:1 attention" (id. at p. 2).

A pediatric neuropsychologist conducted a private record review and consultation using information collected through parent interview and the review of the student's records (Tr. pp. 166, 170, 177; Parent Ex. B at pp. 1, 9).⁸ In a report dated May 5, 2020 the neuropsychologist provided recommendations for the student such as that he required a "small and supportive classroom within a therapeutic milieu," an FBA and BIP, individual paraprofessional services, related services, evaluations including a "[d]evelopmental-[b]ehavioral [p]ediatric [e]valuation," and various classroom strategies and testing accommodations (id. at pp. 5-9).

With regard to the parties' dispute regarding the student's need for compensatory educational services, according to the "sprint specialist"—the individual who managed special education at the charter school—the student initially received two hours of tutoring per day following his November 2019 long-term suspension (Tr. pp. 31, 33). After the first week, the parent requested additional tutoring hours to ensure the student was making progress, and the charter school agreed (Tr. pp. 33, 136). Subsequently, Success provided four hours per day of 1:1 tutoring at a public library to the student (id.).⁹ The sprint specialist testified that she compiled a weekly packet, which comprised the same reading, writing, math, and science coursework that the student's peers were utilizing in the classroom and sent it to the tutor and the parent (Tr. pp. 34-35). The sprint specialist received daily and then weekly progress reports that outlined what the student was covering, and was in daily contact with his tutors (id.). In addition, she testified that the student was working towards his reading, writing, and math IEP goals during tutoring (Tr. p. 39). According to the sprint specialist, each day the tutor provided approximately 45-60 minutes

⁸ The documents reviewed by the independent evaluator included the student's September 2019 and January 2020 IEPs, the December 2019 neuropsychological evaluation report, the October 2019 psychiatric evaluation report, the October 2019 psychoeducational evaluation report, a September 2019 BIP, and a March 23, 2018 FBA (Tr. pp. 171-72; Parent Ex. B at p. 1).

⁹ The sprint specialist testified that regarding closures related to COVID-19, once the student received his tablet he continued to receive four hours per day of 1:1 instruction (Tr. pp. 33, 37-38). Further, the sprint specialist stated that the parent never expressed to her that she wanted the student to receive remote instruction with peers through a classroom setting (Tr. pp. 37-38).

of reading instruction to address reading comprehension goals, 30 minutes of writing instruction that incorporated written language goals, and math instruction (Tr. pp. 43-44).

The tutoring reports included in the hearing record from December 2019 indicated that the student was working on weather, maps and vocabulary in science, and although he "struggled a bit" he also reportedly "did very well" (Dist. Ex. 13 at p. 1). In math, the student reportedly knew his multiplication tables "extremely well" and worked on simplifying word problems and creating equations from them (*id.* at p. 2). In ELA, the student did "wonderfully" writing spelling words in sentences, an "excellent job" describing character's traits in stories, and was "consistently excited and engaged" during the session (*id.*). The student "immediately caught on and understood" a concepts after they were "broken down and put into simpler terms" (*id.* at p. 3). Regardless of lack of access to "experiments" when working on science concepts, the tutor "improvised" when needed, and the student was "able to draw the same conclusions" as he would have in school (*id.*). Although he preferred math over science schoolwork, the student reportedly "persevered" and did "excellent work" (*id.*). The student was "not as focused" during one of the sessions, but he was able to complete his work "quickly and diligently" and he "showed significant improvement" in skills from the prior week (*id.* at p. 4). In addition, the student "showed a thorough understanding" of his vocabulary words (Dist. Ex. 13 at p. 4).

Meeting minutes from the January 2020 CSE meeting reflected reports that the student was "doing well" with the 1:1 tutoring services; specifically, that he was "able to master concepts taught," "engaged, consistently excited," "able to access all material" and the "rate of academic progress was higher" (Dist. Ex. 5 at pp. 1-2). According to the sprint specialist, the student was able to successfully complete all his work, which was "definitely improvement from when he was in our school building, where frankly, he was not getting through the academic content" (Tr. pp. 35-36, 46; *see* Dist. Ex. 5 at p. 2). She indicated that "any time that there was a concept that [the student] struggled with, he and the tutor worked through it together" which resulted in "really good growth" such that the student was "on track to be promoted to the fourth grade" (Tr. p. 36). The sprint specialist testified it was her understanding that the parent "was happy with the arrangement," and that the tutor reported that the student was making progress during the tutoring sessions (Tr. pp. 34, 38).¹⁰ Additionally, the sprint specialist testified that the student benefitted from the 1:1 instruction and opined that "he was not getting instruction while he was in our building;" a situation which "definitely changed with the one-on-one attention" (Tr. pp. 38-39). She opined that the "whole class setting" at Success was not "a good fit" for the student, but that he had "benefitted academically and emotionally" in the 1:1 tutoring environment (Tr. pp. 44, 46).

As discussed above, the hearing record shows that the student did not receive instruction in a classroom pursuant to his September 2019 and January 2020 IEPs, and there is evidence that the 1:1 tutoring sessions may not have afforded the student all of the benefits associated with classroom learning opportunities (*see* Tr. pp. 151-53, 178-79, 182-83). However, the hearing record also shows that the student did receive educational benefits from the tutoring services provided throughout the remainder of the 2019-20 school year, which enabled him to be "on track" for promotion to the next grade (*see* Tr. pp. 34-39; Dist. Exs. 5 at pp. 1-2; 13). Although the parent is correct that the 1:1 tutoring environment lacked opportunities for peer interaction, this case is a

¹⁰ To her knowledge, the parent had not expressed to the sprint specialist or "anyone else" "any unhappiness" with the 1:1 tutoring "arrangement" (Tr. p. 39).

good example of just how difficult it can be to simultaneously fulfill the all of the aims of the IDEA when the objective of providing a student with the opportunity to make academic progress is competing with the objective to place the student with nondisabled peers to the maximum extent appropriate, especially in circumstances like this case in which the student's behavior with peers was by all accounts becoming increasingly aggressive and unsafe. Even the parent faulted the district in her due process complaint notice for failing to place the student in a therapeutic nonpublic school (Parent Ex. A at p. 5), which was significantly more restrictive setting than Success. One district court has held that "[g]iven the significance of the LRE mandate, the Court finds [sic] is unconvinced that compensatory education could never be appropriate where a school district fails to mainstream the student, but otherwise provides a FAPE E.P. v. N. Arlington Bd. of Educ., , 2019 WL 1495692, at *11 [D.N.J. Apr. 1, 2019] [emphasis in the original]), but the Third Circuit Court of appeals has also explained that award of compensatory education may be 'improper' where a district violates the LRE mandate but has otherwise provided the child with FAPE (A.G. v. Wissahickon Sch. Dist., 374 F. App'x 330, 335 [3d Cir. 2010]). This case is not one which the student's educational progress so clearly deteriorated during the period in which the district was seeking a nonpublic school for the student and he was receiving four hours of 1:1 tutoring, but instead he appeared to achieve some significant learning (see Lauren W. v. DeFlaminis, 480 F.3d 259, 272–73 [3d Cir. 2007]). This is not a case that calls for a mechanical hour-per-hour calculation in order to make the student whole, because the 1:1 tutoring already provided to the student arrived what a compensatory award, qualitatively speaking, should look like as a result of improperly suspending the student and while a new placement was identified (see Reid, 401 F.3d at 518). Therefore, the evidence in the hearing record supports the IHO's finding that no further compensatory educational services beyond those that were voluntarily provided by the district were required in order to remediate lost educational instruction.

Further, I find no reason to depart from the IHO's finding that the parent was not willing to accept the interim placements that the district offered. After the student was suspended from Success in November 2019 the evidence shows that CSE offered "a community school" placement with ICT services which the parent did not accept, and at the January 2020 CSE meeting, offered an interim 12:1+1 special class placement in a "D75" school while awaiting placement in an NPS (Tr. pp. 40-41, 85-86, 92-93, 112, 139-40; Dist. Exs. 3 at pp. 1, 7; 5 at pp. 1, 2, 6).¹¹ The school psychologist testified that in a conversation subsequent to the student's suspension, the parent indicated that regarding the tutoring, the student was "doing fine, and that there were no behavioral concerns" (see Tr. pp. 85-87). According to the sprint specialist, during the January 2020 CSE meeting the parent "expressed pretty adamantly that she was not open" to the proposed interim placement, rather, she "would prefer the one-to-one tutoring arrangement" until an NPS was

¹¹ I addressed parent's reply and the district's response thereto above. In the request for review, the parent argues that the district failed to present evidence during the impartial hearing of prior written notices that addressed the student's removal from the charter school or subsequent IEP meetings. However, pointing that the district failed to meet its burden of production to show that it issued prior written notices—a procedural violation that in itself did not appear to cause the substantive denial of a FAPE—is not a particularly meaningful factor in the determination of whether the student should receive additional compensatory education services, especially when the district already conceded that it failed to offer the student a FAPE because the student should not have been suspended as well as the parent's belief that the student should not return to Success and her reluctance to accept an interim classroom setting offered by the district.

identified (Tr. p. 69; Dist. Exs. 3 at p. 1; 5 at pp. 1, 2, 6).¹² The school psychologist also testified that the parent preferred that the student continue to receive 1:1 tutoring services over the interim placement offered at the January 2020 CSE meeting, and that he was "doing well" with tutoring at that time (Tr. pp. 94, 96). Although the parent testified that the 1:1 tutoring was not appropriate for the student, she also stated that "anything was better than being in Success" and she was "just waiting for [the district] to make the placement" (Tr. p. 153). Even though the parent may have preferred that the student receive some other type of service while Biondi was being identified and put in place, the IHO was not required to discount the benefit that the student was receiving from the four hours of 1:1 tutoring each day. As compensatory education is an equitable remedy, and the evidence in the hearing record showed that the parent favored continuing the student's 1:1 tutoring services over other types of placements offered by the district, those factors further weigh against further increasing the compensatory education beyond those services already provided to the student before he was placed in Biondi.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the provision of 1:1 tutoring services to the student subsequent to his suspension from the charter school did not result in educational harm such that compensatory educational services were warranted, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 10, 2020**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹² The parent testified that she visited the proposed interim placement site, and determined it was not appropriate for the student (Tr. pp. 140-42).