The University of the State of New York

The State Education Department
State Review Officer
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No. 20-135

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 Board of Education of the Westhampton Beach Union Free School District

Appearances:
Kevin A. Seaman, Esq., attorney for respondent

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 dismissed the parent's due process complaint notice and held the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for the student for the 2019-20 school year were appropriate. 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

This appeal arises from an IHO's decision issued after the matter had been remanded by the undersigned for further development of the hearing record (see Application of a Student with a Disability, Appeal No. 19-121). Additionally, the student in this case has been the subject of seven prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history

preceding this case—as well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

Based on the parent's allegations, three CSE meetings were convened on June 19, July 21, and August 25, 2019 to conduct an annual review and develop an IEP for the student's 2019-20 school year (see Record Ex. at pp. 009, 012, 014, 016, 452-53, 456, 458).[1]

In a due process complaint notice dated September 5, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Record Ex. at pp. 003-05). On October 2, 2019, the IHO conducted a prehearing conference with the parties (Oct. 2, 2019 Tr. pp. 1-56),[2] and, thereafter, the parent submitted an undated amended due process complaint notice (Record Ex. at pp. 006-33). The parties participated in a second prehearing conference conducted by the IHO on October 29, 2019 (Oct. 29, 2019 Tr. pp. 1-30).

In a decision dated November 15, 2019, the IHO granted the district's motion to dismiss the parent's due process complaint notice prior to conducting an impartial hearing on grounds related to res judicata, sufficiency of the due process complaint notice, and jurisdiction of the IHO (Record Ex. at pp. 389-93). The parent appealed the IHO's determination related to res judicata, and, in a decision dated December 26, 2019, the undersigned remanded the matter to the IHO for further administrative proceedings (Application of a Student with a Disability, Appeal No. 19-121). In that decision, the undersigned noted that, although the parent's claims were similar to those raised previously and resolved for the 2018-19 school year,[3] the parent was now raising claims regarding the 2019-20 school year and that, therefore, the IHO prematurely dismissed the parent's claims without an evidentiary hearing (id.). However, in Application of a Student with a Disability, Appeal No. 19-121, it was specifically acknowledged that, in considering the parent's claims relevant to the 2019-20 school year, it was "important to take into account prior school year determinations and the extent to which a student's needs have changed, the progress the student has made since his previous IEP was developed, and the extent to which the district's available continuum of programs ha[s] changed during the intervening period, if at all." Toward that end, the undersigned noted that:

> A better practice more in line with the goal of reaching a determination on substantive grounds may be to limit the scope of the hearing to relevant factual matters that differ compared to the prior school year(s). To facilitate this, the IHO could, upon notice to the parties, adopt the legal principals discussed in a prior matter involving the student and limit the hearing to

[1] For reasons discussed below, the entire contents of documentary evidence filed by the district as part of the hearing record in this matter were combined into one "Record Exhibit" and consecutively page numbered (Record Ex. at pp. 001-478).

[2] The transcripts of the two hearing dates held prior to the remand were separately paginated. Therefore, citations to these transcripts will include the date of the hearing (see Oct. 2, 2019 Tr. pp 1-56; Oct. 29, 2019 Tr. pp. 1-30).

[3] The claims raised for the 2018-19 school year were addressed in Application of a Student with a Disability, Appeal No. 19-021.

> factual matters related to the student's needs or the district's available continuum as they may relate to application of the legal standard. The parent should be provided an opportunity to be heard with regard to facts since the events underlying the last proceeding, but need not be provided an unrestrained right to elicit facts to support legal arguments that have been rejected previously. For example, the parent does not have to be heard anew on the issue of whether the school district is legally required to create a new class to address his son's needs, but there should be a limited inquiry as to whether the district has, since the 2018-19 school year, created a program in district that could appropriately address the student's needs.

(id.).

With these instructions, this matter was remanded to the IHO to render a determination regarding the appropriateness of the student's IEP for the 2019-20 school year based on 10 allegations set forth in the amended due process complaint notice proceedings (Application of a Student with a Disability, Appeal No. 19-121). The parent's claims which were remanded to the IHO, broadly stated, pertained to the student's access to the general education curriculum and grade-level learning standards, present levels of performance and annual goals in the IEP, and the CSE's consideration of the continuum of services and the least restrictive environment (LRE) for the student (id.).

The district was directed to "be prepared to defend against the alleged claims by presenting evidence regarding why the CSE made the recommendation that it did and whether the student's needs and progress remained constant such that a placement recommendation similar to prior school years continued to be appropriate for the 2019-20 school year" (Application of a Student with a Disability, Appeal No. 19-121).[4]

A. Impartial Hearing upon Remand

Approximately four months passed after the determination was issued in Application of a Student with a Disability, Appeal No. 19-121 before the parties took up the matter again before the IHO, and during the intervening period the COVID-19 pandemic broke out across the United States. A pre-hearing conference was held on April 24, 2020 (see Tr. pp. 1-45). During the pre-hearing conference, the IHO indicated that he was limiting the scope of the impartial hearing to the district's offer of a FAPE for "the 2019-2020 school year and the predicate for the IEP, i.e., did the child's condition change to merit consideration of a different placement or did the school district's offering change so that they could accommodate this particular student" (Tr. pp. 14, 32-33; see Tr. pp. 36-37).[5] The IHO requested that the parties submit briefs, affidavits of witnesses,

[4] In Application of a Student with a Disability, Appeal No. 19-121, it was held that some of the parent's claims relating to CSE composition, predetermination, parent participation, and retaliation, as well as his requests for an order requiring the district to hire an expert to supervise the implementation of a hybrid program and for attorney's fees, had been adversely ruled upon by the IHO and thereafter abandoned during State-level review and/or were outside of the jurisdiction of the IHO and SRO.

[5] The parent disagreed with the IHO's interpretation of the issues remanded (see Tr. pp. 11-15, 33).

and documentation regarding these limited issues, and indicated that the witnesses would be made available for cross-examination (Tr. pp. 27-28, 36).[6] The parties agreed to submit such information (Tr. pp. 28-30, 31-32, 33). The IHO gave further instructions as to what he was seeking from the parties, specifically, that he wanted factual submissions regarding the issues he laid out that were remanded and not "extensive legal argument" (Tr. pp. 36-38).

On April 27, 2020, the IHO sent a letter to the parties to further clarify the issues for remand (see Record Ex. at pp. 206-08).[7] In that letter, the IHO explicitly "adopt[ed] the legal principles discussed in the prior hearings involving this student and, therefore limit[ed] th[e] hearing to factual matters related to the student's needs or the District's available continuum as they may relate to the application of the legal standards" (id. at pp. 207-08). The IHO laid how "the Parent c[ould] support" the 10 claims specifically remanded in Application of a Student with a Disability, Appeal No. 19-121, and reiterated instructions to the parties to submit "Affidavits of Fact" by May 29, 2020 (id. at pp. 207-08).

The parent submitted a "Preliminary Statement" dated May 12, 2020 (see Record Ex. at pp. 036-49). In this preliminary statement, the parent argued that the student was not "severely disabled" as was "presumed" by a prior IHO who adjudicated the parent's claims relating to the student's 2018-19 school year (id. at p. 036).[8] The parent argued that, whereas the IHO in the prior matter stated that he was not challenging the student's classification as a severely disabled student, he was "choosing to do so" in the present matter and that this constituted a change in circumstances (id. at p. 037).[9] The parent asserted that the CSE relied on the idea that the student was severely disabled to deny the student's access to the general education curriculum and general education setting (id. at pp. 039-41). Further, the parent asserted that, on this same basis, the CSE failed to create annual goals that aligned with grade-level standards and failed to appropriately assess the student to create his present levels of performance (id. at pp. 041-42). Also, the parent contended that the CSE's reliance on the idea that the student was severely disabled denied him an education that was appropriately ambitious (id. at pp. 042-43). Finally, the parent argued that the student was denied an education in the LRE and that the student's placement was predetermined (id. at pp. 043-47). The parent did not submit any exhibits or affidavits with his preliminary statement; however, he did request the IHO schedule a hearing "for the purposes of eliciting necessary testimony to evaluate the efficacy of his claims" (id. at p. 049).[10]

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[6] This request was made due to the conditions relating to the COVID-19 pandemic (see Tr. p. 48).

[7] In the April 27, 2020 letter, the IHO also denied a request from the parent to amend the due process complaint notice (Record Ex. at pp. 206-07; see Record Ex. at pp. 035, 118-120).

[8] The IHO decision referenced by the parent was dated February 20, 2019 (see Record Ex. at pp. 125-205). In that decision, that IHO held that the district offered the student a FAPE for the 2018-19 school year as the district's recommended program was appropriate (id. at p. 201). The February 20, 2019 decision was affirmed in Application of a Student with a Disability, Appeal. No. 19-021.

[9] The parent acknowledge that the student had a "significant cognitive disability" (Record Ex. at p. 038).

[10] The parent alleged that three "triennial reports" generated for the CSE's consideration in planning for the student's 2019-20 school year supported his claim that the student was not severely disabled, as well as his

The district submitted a memorandum of law to the IHO that was dated May 21, 2020 (Record Ex. at pp. 308-20). The district also submitted an affirmation of the attorney representing the district during the impartial hearing and an affidavit of the district's director of pupil personnel services and special education (district director) (Tr. p. 74; Record Ex. at pp. 121-24, 209-19).[11, 12] In the memorandum of law, the district's attorney asserted that "there had not been any cognizable variances displayed by the student since [the February 2019 IHO] decision to date" (id. at p. 310). Further the district argued that "there ha[d] been no modifications of the District's curriculum/program offerings during the 2019-20 School Year such that it would be able to provide [the student] a FAPE within the District's schools as compared to the recommended cross contract with a neighboring public-school district" (id.).

The district also offered documentary evidence, including an IEP dated December 18, 2019, as well as a summary of an October 15, 2019 team meeting for the student, and three progress reports from during the 2019-20 school year (see Record Ex. at pp. 220-75).[13] According to the IEP, the December 18, 2019 CSE recommended a 12:1+1 special class five times weekly in an "Other Public School District," as well as 1:1 adapted physical education and support of a 1:1 aide for transitions (id. at pp. 238, 243). Additionally, the CSE recommended related services of two 30-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of individual physical therapy (PT) per week, three 30-minutes sessions of individual speech-language therapy per week, one 30-minute session of small group speech-language therapy per week, four 90-minute sessions of individual special instruction per week in the home and

"substantive claims at large" (Record Ex. at pp. 038-39, 48); however, neither the parent nor the district offered these reports into evidence. Similarly, the parent argued that the transcripts of CSE meetings held on June 21, 2019, July 19, 2019, and August 15, 2019 "profile[d] as the primary evidence in this case" (id. at p. 048), but the transcripts of those CSE meetings were not offered into evidence.

[11] The attorney affirmation filed as part of the hearing record was not dated; however, due to the contents of the affirmation, it is presumed that this was the affirmation reflected in the exhibit list appended to the IHO's decision as dated May 27, 2020 (see IHO Decision at p. 41; Record Ex. at pp. 121-24). The affidavit of the district director reflects that it was sworn to on a date that was typed as May 22, 2022 and then modified in handwriting to June 22, 2020 (Record Ex. at p. 219); however, as it appears the affidavit was submitted prior to the hearing date on June 5, 2020 (see Tr. p. 48), it is unclear what date the district director swore to the contents of the document and it seems that the affidavit was a "conforming copy" signed by the district's attorney (see Tr. pp. 102-05). In any event, during the impartial hearing on June 22, 2020, the district director swore to the truth and accuracy of the contents of the document (Tr. p. 107).

[12] In the affidavit of the district director, she stated that "there have not been any cognizable variances displayed by the child since [the February 2019 IHO] decision to date (the 2019-20 School Year)" (Record. Ex. at p. 209). Additionally, she asserted that there had been no modifications of the district's curriculum or program offerings, which would allow for the student to be educated within the district (id.).

[13] Specifically, the district submitted a December 26, 2019 progress report completed by providers who delivered educational consultant and parent counseling and training services (Record Ex. at pp. 245-248); a May 9, 2020 annual goal progress report from a private agency that delivered special instruction to the student (id. at pp. 252-54); and a third quarter annual goal progress report from a Board of Cooperative Educational Services (BOCES) (id. at pp. 255-75).

community, and two one-hour sessions of parent counseling and training per month (id. at p. 238).[14]

Following the submission of these documents, the parties participated in the impartial hearing which reconvened on June 5, 2020 (Tr. pp. 46-70). During this hearing date, the IHO confirmed that the parent was only submitting the preliminary statement with no affidavits or other evidence (Tr. pp. 49-50). The parent requested to cross-examine the district director and requested to subpoena the evaluators who conducted assessments of the student as part of the triennial review (Tr. pp. 50-51). The IHO granted the request to cross-examine the district's director, who had essentially provided what would be considered direct testimony by affidavit (Record Ex. at pp. 209-219),[15] but denied the request for a subpoena noting that, although the parent believed the triennial evaluations supported his claims, he did not submit them, and if he had, it would have been up to the district to "cross-examine" (Tr. p. 51). During the impartial hearing, the parent indicated he had not been "aware that [he] had th[e] burden" to produce such documents (id.).

The impartial hearing reconvened for a final hearing date on June 22, 2019, at which time the parent cross-examined the district director (Tr. pp. 71-224).[16, 17]

B. Impartial Hearing Officer Decision

In a decision dated August 7, 2020, the IHO went through a detailed review of the procedural history leading up to the decision, the evidence submitted, and the arguments presented by the parties (IHO Decision at pp. 1-31, 39). The IHO went on to find that the parent's "Preliminary Statement," rather than setting forth facts regarding changes in the student or the district offerings since the 2018-19 proceedings, outlined an argument pertaining to the student's classification as "severely disabled" that amounted to an appeal of the February 2019 IHO decision regarding the 2018-19 school year (id. at pp. 32-33). The IHO found that he did not have jurisdiction to review and overturn the findings of a prior IHO, as that authority lies within the purview of an SRO, who in this instance affirmed that prior IHO decision (id. at p. 33). The IHO further found that the parent failed to present any evidence to support his claims, even though he was offered multiple opportunities to present such evidence (id. at pp. 33-34, 35-37).

[14] The CSE found that the student was eligible for 12-month services (Record Exhibit at p. 240). For July and August 2019, the CSE recommended a daily 12:1+1 special class, two 45-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, and once monthly parent counseling and training (id.).

[15] State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

[16] On June 15, 2020, the parent filed a new due process complaint notice, which raised claims regarding implementation of assistive technology services and an assistive technology evaluation (Record Ex. at pp. 050-51). However, the record demonstrates that those claims were not consolidated with the current matter and the parent withdrew that due process complaint notice without prejudice (Tr. p. 218; see IHO Decision at p. 26).

[17] Both parties submitted post-hearing briefs to the IHO (Record Ex. at pp. 054-73, 362-74).

The IHO held that the burden of proof was on the district during the impartial hearing and that the district met this burden (IHO Decision at pp. 34, 37). The IHO found that the district's evidentiary submissions were unrebutted by the parent (id. at p. 34). The IHO cited to the affidavit of the district's director that there were no changes in the student's needs since the prior February 2019 IHO decision and that the district had not modified its classes or curriculum, so that it might be able to educate the student within district (id. at pp. 34-35). Noting that there were "no factual allegations that the CSE ignored" evaluative data or assessments, the IHO held that the parent conceded the "CSE did a review of the facts . . . and found no significant changes to either the student or the District's programming" (id. at p. 35).

The IHO indicated that "he was compelled to repeat" his prior determination that the parent's claims were a reiteration of legal positions previously adjudicated in the prior proceeding involving the 2018-19 school year because the parent did not take advantage of the "full and fair opportunity to present any salient facts" showing that the student's needs have changed since the 2018-19 school year (IHO Decision at p. 38). Therefore, the IHO granted the district's motion to dismiss the amended due process complaint notice regarding the 2019-20 school year, in its entirety (id.).

Alternatively, the IHO found that even if the issues "were to be determined on their factual evidence," the district offered the student a FAPE in the LRE (IHO Decision at p. 38). The IHO held that the district had reviewed appropriate assessments to create the IEP for the 2019-20 school year, the present levels of performance were appropriate, the student's classification was correct, and that the student's goals and objectives were appropriate to meet his needs (id.).[18] The IHO noted that the district met on at least four occasions to create an appropriate IEP for the 2019-20 school year and that nothing in the record supported the parent's position that the IEP was not appropriate because the student was denied access to the general education curriculum (id. at p. 39). Finally, the IHO determined that there was "nothing in the record that the academic goals need to be aligned with grade level learning standards or that [the student was] not education in the LRE" (id.).

IV. Appeal for State-Level Review

The parent appeals.[19] The parent reviewed the facts of the case for over six pages of the request for review and then submitted twenty-five numbered issues for review. For clarity purposes, those issues are set forth verbatim as follows:

[18] The IHO also held that the IEP appropriately "list[ed] all the supplementary aids and services/program modifications/accommodations that the student needs, Assistive Technology Devices and/or services, supports for school personnel on behalf of the student and entitles the student to extended school year eligibility" and that "the IEP has appropriate testing accommodations and appropriate coordinated set of transition activities" (IHO Decision at pp. 38-39).

[19] As recently noted by the District Court of the Eastern District of New York in a matter between the same parties, although proceeding pro se, the parent is an attorney and, therefore "is held to the same standards as pleadings drafted by lawyers" (C.K. v Westhampton Beach UFSD, 2020 WL 4740498, at *4 [E.D.N.Y. June 24, 2020], adopted at, 2020 WL 4743189 [E.D.N.Y. July 27, 2020]).

1. Whether, [the] IHO . . . erred in not allowing the petitioner's claims, as remanded by SRO Ba[]tes, to be fully and appropriately adjudicated.

2. Whether, [the] IHO . . . erred in not allowing the petitioner to challenge his son's classification as a "severely disabled student" to serve as a factual "change" that had occurred year over year.

3. Whether, [the] IHO . . . erred in not allowing the petitioner to examine any of the CSE members, call any witnesses, examine and/or utilize any of the CSE transcripts, and examine and/or utilize his up-to date triennial assessment reports or any educational evaluation.

4. Whether, [the] IHO . . . appropriately adopted [the prior IHO's] presumption that the petitioner was a "severely disabled student".[20]

5. Whether, [the] IHO . . . erred in adopting numerous erroneous legal conclusions, namely that "severely disabled students" are not entitled to access the general education curriculum, have their PLEPS derived from appropriate educational assessments, and have their academic goals aligned with grade-level learning standards, as essential components of a FAPE that is "appropriately ambitious".

6. Whether [the] IHO . . . erred in adopting an erroneous legal conclusion, namely that the respondent district was bound to accept the propriety of the respondent district's placement recommendation, simply because [the prior IHO] had determined that a similar placement recommendation for the year prior was appropriate.

7. Whether [the] IHO . . . erred in not requiring the respondent district to uphold its burden of proof throughout the due process hearing.

8. Whether [the] IHO . . . erred in not recognizing that the due process hearing under review concerned an entirely different academic year than the year prior, and moreover concerned the actions of an entirely different CSE membership.

9. Whether the respondent district "pre-determined" the educational program and placement of the petitioner.

[20] The parent was again referencing the previous IHO's decision dated February 2019 regarding the 2018-19 school year (see Record Ex. at pp. 125-205), the parent's appeal of which was decided by another SRO in Application of a Student with a Disability, Appeal No. 19-021. Based upon ministerial requests made to the Office of State Review after issuance of that State-level determination, it appears that issues related to the 2018-19 school year in that proceeding are pending for judicial review before the U.S. District Court for the Eastern District of New York.

10. Whether the respondent district failed to undertake the meaningful analysis necessary to ensure that the petitioner's educational placement occur within the [LRE].

11. Whether the respondent district failed to implement a [FAPE] by failing to appropriately derive the petitioner's PLEPS based upon appropriate assessments, by failing to provide the petitioner with access to the general education curriculum and by failing to align the petitioner's academic goals with grade-level learning standards, so as to provide an "appropriately ambitious" education.

12. Whether the respondent district's educational program and placement recommendation was in accord with the mandates imposed by the doctrine of [LRE].

13. Whether [the] IHO . . . erred in not allowing the petitioner to introduce germane and relevant evidence, beyond his limiting instructions, that would have theoretically supported the petitioner's claims.

14. Whether [the] IHO . . . erred in concluding that "back-end" compensatory education would not be an appropriate remedy for the violations committed by the respondent district.

15. Whether [the] IHO . . . erred in concluding that he lacked the authority to issue equitable relief.

16. Whether, throughout the context of the due process hearing, [the] IHO . . . improperly restrained the petitioner from appropriately cross-examining the respondent district's witness, relative to proving his case.

17. Whether the respondent district CSE Chairperson acted unilaterally in determining the petitioner's educational program and placement.

18. Whether [the] IHO . . . erred in limiting the scope of the due process to focusing upon whether "changes" had occurred to the petitioner or to the respondent district, year over year.

19. Whether [the] IHO . . . erred in holding that the petitioner's due process complaint failed to assert facts that supported his claims.

20. Whether [the] IHO . . . erred in applying the doctrine [of] "res judicata" to a situation wherein the complaint filed accusations relevant to charges concerning an entirely different academic year, and moreover concerning the actions of an entirely different CSE membership.

21. Whether [the] IHO . . . erred in holding that the respondent district's evidence supported the contention that no changes had occurred to either the petitioner or the respondent district itself, year over year.

22. Whether [the] IHO . . . erred in assuming the "legitimacy" of the IEP before him, even though the "legitimacy" of the IEP was being challenged by the petitioner.

23. Whether [the] IHO . . . erred in concluding that the potential for the petitioner to be educated within district, whether within either a "hybrid program" or "special class" was already decided relevant to the 2019-2020 academic year.

24. Whether [the] IHO . . . erred in concluding that there was an "agreement" regarding the limited scope of the due process hearing, and additionally, whether the factual submissions that were tendered were designed to be the "end all and be all" of the due process hearing.

25. Whether [the] IHO . . . misconstrued the ruling of SRO Ba[]tes, by way of assuming that SRO Ba[]tes' guidance regarding some factors that would be relevant, were ultimately the sole and exclusive factors, appropriate for consideration.

For these alleged errors, the parent requested the IHO decision be overturned and that his "claims be sustained or alternatively remanded for appropriate adjudication."[21]

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]).

[21] Throughout, the parent's request for review and memorandum of law, citations to the hearing record and the IHO's decision are sparse in contravention of State regulation (8 NYCRR 279.8[c][3]; [d][2]); however, as further discussed below, I find it difficult to fault the parent alone for such a deficiency where the documents in the hearing record were unmarked and not formally entered into evidence.

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 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]).[22]

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

VI. Discussion

A. Preliminary Matters

1. Record of the Proceeding before the IHO

As an initial matter, discussion of the state of the hearing record filed by the district in this matter is necessary. Federal and State regulations require every school district to maintain a verbatim record of the proceedings before an IHO (see 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]). The district is required to file the complete record before the IHO, as well as a signed certification "that the record submitted is a true and complete copy of the hearing record before the impartial hearing officer" (8 NYCRR 279.9[a], [b]). The record before the IHO includes copies of the due process complaint notice, a response to the due process complaint notice, the IHO's decision, any written interim orders, rulings, or decisions rendered by the IHO, the written hearing transcript (hard copy and electronic), prehearing conference summaries or transcripts, original exhibits accepted into evidence at the hearing, an index to the exhibits, and any written post-hearing briefs or memoranda of law submitted to the IHO (8 NYCRR 279.9[a]; see 8 NYCRR 200.5[j][5][vi]). When the board of education is the respondent, the "completed and certified record" must be filed within 10 days after the petitioner served the notice of intention to seek review (8 NYCRR 279.9[b]).

An SRO "may, at his or her discretion, make appropriate determinations" when a completed and certified hearing record is not filed in a timely manner (8 NYCRR 279.9[b]). Specifically, State regulation provides that an SRO may strike the board of education's answer or other responsive paper, dismiss a cross-appeal, "make a finding that the board of education has violated the parent's right to due process," or refer the "board of education to the office of the State Education Department responsible for enforcing compliance with Article 89 of the Education Law and the provisions of this Title" (8 NYCRR 279.9[b][1]-[4]). In the absence of the complete record of the proceeding, an SRO cannot properly proceed with a review of the findings of fact and decisions of the IHO, and federal regulations require an SRO to examine the entire hearing record prior to rendering a decision (see 34 CFR 300.514[b][2][i]).

In this case, the parent personally served the notice of intention to seek review on the district clerk on August 11, 2020 (see Aug. 11, 2020 Parent Aff of Serv.). Accordingly, the district

[22] 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).

was required to file a copy of the hearing record by August 21, 2020 (8 NYCRR 279.9[b]). The parent served the request for review on the district, and it was received by the Office of State Review on August 17, 2020 (see Aug. 13, 2020 Parent Aff. of Serv.), meaning that the 30-day deadline for issuing a final decision began to run (see 34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]). On August 21, 2020, the Office of State Review received from the district an answer to the parent's request for review, but only portions of the hearing record.[23]

As previously noted, the documentary exhibits in the hearing record in this case were merged into one record exhibit by staff of the Office of State Review. I directed this action because my inspection of the hearing record filed by the district revealed that it was in complete disarray. Notably, virtually none of the exhibits were labeled or numbered, documents were accumulated and submitted in no particular order, and some documents were stapled in with other, separate documents. Further, the record was not accompanied by an exhibit list other than that appended to the IHO's decision or a certification of record from the district. Upon comparing the documents filed to the exhibit list appended to the IHO's decision, it became apparent to me that many documents were missing or did not match the IHO's listing in terms of the dates or number of pages. Therefore, in a letter dated August 25, 2020, the undersigned directed the district to file the missing parts of the hearing record, "provide a written explanation for the pagination discrepancies noted," and provide a certification of the hearing record as required by State regulation. The letter was accompanied by the exhibit list appended to the IHO's decision, along with notations as to what was received by the Office of State Review. The district was directed to respond by either secure electronic transmission[24] or overnight carrier by no later than close of business on August 27, 2020, absent a request for a specific extension of time. In addition, the district was informed that "[a]t this time, now that the request for review has been served on the district and received by the Office of State Review, the district's failure to comply with State regulations regarding the timely submission of a complete copy of the administrative hearing record has the potential to significantly impede the process of reviewing the parent's request for review and thereby violate the parent's due process rights."[25]

[23] By letter dated August 18, 2020, the undersigned attempted to communicate to the district regarding the urgency of filing the hearing record in a timely manner given that the timeline had already begun to run; however, the Office of State Review was unable to reach the district's attorney by either telephone or facsimile.

[24] The Office of State Review receives hundreds of thousands of pages of filings per year but lacks a reliable, robust, secure, electronic filing and document management system of the kind that are becoming more common place in many courts and other administrative tribunal systems. However, in order to ease the terrible ordeal experienced by parties during the COVID-19 pandemic, a makeshift procedure for allowing parties to securely encrypt and transmit information electronically on a voluntary basis was devised as an additional temporary measure by the undersigned shortly after the Governor of the State of New York declared a state of emergency. The more traditional, stalwart filing procedures via U.S. Mail and overnight carrier under Part 279 have remained functional and in effect at all times in the Office of State Review.

[25] Again, the Office of State Review was unable to immediately reach the district's attorney by facsimile or telephone; however, a member of the Office of State Review staff contacted the district's attorney by e-mail, explaining the failed attempts to communicate but also explaining the policy of the Office of State Review to not communicate with parties via e-mail with respect to appeal matters. In response, the district's attorney provided an alternative facsimile number, and the correspondence was successfully transmitted on August 26, 2020. According to the district's attorney, electricity in his area had been out for six days as a result of a tropical storm

The district failed to properly respond or send the remainder of the record by the August 27, 2020 deadline set by the August 25, 2020 letter. In a letter addressed to the undersigned, dated August 27, 2020, the district's attorney indicated he was working "on locating the missing items" but noted that the "volume of the missing items [wa]s not insubstantial" and that, therefore, he was "hesitant to email the items as listed attachment."[26] He also noted his delayed receipt of the August 18 and August 25, 2020 letters.[27] He indicated he would "overnite the items" so that they would be received by the Office of State Review by August 28, 2020. The district's attorney further "apologize[d] for the need to supplement the record" but indicated "there was some uncertainty as to the exhibits as a result of the remand."

By letter dated August 27, 2020, the undersigned reiterated that parties are not permitted "to communicate by e-mail with the Office of State Review" and stated that documents sent as attachments to an email would not be accepted. However, I also reiterated the option, set forth in my letter dated August 25, 2020, of "e-filing the documents, in the manner described on the OSR website (see https://www.sro.nysed.gov/common/sro/files/osr_efilingqa_covidrevised.pdf)." I indicated that if the district was unable to send the documents via the secure electronic transmission procedures, the district's attorney should "avail [him]self of the option to seek an extension of time to comply with the directives set forth in [the] August 25, 2020 letter, and then . . . overnight the documents."

The Office of State Review did not receive any documents by via the secure electronic transmission procedures or any further correspondence from the district attorney within the specified timeframe. Instead, on August 31, 2020, further portions of the hearing record were received by mail; however, the district failed to include a certification of record or the requested explanation as to the discrepancies with the exhibits from the IHO exhibit list. The documents received were not accompanied by any cover letter stating what the district's filing included or how it was responsive to the undersigned's August 25, 2020 letter.[28]

Due to the lack of clarity with the record, I was required to direct staff of the Office of State Review to expend substantial time and resources to attempt to identify what the district's filing included and organize the documents into some semblance of order. Even after this exercise of labor, the record was still lacking clarity given that most of the documents were not marked or labeled with identifying numbers or letters during the impartial hearing and the district failed to

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and he had been unaware that his office was without facsimile communication since that time. While a loss of power for several days is problematic, I hereby take judicial notice that National Weather Service data shows that Tropical Storm Isaias hit the southeastern New York area several weeks prior, on August 4, 2020 (see https://www.nhc.noaa.gov/text/WTUS81-KOKX.shtml).

[26] Despite the admonition against communicating via e-mail, the district's attorney sent his letter in an unsecure manner as an attachment to an e-mail purportedly because of a failed attempt to fax the letter to the Office of State Review.

[27] Although the district's attorney's letter refers to communications from the undersigned as "emails," they were letters transmitted by facsimile only.

[28] The only letter included with the filing was the letter previously sent by the district's attorney by e-mail on August 27, 2020, described above.

address discrepancies identified in my August 25, 2020 letter. The district's explanation for the initial discrepancies (i.e., that "there was some uncertainty as to the exhibits as a result of the remand") is wholly without merit since most if not all of the omitted documents were documents that were provided to the IHO during the impartial hearing after remand and the district had the exhibit list appended to the IHO's decision available to reference in compiling the record for filing. Further, the district's attorney should be well aware of the expectations relative to the district's filing of the hearing record, as he has represented the district in the eight prior State-level administrative appeals involving this student and has received and responded to communications involving the hearing record in each of those matters.

Due to the district's failure to file a timely and complete hearing record, the appropriate sanction is to strike district's answer pursuant to 8 NYCRR 279.9(b)(1). The district did not comply with the regulations or my subsequent directives as significant portions of the hearing record were not received by the Office of State Review until August 31, 2020 and, even then, discrepancies remained unexplained and the hearing record remained uncertified by the district (see Record Ex. at p. 034). Further, as previously noted, the record that was received by this office was not organized, labelled, or paginated. It is shocking that none of the three experienced attorneys involved in this case (the parent, the district's attorney, and the IHO) had the wherewithal to routinely mark documents accepted into the hearing record with a letter, number, or roman numeral, which is the standard legal practice in virtually every special education due process proceeding conducted in this State (see, e.g., Record Ex. at pp. 202-05), but the district, which bears the custodial responsibility for impartial hearing records for all students in the district as well as the long standing responsibilities under Part 279 to replicate and certify that a complete copy of the record has been proffered for subsequent State-level and judicial review, should have insisted during the impartial hearing that a clear practice be followed. Instead, the district contributed in large part to the problem.

As for the treatment of the hearing record for purposes of this decision, the only portions of the hearing record that made sense consisted of the hearing transcript created by a certified transcriptionist. Rather than spending further time assigning exhibit numbers to each document received and attempting to identify which documents were intended to be attached to which motion papers or affidavits included in the hearing record, instead the entirety of the record filed by the district (along with some portions of the record filed by the district in the appeal prior to remand) were combined into one "Record Exhibit" and assigned consecutive page numbering (i.e. "Bates stamping").[29] I acknowledge that this is hardly an ideal way to reference the hearing record, since the citations to documents will not reflect the same system used by the IHO or the parties; however, given the state of the district's filing and the time constraints imposed by federal law for issuing this decision, this was the only viable solution available within the timeframe and human resources available.

[29] Although it will not be simultaneous with the issuance of this decision, I will direct the staff of the Office of State Review to provide the pagination information to the parties.

2. Scope of the Impartial Hearing

Relevant to the scope of the impartial hearing, the parent makes several assertions on appeal directed at the IHO's treatment of the issues to be addressed during the remand. Generally, the parent objects to the IHO's adoption of legal conclusions from prior matters involving the student and his instructions to limit the scope of the impartial hearing to the question of whether the student's needs or the district's offerings had changed since the last proceeding. Further, the parent asserts that the IHO erred by adopting the presumption that the student was "severely disabled" and that he should have been able to challenge this classification of the student.

With regard to the IHO's adoption of legal principals from prior matters, the undersigned explicitly suggested this manner of proceeding (Application of a Student with a Disability, Appeal No. 19-121). While the IHO may have provided more clarity to the parties if he specified which legal principals he was adopting, given the parties familiarity with the prior proceedings, this does not amount to reversible error in this instance.[30] As for the specific issues to be addressed, in Application of a Student with a Disability, Appeal No. 19-121, the undersigned specified 10 of the parent's claims for the IHO to address on remand and further offered direction that, in deciding these issues, it was appropriate to take into account the prior school year determinations and the extent to which the student's needs or the district's available continuum of programs have changed during the intervening period. During the impartial hearing, the IHO tended to focus on the question of the change in the student's needs and the district's programming, at times seeming to overlook the asserted claims that such evidence would support (see Tr. pp. 14, 32-33, 36-37). But, ultimately, in his April 27, 2020 letter to the parties to further clarify the issues for remand, the IHO appropriately explained that the scope of the impartial hearing would encompass the parent's 10 specific claims underlying the allegation that the district denied the student a FAPE for the 2019-20 school year (see Record Ex. at pp. 206-08).

As to the parent's argument that the IHO should have considered whether the student is a "severely disabled student," the language on which the parent focuses arises from the definition of "State learning standards" in State regulation (8 NYCRR 100.1[t] see Record Ex. at pp. 041-42). That regulation provides that:

> the alternate performance level for the State learning standards and the State assessment for students with severe disabilities reflect the knowledge, skills and understandings that such students are expected to know and be able to do as indicated in their individualized education programs. Students with severe disabilities means students who have limited cognitive abilities combined with behavioral and/or physical limitations and who require

[30] To the extent that the parent argues that the IHO "adopted several unlawful premises, namely that 'severely disabled students' are not entitled to access the general education curriculum, are not entitled to have their present levels of performance (PLEPS) derived from appropriate assessments, and are not entitled to have their academic goals aligned with grade level learning standards" (Parent Mem. of Law at pp. 2, 11 [emphasis in the original]). The parent does not cite to the prior decisions to identify the source of these "premises," and review of the February 2019 IHO decision regarding the 2018-19 school year (see Record Ex. at pp. 125-205), and the decision issued upon appeal thereof (Application of a Student with a Disability, Appeal No. 19-021), does not reveal any determinations that reflect the premises referenced by the parent.

> highly specialized education, social, psychological and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment. Students with severe disabilities may experience severe speech, language, and/or perceptual-cognitive impairments, and evidence challenging behaviors that interfere with learning and socialization opportunities. These students may also have extremely fragile physiological conditions and may require personal care, physical/verbal supports and/or prompts and assistive technology devices.

(8 NYCRR 100.1[t][2][iv]). However, in the prior State-level administrative decision relating to the student's 2018-19 school year, Application of a Student with a Disability, Appeal No. 19-021, the question of the student's access to the general education curriculum and grade-level learning standards was addressed and the legal framework discussed therein may be deemed part of the legal conclusions adopted by the IHO in the present matter (see Record Ex. at pp. 207-08). The SRO in Application of a Student with a Disability, Appeal No. 19-021 determined that:

> Overall, while a CSE should include member(s) that "know the expectations of the general education classroom for the corresponding grade of the student both in terms of what learning (i.e, knowledge and skills) is expected (general curriculum) as well as how the students are expected to access and demonstrate what they have learned," ultimately the annual goals and recommended supports and services included in the IEP must be aligned with the student's strengths, needs, and present levels of performance (see "The Role of the Committee on Special Education in Relation to the Common Core Learning Standards," at pp. 1-2, Office of Special Educ. Field Advisory [June 2014]; see also 34 CFR 300.320[a][1], [2], [4]; 8 NYCRR 200.4[d][2][i], [iii], [v]). To that end, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 [OSEP Dec. 2017]; Dear Colleague Letter, 66 IDELR 227).

There has been no change in controlling law or State policy and I see no reason not to apply the same rule equally in the present matter as the SRO did in Application of a Student with a Disability, Appeal No. 19-021, regardless of whether or not the student was deemed "severely disabled." The CSEs that convened to develop the student's IEP for the 2019-20 school years were tasked with creating an IEP reasonably calculated to enable the student to receive educational benefit (see Rowley, 458 U.S. at 206-07), and the student's performance level for purposes of defining State learning standards or assessments, alone, would not alter a review of the appropriateness of the student's IEP. Notably, in arguing that there had been a change in circumstances such that the student was no longer severely disabled, the parent did not point to any factual change in the student's needs, such as evidence of progress or the results of an assessment demonstrating that the student's underlying needs have evolved, but instead focused on the appropriateness of the label "severely disabled" and the consequences of the label on the student's programming. Thus, notwithstanding the reference to the student's needs, the parent's

argument is legal in nature and falls under the scope of the legal principals adopted by the IHO.[31] Accordingly, the parent's arguments do not articulate the sort of change in the student's needs that would warrant further adjudication under the directives outlined in Application of a Student with a Disability, Appeal No. 19-121.

The parent also did not raise any arguments regarding the student's classification as "severely disabled student" in either the September 9, 2019 or October 15, 2019 due process complaint notices (see Record Ex. at pp. 003-33). In the parent's October 2019 amended due process complaint notice, rather than challenging the treatment of the student as severely disabled, the parent acknowledged that the student was "classified as an 'alternately assessed' special education student" (id. at p. 006) and went on to argue that, despite the student's eligibility for participation in alternate assessments, the CSEs should have ensured his access to general education curriculum and grade level learning standards (see id. at pp. 007-16).

This acknowledgment by the parent in the due process complaint notice that the student should be alternately assessed is sufficient reason to dismiss the issue, because 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]). Under the IDEA and its implementing regulations, the 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][b]).

Here, the district and IHO did not agree to expand the scope of the impartial hearing to include this issue.[32] Since, the issue was not raised in the due process complaint notice, it was

[31] Indeed, in his submission to the IHO the parent argued that, whereas the IHO in the prior matter stated that he was not challenging the student's classification as a severely disabled student, he was "choosing to do so" in the present matter and that this constituted a change in circumstances (Record Ex. at p. 037). This characterization highlights the legal, rather than factual, nature of the parent's argument.

[32] In response to the parent's argument about the student's classification as "severely disabled," the IHO mentioned during the impartial hearing and in his decision that the parent had not raised a challenge to the student's disability category, and the parent conceded that the student has an intellectual disability (Tr. pp. 62-63; Record Ex. pp. 037-38; IHO Decision at p. 33). As the IHO acknowledged, the student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]). However, as noted above, the parent's "classification" challenge pertains to the student's applicable performance level for the State learning standards and the State assessment, not to the student's eligibility for special education. However, similar to the principals noted above, the disability category assigned to a student carries little weight in terms of identifying the student's special education needs and developing a special education program to address them. Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have places considerably less weight on identifying the underlying theory or root causes of a student's educational deficits

outside of the scope of impartial hearing and the IHO did not err in declining to address it (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]).

3. Conduct of the Impartial Hearing and Burden of Proof

Several of the parent's allegations on appeal focus on the IHO's refusal to allow the parent to offer evidence and in placing the burden on the parent to come forward with facts to support his claims.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, even if the parent initiates due process, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO

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and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir. 1997]).

is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Here, as described in detail above, the impartial hearing after remand took place during the COVID-19 pandemic and, under such circumstances, IHO appropriately directed the parties to submit affidavits and documentary evidence, as well as legal arguments in writing, with the caveat that witnesses who provided direct testimony by affidavit in lieu of in-person testimony would be made available for cross-examination (see 8 NYCRR 200.5[j][3][xii][f]). As further discussed above, the IHO also appropriately limited the scope of the impartial hearing in accordance with my remand instructions.

However, in requiring the parties to make their submissions contemporaneous with each other and then faulting the parent for failing to come forward with affidavits or documentary evidence in support of his claims (see IHO Decision at pp. 5, 6, 23, 27, 32-34, 35-38), the IHO inappropriately shifted the burden of production to the parent on this issue of whether the district offered the student a FAPE, whereas the burden of production under State law clearly shifts that burden to the district, except in cases of a unilateral placement of a student by a parent that are not relevant in this dispute. While the IHO acknowledged during the impartial hearing and in his final decision the legal requirement that the burden of production lay with the district (see Tr. p. 161; IHO Decision at p. 34), he also indicated multiple times that it was the parent's responsibility to put in evidence of the student's needs (see Tr. pp. 51-54, 65-66, 117, 119, 121, 140, 199).[33] In Application of a Student with a Disability, Appeal No. 19-121, the undersigned explicitly directed that "[u]pon remand, the district should be prepared to defend against the alleged claims by presenting evidence regarding why the CSE made the recommendation that it did and whether the student's needs and progress remained constant such that a placement recommendation similar to prior school years continued to be appropriate for the 2019-20 school year" (emphasis added). Even if the parent did not have the burden of production and persuasion, the parent also had a right to present relevant evidence on this topic if he so chose and, accordingly I also noted that "[t]he parent should be provided an opportunity to be heard with regard to facts since the events underlying the last proceeding, but need not be provided an unrestrained right to elicit facts to support legal arguments that have been rejected previously" (Application of a Student with a Disability, Appeal No. 19-121).[34] It appears to me that the IHO made a concerted effort to develop the hearing record on the critical facts needed, but in doing so it seems that the IHO placed undue weight on the latter directive, treating the parent's presentation at the impartial hearing less as an opportunity to be heard and more as having the primary responsibility to present the case in chief,

[33] Further, the April 27, 2020 letter demonstrates that the IHO placed the burden of persuasion and persuasion on the parent as the IHO provided the parent with instructions on how he had to prove his case (Record Ex. at pp. 207-208).

[34] In line with this directive, the IHO did limit the parent's cross-examination, although he did allow the parent to stray into certain matters outside the scope of the impartial hearing (see Tr. pp. 193-202, 206-208, 210-211). In this respect, and contrary to the parent's argument on appeal, the IHO acted within his broad discretion and granted the parent a meaningful opportunity to cross-examine the district's witness.

and ultimately as the party that carried the burden of proof with respect to the FAPE claims for the 2019-20 school year.

Contrary to the IHO's emphasis on the parent's production of evidence, it is the district's responsibility to defend the IEP and program that it recommended for the student. The district must present the evidence to do this, not the parent. As discussed in more detail below, the district failed to come forward with relevant evidence to meet this burden. Although, the IHO adopted the legal conclusions from prior matters involving this student, the burden to establish sufficient facts remained on the district to demonstrate that it made an appropriate recommendation for the 2019-20 school year based on the student's educational needs. The district might not be happy defending its CSE recommendations every year, but the IDEA specifies that the CSE must go through a host of specified procedures every year to review and revise a student's IEP not less than annually that it is the right afforded to the parent under the IDEA to challenge the CSE's annual process and revised IEPs on both procedural and substantive grounds and thereby require the district to present evidence every year as opposed to relying on administrative determinations based on factual events from prior school years.

B. FAPE

On appeal, the parent reiterates several claims underlying his allegation that the district failed to offer the student a FAPE for the 2019-20 school year relating to the student's access to the general education curriculum and grade-level learning standards, sufficiency of present levels of performance and annual goals in the IEP, and the CSE's consideration of the continuum of services and the LRE for the student. The parent asserts that the IHO erred in finding that the district's evidence was sufficient to demonstrate that there were no changes in the student's needs since the proceedings relating to the 2018-19 school year. Upon review of the evidence in the hearing record, the parent is correct that the district failed to meet its evidentiary burden and, therefore, failed to demonstrate that it offered the student a FAPE for the 2019-20 school year.

Both due process compliant notices in this case indicate that the parent was objecting to three particular CSE meetings conducted in June, July, and August 2019 and the resultant IEP(s) from those meetings for the student's 2019-20 school year (see Record Ex. at pp. 009, 012, 014, 016, 452-53, 456, 458).[35] The parent's due process compliant notice and amended due process compliant notice are dated September 9, 2019 and October 15, 2019, respectively (see id. at pp. 005, 033). The district during the impartial hearing acknowledged that the parent was challenging three CSE meetings held for the annual review (Tr. p. 32). Despite this, the district failed to enter any information regarding these three CSE meetings into the hearing record. The only IEP entered into the record was dated December18, 2019, two months after the amended due process complaint notice (see Record Ex. at p. 221). The December 2019 IEP is not the subject of this proceeding. In contrast, the parent made frequent reference to transcripts of CSE meetings, as well as evaluative

[35] The parent also specifically questioned the district's director about those three CSEs, indicating that those were the CSEs before the IHO (Tr. p. 113).

information before the June, July, and August 2019 CSEs (see Record Ex. at pp. 006-33, 038-39, 048); however, these documents were not offered into evidence.[36]

Further, the case was remanded to address the 10 claims specified in Application of a Student with a Disability, Appeal No. 19-121, taking into account whether the student's needs had changed in a manner that would warrant a new recommendation for the 2019-20 school year. Yet, the district did not offer into evidence an IEP or any evaluative information to demonstrate the student's needs during the 2018-19 school year and in particular information showing how those needs compared to his needs at the time of the IEP review and planning for the 2019-20 school year. The district produced four exhibits to support the opinion of the district director that the student's needs had not changed (see Record Ex. at pp. 244-75). These exhibits did speak to the student's needs; however, there were all created after the three CSE meetings that were challenged by the parent.[37]

This deficiency did not go unnoticed. The IHO explicitly acknowledged in his decision that neither party provided any prior IEPs or even the IEP in place at the time the due process complaint notice was filed (IHO Decision at p. 18). The IHO also noted that "neither party chose to submit facts demonstrating whether or not those needs articulated in the 2019-2020 IEP, differ[ed] from needs presented [to the] IHO" in the proceeding for the 2018-19 school year (id. at p. 21). Yet, as noted above, the IHO erroneously faulted the parent for gaps in the evidentiary record rather than the district. Despite the lack of evidence, the IHO found that the district met its burden by offering the affidavit of the district director and that the parent failed to rebut this evidence (id. at p. 34). Although, the district director provided testimony that, in her opinion, the student's needs had not changed, this testimony was not specific to the student's needs at the time of the challenged CSEs, nor did it point to any documentation from the time of the challenged CSEs; instead, the district director made vague, generic statements that the student's needs had not changed since February 2019, and she essentially lifted the statements from the prior IHO decision, which addressed the prior school year dispute, not the three CSE meetings and resultant determinations questioned in the parent's due process complaint notice (Tr. pp. 139, 145-46; Record Ex. at pp. 209-10, 212).[38]

All of the district's evidence regarding the student's needs for the 2019-20 school year focus on the student's needs at a point in time after development of the challenged IEP(s), which is the type of evidence that the Second Circuit has found to be impermissibly retrospective for the

[36] As for the transcripts of the CSE meetings, the district's attorney specifically acknowledged during the impartial hearing that "CSE transcripts from last year . . . should also be or can also be used in the context of submitting . . . written arguments by way of affirmation or otherwise" (Tr. pp. 28-29); however, the district failed to proffer them as evidence.

[37] As noted above, these documents included an October 2019 summary of a team meeting about the student and three progress reports from December 2019, April 2020, and May 2020 (Record Ex. at pp. 244-75).

[38] In contrast, the district's director testimony regarding the district's continuum of services may have been sufficient to establish that the program offerings in the district had not changed since the proceedings for the 2018-19 school year. Specifically, the district director testified that the district did not have the 12:1+1 special class within the district high school for the 2019-20 school year (Tr. pp. 163-64; Record Ex. at pp. 123-24, 209, 216-18).

purposes of evaluating the sufficiency of the IEP (R.E., 694 F. 3d at 184-88). In grappling with the permissibility of retrospective evidence, the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88). The district only provided impermissible retrospective evidence to support its argument that the student's recommended program for the 2019-20 school year was appropriate. Based on the lack of evidentiary evidence, including but not limited to the very IEP(s) that the parent challenged as inappropriate in the due process complaint notices, I find that the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 school year.

C. Relief

Here, the parent, in the due process compliant notices, requested compensatory education and that the district be required to create a hybrid program for the student (Record Ex. at pp. 005, 032-33). However, the parent failed to request relief in the request for review as the parent only requested that the IHO decision be overturned and his claims sustained (Req. for Rev. at p. 10).[39]

As previously noted, in Application of a Student with a Disability, Appeal No. 19-121, the parent abandoned his request for an order requiring the district to hire an expert to supervise the implementation of a hybrid program. Moreover, it was previously found in Application of a Student with a Disability, Appeal No. 18-110, that the district does not have to create a program for the student.[40] Thus, the only potential relief for the denial of FAPE is compensatory education and the record does not demonstrate that compensatory education would be appropriate in this matter.

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 [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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be

[39] The parent did not clarify his request for relief in the memorandum of law filed in support of the request for review (see Parent Mem. of Law).

[40] The Second Circuit has explained that "[o]f course, a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools" (T.M., 752 F.3d at 165). The district would not be required to create a new class for one child such as the one sought by the parent in Application of a Student with a Disability, Appeal No. 18-110, and I will not order such relief in this case either.

fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, the student has been receiving special education and related services through his pendency placement (Oct. 2, 2019 Tr. pp. 45-46; Tr. p. 83; Record Ex. at p. 219). As set forth in Application of a Student with a Disability, Appeal No. 19-021, the student's pendency placement was as follow:

> At the time of the May 2018 CSE meeting, the student was receiving the following as pendency (stay-put) services: all related services (OT, PT, and speech-language therapy) delivered to the student within the district public school during the morning; and 35 hours per week of "instructional hours (his academics) at home provided by two special education teachers who work[ed] with [the student] 1:1, one from 10:00 a.m. to 3:00 p.m., and the other from 3:00 p.m. to 5:00 p.m." (DPC I, IHO Ex. XXIX at p. 2). The evidence in the hearing record reveals that the pendency services arose per agreement of the parties (id.).[41]

Since that time, the hearing record in the present matter demonstrates that the student began receiving his special education instruction at the local library (Oct. 2, 2019 Tr. pp. 45-46; Tr. p.

[41] Likewise, in Application of a Student with a Disability, Appeal No. 18-064, it was noted that the student's pendency placement consisted of related services provided daily at an in-district school and home-based services: the student took the bus in the morning to school to receive PT, OT, adapted physical education, and speech-language therapy in school and then returned home to receive five hours of home-based 1:1 instruction from a special education teacher and two hours of home-based after-school 1:1 services from a second special education teacher.

83; Record Ex. at pp. 245, 254). Indeed, the District Court for the Eastern District of New York recently took up the question of the student's stay-put placement during the pendency of that proceeding (and the district's implementation of the same during the COVID-19 pandemic) and noted that, as of the start of the 2019-20 school year, the student's pendency placement was based on an agreement between the parties, pursuant to which, the student "would receive a hybrid of services in the District and then be bussed to the local library (not the library within the school) for special education instruction" (K. on behalf of A.K. v. Westhampton Beach Sch. Dist., 2020 WL 5424722 [E.D.N.Y. Sept. 10, 2020]). The decision did not specify the number of hours of instruction the student received pursuant to their new agreement, but with the information I have available to me it appears that the general contours of the pendency placement remained consistent compared to that summarized in Application of a Student with a Disability, Appeal No. 19-021.

In addition, the hearing record in the present matter reflects that, during the 2019-20 school year, the student received educational consultant services "to provide continuity amongst providers/outside contractors," "to assist in the development" of present levels of performance, annual goals, and data collections systems to measure progress, and to provide paraprofessional training (Record Ex. at p. 245). In addition, the parents participated in monthly parent counseling and training (id. at p. 246). The student received instruction using the "Unique Learning System to address Emerging Skills; Early Learning; Reading Level Assessment, Recognition, and Comprehension; Basic Math and Program Solving; and Writing" (id. at pp. 246, 250). During the 2019-20 school year the student worked on approximately 21 annual goals and reportedly made gradual or satisfactory progress towards most of his IEP goals and achieved several short-term objectives by April and May 2020 (id. at pp. 253-54, 256-75; see id. at pp. 231-37).

I find that in this instance, compensatory education services for the 2019-20 denial of FAPE are not warranted. The student received 1:1 special education instruction plus related services for the duration of the 2019-20 school year. Based on the student's receipt of pendency services in a 1:1 setting "the student received his special education services in, arguably, the most supportive and intensive settings available on the continuum of special education placements" (Application of a Student with a Disability, Appeal No. 17-015). Further, the hybrid nature of the pendency services permitted the student to receive related services in the school setting. Accordingly, there does not appear to be a further "need for education 'restor[ation]'," and it appears the student "may be deemed 'whole'," making further award of educational services unnecessary (Smith v. Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]). A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

In sum, it is altogether unclear from the evidence in the hearing record—and, again, without the parent identifying the specific relief sought in the request for review—what compensatory education services would effectuate the purpose of this equitable remedy: that is, to provide special education services that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457). As a result, given the nature of the parent's claims and the services owed to the student pursuant to pendency during

the 2019-20 school year, there is no basis in the hearing record for an award of compensatory education services.

VII. Conclusion

In summary, the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 school year. However, in accordance with the foregoing, I also find that no compensatory educational services are warranted under the circumstances of this case.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 7, 2020, is modified by reversing that portion which found that the district offered the student a FAPE for the 2019-20 school year.

Dated: **Albany, New York**
September 16, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER