The University of the State of New York

The State Education Department
State Review Officer
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No. 20-151

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

Appearances:
The Law Office of Steven Alizio, PLLC, attorneys for petitioner, by Steven J. Alizio, Esq., and Justin B. Shane, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory education services to remedy the failure of respondent's (the district's) Committee on Special Education (CSE) to recommend an appropriate educational program and services for her son for the 2019-20 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and

initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of prior and contemporaneous administrative proceedings. First, in March 2018, the parent filed a due process complaint notice requesting an independent educational evaluation (IEE), which an IHO granted (Parent Ex. B at p. 5). Thereafter, a full neuropsychological evaluation was conducted resulting in a report dated August 31, 2018 (see Parent Ex. C).

According to the parent, a CSE convened on December 20, 2018, to formulate the student's IEP (Parent Ex. D at p. 2). Subsequently, the parent filed a due process complaint notice on April 1, 2019 challenging the district's recommendations for the 2009-10 through 2018-19 school years (Parent Ex. B at pp. 2-3).[1] In a decision dated June 12, 2019, an IHO held that the district denied the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, and 2018-19 school years (id. at p. 10). According to the IHO's decision, the district "conceded" it would not "defend its placement[]" recommendations for the years under review (id. at p. 6). The IHO in that matter ordered the district to arrange for the placement of the student at Fusion Academy (Fusion) at district expense "for the remainder of the 2018-19 school year" (id. at p. 10).[2] Additionally, the IHO held that the student required an extended school year program at Fusion (id. at p. 11). The IHO ordered transportation to and from Fusion (id.). The IHO held that "[t]he program at Fusion Academy should include all costs associated for [the student] to receive counseling" and "include speech and language therapy for two hours per week, at the enhanced rate" (id.). Further, the IHO ordered the district to conduct an occupational therapy (OT) evaluation to determine the student's eligibility for OT services (id.). Finally, the district was ordered to fund compensatory education services in the amount of 800 hours of individual tutoring by a qualified agency, at an enhanced rate (id.).

In a letter to the district dated June 17, 2019, the parent noted that, in the prior impartial hearing, the district had conceded that it failed to offer the student a FAPE for the 2018-19 school year, which encompassed the recommendations in the December 2018 IEP, and that the CSE had not convened to develop a new IEP for the student for the 2019-20 school year (Parent Ex. D at pp. 1-2). Therefore, the parent notified the district of her intent to unilaterally place the student at Fusion for the 12-month 2019-20 school year and seek public funding for the costs of the student's attendance (id. at p. 2).[3]

A. Due Process Complaint Notice

In a due process complaint notice, dated July 1, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (see Parent Ex. A).

First, the parent alleged that the district failed to timely provide the parent with copies of evaluations, the December 2018 IEP, or the prior written notice and that the December 2018 CSE refused to consider the August 2018 neuropsychological IEE (Parent Ex. A at p. 4). In addition, the parent alleged that the recommendations in the December 2018 IEP were "less supportive"

[1] Ultimately, the parent withdrew her claims related to school years prior to the 2016-17 school year (Parent Ex. B at p. 3).

[2] The Commissioner of Education has not approved Fusion as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The hearing record includes several enrollment contracts for the student's attendance at Fusion, executed by the parent on July 25, 2019, with varying "Estimated Student Start Date[s]" and courses listed (see Parent Exs. T; V-X).

than the student's previous IEP and were not consistent with the recommendations in the neuropsychological IEE (id.). The parent also expressed doubt that the recommendation for a paraprofessional would be consistently implemented by the district (id. at p. 5). Finally, the parent alleged that the district failed to develop an IEP since December 20, 2018 and did not offer the student "an appropriate school placement" for the 2019-20 school year (id.).

The parent requested pendency based upon the June 12, 2019 IHO decision (Parent Ex. A at p. 6). Specifically, the parent sought pendency as follows: tuition at Fusion (including counseling), transportation to and from Fusion, and two hours per week of speech-language therapy (id. at pp. 6, 7).

As relief, the parent requested a finding that the district denied the student a FAPE for the 2019-20 school year (Parent Ex. A at p. 7). Additionally, the parent sought tuition at Fusion for the 12-month 2019-20 school year and round-trip transportation (id.). Further, the parent sought funding for the following services: speech-language therapy for two hours per week, at an enhanced rate; counseling for three hours per week, at an enhanced rate; and OT in an amount to be determined, at an enhanced rate (id.).

B. Impartial Hearing and Events Post-Dating the Due Process Complaint Notice

On July 16, 2019, a pendency hearing was held (Tr. pp. 1-6). In a decision dated July 16, 2019, the IHO ordered that, effective July 1, 2019, the district would be required to "fund all costs" for the student's education at Fusion, including "costs for the student to receive counseling" (IHO Ex. I at p. 3). Additionally, the district was ordered to fund two hours per week of speech-language therapy at an enhanced rate and provide the student with transportation to and from Fusion (id.).

While the present matter was pending, an additional dispute between the parties evolved. Specifically, pursuant to the June 12, 2019 IHO decision from the prior proceeding, the district was required to conduct an OT evaluation to determine if OT services were appropriate for the student (Parent Exs. B at p. 11; F at p. 2). The evaluation was conducted on August 6, 2019 and an evaluation report was generated on August 8, 2019 (Parent Ex. F at p. 2).[4] On December 13, 2019, the parent notified the district of her disagreement with the OT evaluation and requested an OT IEE (Parent Exs. E at p. 1; F at p. 3). Having received no response, the parent filed a due process complaint notice, dated January 23, 2020, requesting an OT IEE (see generally Parent Ex. F).[5] An impartial hearing was held on February 25, 2020 at which the district failed to appear or

[4] In an email to the district dated December 12, 2019, the parent's attorney indicated that the parent had not yet received a copy of the OT evaluation report (Parent Ex. E at p. 3). In response to the parent's attorney's request, the district provided a copy of the evaluation report on December 13, 2019 (id. at p. 1).

[5] In an interim decision dated January 24, 2020, the IHO declined to consolidate the impartial hearings to address the parent's claims raised in the July 1, 2019 and January 23, 2020 due process complaint notices (see generally Jan. 24, 2020 Interim IHO Decision; Parent Exs. A, F).

present any evidence (Parent Ex. G at p. 2). On February 28, 2020, the IHO ordered the district to fund an OT IEE by an evaluator of the parent's selection (id. at p. 3).[6]

The impartial hearing continued for 10 more days of proceedings concluding on July 27, 2020 (Tr. pp. 7-129).[7] While the impartial hearing was pending, the district funded the student's tuition at Fusion, counseling services, and speech-language therapy pursuant to the IHO's pendency decision, until "some point in March" when, according to the parent's attorney, the district stopped making payments (see Tr. pp. 51-52, 60).[8] The parent indicated that the student would not be permitted to continue at Fusion unless the district made "the outstanding payment[s]," and further that the "counseling services ha[d] also stopped" due to an outstanding balance owed by the district (Tr. pp. 51-52).

Regarding the costs of the student's tuition at Fusion, as of the last date of the impartial hearing on July 27, 2020, the IHO found the issue "moot" given the district's obligation to fund the same pursuant to pendency, although she acknowledged there was "a concern about the remote learning piece" that she was "willing to hear" (Tr. p. 57). Beyond that, the IHO indicated that the impartial hearing would address any outstanding issues relating to the parent's request for OT, speech-language therapy, and counseling services (Tr. pp. 57-61, 65). The district declined to present any evidence or arguments at the impartial hearing (Tr. pp. 73-74, 76, 114).

C. Impartial Hearing Officer Decision

In a decision dated August 6, 2020, the IHO determined that the district failed to meet its burden of proving the appropriateness of its program recommendations for the 2019-20 school year (IHO Decision at p. 9). The IHO further held that she was not required to make a finding on the appropriateness of Fusion, as she previously ordered the district to fund the student's tuition at Fusion and two hours of speech-language therapy pursuant to the district's stay-put obligation and

[6] The parent filed another due process complaint notice on July 1, 2020 alleging that the district denied the student a FAPE for the 2020-21 school year and seeking tuition reimbursement for the student's placement at Fusion (July 16, 2020 Interim IHO Decision at p. 1). In an interim decision dated July 16, 2020, the IHO also denied consolidation of that matter with the pending matter concerning the 2019-20 school year (id. at pp. 1-2).

[7] Of the 11 hearing dates, only the last date was devoted to receiving evidence on the merits of the parent's claims (see Tr. pp. 70-129); on the remaining dates, the IHO addressed pendency, sought updates from the parties related to the status of settlement negotiations and related matters, and clarified the issues for the impartial hearing (see Tr. pp. 1-69). On the last hearing date, the parent offered the affidavits of three witnesses in lieu of in-person testimony (see Parent Exs. K; M; N). Two of the three affidavits were unsigned and unsworn; however, during the impartial hearing, the witnesses swore to the truth of the content of the affidavits (see Tr. pp. 88, 107; Parent Exs. M-N). 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]). The witnesses were made available at the impartial hearing, and the IHO asked questions of them (see Tr. pp. 83-97, 107-113). The district declined the opportunity to cross-examine the three witnesses who testified via affidavit, as well as the parent, who offered live testimony (see Tr. pp. 87, 89, 104, 107, 113).

[8] Around this time, all schools statewide were shuttered and many businesses began to curtail operations as a result of the Coronavirus (COVID-19) pandemic.

the "order was effective for the entire 2019[-20] school year" (id.). In terms of equitable considerations, the IHO held that there was no evidence that the parent interfered with the district's attempts to offer the student a FAPE (id. at p. 12). The IHO ordered the district to pay any outstanding invoices from Fusion for the 2019-20 school year, "including during the period of school closure" (id. at pp. 9, 12). In connection with the speech-language therapy, the IHO determined that the student should have received a total of 92 hours over 46 weeks but that the student only received the mandated services during 26 of those weeks; therefore, the IHO ordered the district to fund 40 hours of compensatory speech-language therapy "based upon the lack of service for 20 weeks" (id. at pp. 10, 13).

With respect to counseling, the IHO indicated that, although her pendency decision required the district to fund counseling in an unspecified amount, this was based on language in the June 12, 2019 IHO decision which assumed that the student would receive counseling at Fusion (IHO Decision at p. 10). However, the IHO noted that the student did not receive counseling at Fusion and instead received three hours per week of outside counseling/psychotherapy (id.). The IHO held that, based upon the evidence in the hearing record, the student did not require three hours per week of school-based counseling for the 2019-20 school year (id. at pp. 10-11). Instead, the IHO found that hearing record supported a finding that the student required one hour per week of "outside counseling" for "his anxiety and social issues" (id. at p. 11). Accordingly, the IHO ordered the district to fund four hours of "make-up counseling sessions" for the period in June 2020 when the student did not receive counseling (id. at pp. 11, 13).

In connection with OT, the IHO held that the hearing record supported that the student required two hours per week of OT for summer 2019 and one hour per week of OT for the 2019-20 school year (IHO Decision at pp. 11-12). Therefore, the IHO held that the student was entitled to compensatory services in the amount of 52 hours for the entire 2019-20 school year, and not the 400 hours requested by the parent (id. at pp. 12, 13).

IV. Appeal for State-Level Review

A. Request for Review and Answer

The parent appeals, arguing that the IHO erred in declining to order compensatory counseling and OT services in the amount requested by the parent. First, the parent asserts that the IHO demonstrated bias in the district's favor and denied the parent her due process rights. Regarding compensatory education, the parent argues that the IHO improperly applied a quantitative approach to calculating an award, rather than a qualitative approach. In addition, the parent alleges that the IHO failed to hold the district to its burden of proof regarding the student's need for compensatory counseling and OT services.

More specifically, regarding counseling, the parent argues that the IHO sua sponte raised the issue of the student's need for three hours of outside counseling per week, notwithstanding that the district was funding the same and the parent did not believe the quantity of services was in dispute at the impartial hearing. Regarding OT, the parent argues that the IHO erred in finding that she could not consider the student's deficits in the area of OT prior to the 2019-20 school year. Moreover, to the extent the IHO relied on res judicata or collateral estoppel in making her determination related to compensatory OT services, the parent argues that the IHO improperly

raised these affirmative defenses on the district's behalf. The parent further asserts that the IHO erred in making assumptions not supported by the hearing record regarding the student's need for OT services and improperly discounted the recommendation of the occupational therapist who evaluated the student and whose testimony was unrebutted.

Based on the foregoing, the parent seeks an order requiring the district to fund 12 hours of compensatory counseling and 400 hours of compensatory OT. In the event that the record is deemed insufficient to make these findings, the parent requests that the "matter be remanded to the IHO for further fact-finding."

In an answer, the district generally admits or denies the allegations contained in the parent's request for review. The district contends that the IHO's award for counseling and OT services is "sufficient to remedy the deprivation of FAPE for the 2019-20[] school year" and therefore, the IHO's decision should be upheld in its entirety.

B. Supplemental Briefs

After an initial review of the parties' respective pleadings and the hearing record, the undersigned determined that further briefing was necessary from the parties to consider the issues presented for review on appeal (see 8 NYCRR 279.6[d]). Accordingly, in a letter dated October 14, 2020, the parties were provided an opportunity to file supplemental briefs on two specific issues. First, the parties' positions were sought as to whether the appropriate remedy for a denial of FAPE could consist of both tuition reimbursement and compensatory education for the 2019-20 school year. Second, as the parent was seeking additional compensatory counseling services, I requested clarity on how the district came to initially pay for the counseling services for the 2019-20 school year, i.e., pursuant to pendency or some other agreement, as there was a lack of evidence in the hearing record.

In its supplemental brief, the district argues that the IHO exceeded her jurisdiction by awarding both tuition reimbursement and compensatory education. The district cites to secondary authority and caselaw standing for the proposition that compensatory education and tuition reimbursement are separate remedies and that, where an IHO awards tuition reimbursement, the parent is not also entitled to compensatory education for the same time period. Although the district recognizes that it did not cross-appeal the IHO's decision, it argues that the IHO's award of compensatory education should be annulled or, in the alternative, "no further relief should be awarded" other than that which the IHO already awarded.

In response to the inquiry regarding counseling services, the district states that it authorized two hours per week of counseling services pursuant to pendency for the 2019-20 school year and three hours per week for the 2020-21 school year. The district admits that it has not yet paid for the counseling services. The district argues that, since the parent selected the counseling provider, the parent is not entitled to compensatory services for any missed services.

In her supplemental briefing, the parent argues that the student's placement at Fusion was "not a typical unilateral placement" because the district failed to develop an IEP or to offer any school for the student to attend for the 2019-20 school year. Thus, argues the parent, she did not reject a district program but was, instead, forced to pursue an impartial hearing and invoke the

student's right to a pendency placement. The parent points to her due process complaint notice to show that she alleged that an appropriate program for the student for the 2019-20 school year consisted of the pendency placement (including Fusion plus speech-language therapy and counseling from providers outside of Fusion) and OT. The parent cites examples in caselaw of funding awards that consisted of private school tuition and supplemental services from outside providers. The parent argues that, due to her financial circumstances, she was unable to front the costs of OT, speech-language therapy, or counseling when the district failed to fund these services pursuant to pendency. Given the passage of time while the impartial hearing was pending, the parent argues that her request for relief was "necessarily transformed to a request for funding for those services that were privately provided to [the student] and compensatory relief for the services that [the student] required, but did not receive during the school year."

Next, the parent argues that the undersigned does not have jurisdiction to address the question of whether a remedy in this case may consist of both tuition and compensatory services as it was not raised during the impartial hearing or on appeal. In the alternative, the parent cites to a line of cases that the IDEA allows for "broad" relief and thereby by extension permits a simultaneous award of both tuition reimbursement and compensatory education.

Regarding counseling services, the parent indicates that, for a portion of the 2019-20 school year, the district funded "counseling services from an independent provider at a frequency that varied with the provider's availability" pursuant to pendency. Subsequent to a change in providers, the parent indicated that the district's implementation unit recently confirmed that the student was authorized to receive up to three hours per week of counseling at the rate of $210. The parent submits additional evidence with her supplemental briefing.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[9]

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. Conduct of Impartial Hearing - IHO Bias/Impartiality

The parent contends that the IHO was biased and failed to conduct herself in an impartial manner. More specifically, the parent argues that the IHO effectively represented the district when the district failed to present a case, raised affirmative defenses on behalf of the district, limited the parent's presentation of evidence, and cross-examined the parent's witnesses. Further, the parent suggests that the IHO's interest in completing the hearing quickly affected her impartiality. Ultimately, the parent argues that she was denied a "fair and neutral forum to be heard."

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

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]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While

[9] 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).

an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

In the instant matter, the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. The parent correctly notes that the district failed to present evidence or mount a defense to the parent's claims. However, this did not entitle the parent to a default judgement, and it was within the IHO's broad discretion to ensure an adequate hearing record to address the outstanding issues.[10]

The parent takes particular issue with the IHO's exclusion of the affidavit testimony of one of the parent's witnesses because that witness was not able to appear for further testimony, notwithstanding that the district declined to cross-examine any of the parent's witnesses (see Parent Mem. of Law at p. 18; see also Tr. p. 61). Review of the hearing record reveals that the only document offered by the parent, which was not ultimately entered into evidence was parent exhibit "L," an unsworn affidavit (see Tr. p. 75). However, counsel for the parent withdrew the exhibit and did not seek to develop the hearing record regarding the reasons for the withdrawal or express any concerns or objections on the record regarding that outcome (see Tr. pp. 105-06). Accordingly, the hearing record provides no basis for a finding that the IHO excluded any evidence offered by the parent, let alone that she did so in a manner that demonstrated bias. To the extent the parent cites the IHO's questioning of the parent's witnesses to support her claim of bias, State regulation specifically permits such a practice and the parent offered no objection during the impartial hearing to the IHO's questioning (see 8 NYCRR 200.5[j][3][vii]). Further, a review of the hearing record reveals no basis for a finding that the IHO abused her discretion in inquiring of the witnesses (see Tr. pp. 84-87, 89-97, 100, 104-05, 108-13).

Next, the parent claims that the IHO raised affirmative defenses on the district's behalf (specifically, res judicata and collateral estoppel); however, rather than raising an affirmative defense per se, the IHO took issue with the degree to which the parent's request for compensatory OT aligned with the time period for the denial of a FAPE (Tr. pp. 123-26). As discussed below, compensatory education is an equitable remedy, and it was an appropriate exercise of the IHO's discretion to inquire about the appropriate scope of the remedy.

Lastly, the parent broadly asserts, without citation to the hearing record, that the IHO demonstrated an interest in completing the impartial hearing as quickly as possible and, as a result, impeded a full development of the hearing record. To the contrary, the IHO granted several adjournments of the hearing at the request of the parties for various purposes, including so the parties could pursue settlement negotiations, and, while the IHO took care to narrow the issues for

[10] Indeed, an outright default judgment awarding compensatory education—including any and all of the relief requested by the parent without further inquiry—is a disfavored outcome even in cases where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]).

determination, this served to promote efficiency and does not demonstrate that the IHO rushed the hearing process.[11]

Overall, contrary to the parent's allegation, a review of the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her requests for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, the evidence in the hearing record does not support a finding that the IHO exhibited bias against the parent.

2. Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, the district does not put forth a cross-appeal challenging those portions of the IHO's decision which found that the district denied the student a FAPE for the 2019-20 school year and which ordered the district to fund the costs of the student's attendance at Fusion. Additionally, the district does not dispute the IHO's order requiring the district to fund four hours of compensatory counseling services and 52 hours of OT services. Further, neither party appeals the IHO's award of 40 hours of compensatory speech-language therapy. In its supplemental brief, the district requests that the IHO's order of compensatory education be annulled (see Dist. Supp. Brief at p. 3). Although State regulation permits a State Review Officer to "require[e] a party to clarify a pleading or submit further briefing," such further briefing does not substitute for a pleading (see 8 NYCRR 279.4, 279.6). As such, the IHO's determination that the district denied the student a FAPE and her orders directing tuition payment and compensatory speech-language services have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Further, while the parent's appeal of the IHO's awards of OT and counseling compensatory services are addressed below, since the district did not cross-appeal those awards, the amounts of compensatory services will not be reduced.

[11] State regulation identifies that one of the purposes of a prehearing conference is to "simplify[] or clarify[] the issues" to be resolved at the impartial hearing (see 8 NYCRR 200.5[j][3][xi][a]).

B. Relief

1. Compensatory Education Generally

Before turning to the parent's specific requests for compensatory education, it is necessary to address whether an appropriate remedy for a denial of FAPE should consist of both tuition reimbursement and compensatory education for the 2019-20 school year. This question was the subject of the supplemental briefs submitted by the parties at the request of the undersigned. Before turning to the crux of the question, the parent argues that this particular issue was not raised during the impartial hearing or on appeal and has, therefore, been waived; however, even assuming that the district's silence on the question could be deemed a waiver, it has been held that a "'concession of a point on appeal by [a party] is by no means dispositive of a legal issue'" and need not be accepted if the law does not support it (D.S. v Trumbull Bd. of Educ., 975 F.3d 152, 162 [2d Cir. 2020], quoting Roberts v. Galen of Va., Inc., 525 U.S. 249, 253 [1999] [alteration in the original]).[12] Therefore, I turn now to examining the different kinds of available relief.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). A unilateral placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). A private placement is appropriate

[12] Moreover, the IHO alluded to the question during the impartial hearing and invited the parent to submit a brief. Specifically, the IHO stated:

> If the parent made this placement, the parent chose the placement, you know, chose Fusion for her son, and asked the Department to fund it. So how does she claim a denial of FAPE? And the student attended there the entire school year and clearly he's entitled to funding there for the entire . . . school year, but how is there a claim for denial of FAPE, when it was a parent -- parental placement?

(Tr. pp. 126-27). While the IHO appears to have conflated the question of the district's offer of FAPE and the remedy, the IHO generally intuited the issue now before me, i.e., whether the district may be required to remedy a denial of a FAPE through compensatory education when the parent has unilaterally placed the student and, therefore, taken ownership of the contours of the student's programming.

if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

Another form of relief available is compensatory education, which is an equitable remedy tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). 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 fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette Cnty., Ky. 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"]).

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an

appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

In her due process complaint notice, the parent requested tuition at Fusion for the 2019-20 school year, as well as funding for speech-language therapy, counseling, and OT services from "qualified independent provider[s] of the Parent's choosing at . . . enhanced rate[s]" (see Parent Ex. A at p. 7). The parent argues that this request did not represent a request for tuition reimbursement for a unilateral placement and compensatory education but rather that Fusion "was just one part of the special education program sought by [the] Parent" (Parent Supp. Brief at pp. 1-2).[13] A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L.., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). However, for the outside services to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"] [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an

[13] The parent also argues that her "invocation of her pendency rights" by filing a due process complaint notice "did not constitute a unilateral placement" or prevent her "from seeking additional services" (Parent Supp. Brief at pp. 1-2). While a student is entitled to remain in his or her stay-put placement during the pendency of the proceedings, this statutory protection is similar to preliminary injunctive relief to protect the student while the proceedings are pending and is distinct from the ultimate relief available to a parent through the due process proceedings (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Zvi D., 694 F.2d at 906). To the extent the district failed to implement pendency, a remedy may be appropriate, as discussed below; however, that does not result in a transformation of the ultimate relief sought in the matter.

award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

Here, the hearing record does not include evidence of the parent's financial obligation for the related services or her inability to pay. Indeed, the parent is not seeking funding for private related services she secured for the student; instead, she is seeking district funding of compensatory education services to make up for gaps in the unilateral placement. And there is no basis to find that this matter represents a unique or rare circumstance such that it would warrant an order requiring the district to fund the unilateral placement, as well as prospective compensatory education to make-up for deficiencies in the placement chosen by and arranged for by the parent.

Notwithstanding my determination that the parent's request for district funding of related services in addition to the unilateral placement is an inappropriate form of relief in this matter, as noted above, since the district did not cross-appeal the award of compensatory services, the IHO's decision awarding compensatory services shall not be reduced or annulled. The parent's appeal of the amount of OT services awarded by the IHO is addressed below in the alternative, and the amount of counseling services awarded are considered below as a distinct issue, i.e., whether the student is entitled to compensatory counseling services to make up for a lapse in the implementation of the student's stay-put placement during the pendency of these proceedings.

2. Occupational Therapy Services

Even if compensatory education was an appropriate remedy in this matter, there is no basis in the hearing record for an upward modification of the IHO's award of compensatory OT services for the 2019-20 school year.

The IHO determined that "any compensatory OT award must be limited to the 2019[-]20 school year" (IHO Decision at p. 11). The parent disagrees, arguing that the IHO erred in limiting the compensatory OT services to the 2019-20 school year, and should have awarded 400 hours of compensatory OT services to remedy the district's failure to provide the student with OT services prior to and including the 2019-20 school year. The district concurs with the IHO, arguing that the parent had a "full and fair opportunity" to litigate the issue of OT services in connection with her denial of FAPE claims in the proceeding relating to the school years prior to 2019-20. The district also argues that the June 2019 IHO decision arising from the prior proceeding directed the district to conduct an OT evaluation, and if the parent wanted further relief, she should have appealed the June 2019 decision.

Putting aside the question of whether the doctrines of res judicata or collateral estoppel barred the parent's request for an award of OT services to address the district's purported failure to recommend OT services for the student over time, including school years prior to the 2019-20 school year, the issue of the district's offer of a FAPE to the student (or any remedy relating thereto) for any school year other than the 2019-20 school year was outside the scope of the impartial hearing.[14] Generally, the party requesting an impartial hearing has the first opportunity to identify

[14] Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the

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, as noted above, the parent confined her allegations of a denial of a FAPE to the 2019-20 school year (see Parent Ex. A). Further, the district did not agree to expand the scope of the impartial hearing and the parent did not seek the IHO's permission to amend the due process complaint notice. Accordingly, the IHO properly limited the scope of the relief to that portion requested by the parent which might remedy a denial of a FAPE for the 2019-20 school year.

Turning to the evidence in the hearing record relevant to reviewing the IHO's award, the first recommendation for OT services was contained in the August 2018 neuropsychological evaluation (see generally Parent Ex. C). The neuropsychologist recommended OT two to three times per week based upon the student's "impaired motor skills" (id. at pp. 12, 17).[15]

While at Fusion during the 2019-20 school year, along with one-to-one instruction in core academic subjects, the student also attended a class that focused on his "executive functioning and organizational skills" in a one-to-one setting (Parent Ex. N at p. 2). The executive functioning class was four days a week for one hour each session during the 2019-20 school year (not during the summer) (Tr. pp. 96-97; Parent Ex. R at pp. 1-4). The Fusion teacher that taught the executive function and organizational skills class worked to prioritize the student's due dates, plan for homework, and read and review assignments (Tr. pp. 92-93). Fusion also offered a homework café period for students to complete homework and to provide for opportunities for teacher support and socialization with peers (Parent Ex. N at p. 2; see Parent Ex. R).

The May 14, 2020 OT IEE results revealed that the student exhibited "executive functioning difficulties," "self-regulation and sensory difficulties," "'[l]ow' visual motor skills," and below average motor coordination skills (Parent Exs. I at pp. 4-5; M at p. 2). The occupational therapist recommended visual aids, "therapeutic equipment, a multisensory approach, and an OT approach that incorporates a listening program e.g., therapeutic listening program to address his auditory sensitivity, adaptability, and self-regulations difficulties" (Parent Ex. I at p. 5). The occupational therapist recommended individual OT two times per week for 60 minutes to work on

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subsequent action were, or could have been, raised in the prior proceeding (see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). Absent the parent's assertion of a claim in the present proceeding relating to the district's offer of a FAPE to the student during the earlier school years, there is no basis for application of the doctrines of res judicata or collateral estoppel.

[15] This conclusion was based upon the administration of the Beery-Buktenica Developmental Test of Visual Motor Integration-Sixth Edition (VMI) (Parent Ex. C at p. 12).

problem solving strategies, coping strategies, self-regulation strategies, and organization (Tr. p. 111; Parent Ex. I at p. 5). Additionally, the occupational therapist recommended six OT goals for graphomotor skills, executive functioning skills, self-regulation strategies, money management skills, and skills to independently navigate his home and school environments (Parent Ex. I at pp. 5-6). Further, the occupational therapist recommended that as a result of the "significant gap of services which have negatively impacted his current level of functioning it is recommended that [the student] also receive 400 hours of compensatory OT services" (id. at p. 5). She opined that the 400 hours were needed "to get [the student] to the point that he would otherwise have been had he been provided with adequate occupational therapy services to date" (Parent Ex. M at p. 2).

In connection with her recommendations, the occupational therapist was not aware that the student participated in an executive functioning class at Fusion (Tr. p. 110). However, she testified that an occupational therapist "bring[s] different strategies to the situation" and, therefore, "even if [the student] was having an executive functioning class, there's specialized treatment that occupational therapists have in the foundational skills in order to help assist him" (id.).

Regarding the degree to which Fusion addressed the student's executive functioning needs during the 2019-20 school year, such evidence must be considered to the extent it might establish that the supports otherwise mitigated the very deficiencies suffered by the student (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [noting that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], 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]).[16] Specifically, Fusion offered an individual one-to-one program that addressed the student's executive functioning skills, attention, and organization skills, which were areas of need identified in the May 2020 OT IEE (see Parent Exs. I, N). Based on the foregoing, the evidence in the hearing record supports a finding that, assuming compensatory education was an appropriate remedy in this matter, the student would not be entitled to an award of OT services greater than that awarded by the IHO. That is, given the scope of the impartial hearing (i.e., limited to the 2019-20 school year), and the evidence regarding the student's program at Fusion, no further OT services would be warranted.

Accordingly, the IHO's award of one hour per week of OT (two "hours per week during the six week summer session; and 1 hour per week during the 40 weeks of the 10 month school year") for a total of 52 hours of compensatory OT services shall not be disturbed (IHO Decision at pp. 12-13). The parent's request for 400 hours of compensatory OT services is denied.

[16] Inasmuch as this is the case, this serves to highlight one pitfall with a compensatory education award in addition to a unilateral placement. The evidence which establishes some mitigation of harm which factors into a compensatory education calculation is also the type of evidence that would have permitted a determination that the parent's unilateral placement of the student at Fusion was appropriate notwithstanding the lack of OT services available at the school.

C. Pendency Compensatory Education—Counseling

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see E. Lyme, 790 F.3d at 452 [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not

guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

As noted above, the IHO determined that the student's pendency placement was based on the unappealed June 2019 IHO decision and consisted of the student's attendance at Fusion, including "costs for the student to receive counseling," as well as two hours per week of speech-language therapy at an enhanced rate (IHO Ex. I at p. 3; see Parent Ex. B). During the impartial hearing, it became apparent that, although the June 2019 IHO decision and the interim decision on pendency had phrased the counseling as being part of the student's program at Fusion, Fusion did not have "a therapist on staff" and the parent ultimately obtained the services from an outside provider (see Tr. pp. 52, 57-60, 89, 101-02; Parent Ex. B at pp. 7, 11; IHO Ex. I at p. 3; see also Parent Ex. K at p. 1). Specifically, during the beginning of the 2019-20 school year, the parent testified that the student received two 90-minute sessions of counseling per week from an outside provider (Tr. pp. 101-02). Notwithstanding the departure from the language in the pendency decision, the district apparently funded the student's outside counseling services for part of the 2019-20 school year (see Tr. pp. 51-52, 60, 81-82, 102); however, the circumstances surrounding the same were not clear from the hearing record. Accordingly, as part of the undersigned's request for supplemental briefs, the parties were asked to state the circumstances pursuant to which the district came to fund the outside counseling services. In its supplemental brief, the district states that it authorized funding for two hours per week of counseling services pursuant to pendency for the 2019-20 school year and three hours per week of counseling services pursuant to pendency for the 2020-21 school year (Dist. Supp. Brief at p. 3). The parent indicates that, for a portion of the 2019-20 school year, the district funded "counseling services from an independent provider at a frequency that varied with the provider's availability" pursuant to pendency but that, subsequent to a change in providers, the district confirmed that the student was authorized to receive up to three hours per week of counseling (Parent Supp. Brief at p. 5). While the district and the parent state a different weekly duration for the counseling services, there appears to be agreement between the parties that the student was entitled to counseling services pursuant to pendency. As to the duration, the additional evidence submitted with the parent's supplemental brief documents the district's "confirmation" that the student's pendency after the first provider stopped delivering services consisted of three hours per week (Parent Supp. Brief Ex. B), which is generally consistent with the parent's testimony at the impartial hearing regarding the weekly duration of the services (see Tr. pp. 101-02), whereas the district's reference to two hours is without evidentiary support. Accordingly, the student's pendency placement is deemed to include three hours per week of outside counseling services by agreement of the parties, at least as of the date that the first provider ceased delivering services, which as discussed below was in or around the end of May 2020.

Having addressed the question of what services the student was entitled to pursuant to pendency, I turn to the question of what relief, if any, is warranted to remedy a lapse in the counseling services. The Second Circuit has held that where a district fails to implement a student's pendency placement, the student should receive the pendency services to which he or she was entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Here, according to the parent, the counselor who was delivering the student's outside counseling during the 2019-20 school year stopped providing services as of May 28, 2020 because the district stopped paying her (Tr. p. 102). As noted above, going forward, the parties agreed that pendency included three hours of counseling services per week. Therefore, the student experienced a lapse in counseling services from June 2020 continuing during these proceedings totaling three hours per week and is entitled to an award of compensatory counseling services for those pendency services that were not implemented.[17]

Given that the parent is entitled to the compensatory counseling services pursuant to pendency and given the above determination that compensatory education is otherwise not an appropriate remedy in this matter given that the parent unilaterally placed the student at Fusion for the 2019-20 school year, I decline to review the IHO's analysis as to the student's need for three hours of outside counseling services per week for the 2019-20 school year.

VII. Conclusion

Having found that those portions of the IHO's decision which found that the district failed to offer the student a FAPE and ordered the district to fund the student's unilateral placement at Fusion are final and binding, the circumstances of this matter do not warrant compensatory education in addition to the unilateral placement in order to remedy the district's failure to offer the student a FAPE for the 2019-20 school. However, as the IHO awarded some compensatory education services, including speech-language therapy and OT , and those awards have not been

[17] The district argues that, as the parent was responsible for obtaining the counseling pendency services from the private provider, the district should not be responsible for funding compensatory services to make up for the lapse (Dist. Supp. Brief at p. 3). The case cited by the district for this proposition relied on a finding that, based on a substantial similarity analysis, the pendency placement was a nonpublic school unilaterally chosen by the parents and that, as such, the lapse in services (due to lack of staffing at the nonpublic school) was attributable to the parents (see Application of the Dep't of Educ., Appeal No. 18-136). However, since that decision was issued, the Second Circuit has held that a parent does not have a right to unilaterally select the location for delivery of the student's pendency placement (Ventura de Paulino, 959 F.3d at 533-35). Here, as the district has agreed to fund the outside counseling services as part of the student's pendency placement, the district's failure to do so and resulting lapse in services due to the provider's termination of delivery of services due to nonpayment is attributable to the district.

appealed, they are also final and binding and will not be disturbed. Separately, the hearing record shows that the student experienced a lapse in pendency counseling services and, as a result, the IHO's order of compensatory counseling services shall be modified to include make-up services consisting of three hours per week from June 2020 and continuing through these proceedings upon the parent's submission to the district of proof of delivery of the services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 6, 2020 is modified by reversing that portion which ordered the district to fund four hours of compensatory counseling services for the 2019-20 school year; and

IT IS FURTHER ORDERED that, upon proof of delivery of services, the district shall fund hour-for-hour compensatory counseling services consisting of three hours per week, multiplied by the number of weeks during which the student did not receive the counseling services under pendency, beginning as of June 1, 2020 through and including the date of this decision.

Dated: **Albany, New York**
December 3, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER