The University of the State of New York

The State Education Department
State Review Officer
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No. 20-167

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 Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian Davenport, Esq., of counsel

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 determined that the educational program and services the respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for part of the 2018-19 and all of the 2019-2020 school years were inappropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been found eligible for special education and related services as a student with autism (Dist. Exs. 1 at p. 1; 2 at p. 1). He has diagnoses of cerebral palsy, epilepsy, verbal apraxia, and reactive airway disease (Dist. Ex. 2 at p. 1). The student attends a state-approved non-public school (id.).

As a result of a due process complaint notice dated July 2, 2018, claiming that the district had failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year, an IHO issued a decision dated March 6, 2019, which found that the district failed to establish that it provided the student with a FAPE for the 2018-19 school year because the most current documentary or testimonial evidence it submitted during the impartial hearing dated back to 2016,

and the hearing record was devoid of any information regarding the student from the three years preceding the hearing (the 2016-17, 2017-18, or 2018-19 school years) (Parent Ex. B). Accordingly, the IHO ordered the district to provide the student's parent with an evaluation consent form and directed the district to perform the evaluations within 30 days of receiving signed consent (id.at p. 4).[1] The IHO further ordered the CSE to convene a new meeting within sixty days of receiving signed consent from the parents (id. at p. 5). Further, the IHO ordered the district to continue to provide the student with the following program for the remainder of the 2018-19 year or until the parties agreed to a new IEP: placement in a specific twelve month school year nonpublic school; a full-time crisis management paraprofessional to be selected by the parent; a transportation paraprofessional; 15 hours per week of home-based applied behavioral analysis (ABA) special education teacher support services (SETSS); counseling services, two sessions per week for 60 minutes per session; occupational therapy (OT), four sessions per week for 30 minutes per session; physical therapy (PT), four sessions per week for 30 minutes per session; speech-language therapy, nine sessions per week for 30 minutes per session; speech-language therapy, four sessions per week for 45 minutes per session (id.).[2]

A May 2019 psychoeducational evaluation was conducted by the district in April 2019 (see Dist. Ex. 2). In pertinent part, the evaluator determined that the student had a tendency to engage in high rates of non-complaint and aggressive behavior across all environments and noted that the parent reported that he could be very unpredictable and a clear antecedent for the behavior was often not apparent (id. at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 2, 2019, the parent asserted that the district denied the student a FAPE for part of the 2018-19 school year and all of the 2019-20 school year (Parent Ex. A at p. 1). The parent contended that the district failed to adequately evaluate the student, failed to create an appropriate IEP, and failed to follow the procedural requirements of the IDEA (id. at p. 1).

The parent asserted that the district violated Section 504 and the IDEA "by adopting and implementing systemic and blanket policies regarding special education service delivery that have affected the services offered to" the student (Parent Ex. A at p. 2).[3] The parent contended that the

[1] The evaluations ordered in the March 6, 2019 IHO Decision included: a functional behavioral assessment (FBA), a behavior intervention plan (BIP) by a Board Certified Behavior Analyst (BCBA), an assistive technology evaluation, a transitional/vocational evaluation, a psychoeducational evaluation, and a classroom observation (Parent Ex. B at p. 4).

[2] The IHO directed that the SETTS, counseling, OT, PT, and speech-language therapy services were to be delivered for 52 weeks per school year (Parent Ex. B at p. 5). The IHO also directed that the counseling, OT, PT, and speech-language therapy services were to be delivered on an after-school basis (id.). Further, the IHO directed that the parent be provided with related service authorizations or direct funding for the OT, PT, and speech-language therapy services specifying a rate for each service (id.).

[3] The parent argued that the district has "applied blanket polices to decisions about [the student's] IEP and placement" and that the district has also "substantially changed [the student's] placement without reevaluation" which violated the student's "rights by failing to ensure that he has equal access to education" as compared to students without disabilities (Parent Ex. A at p. 6). Due to the "discriminatory and inappropriate practices and procedures, [the student] has and will continue to suffer harm and deprivation of a FAPE" (id. at p. 6).

Section 504 violation was gross, reckless, and intentional (id. at p. 6). The parent asserted that in the spring of 2014, the district contacted her to advise her that the student would be re-evaluated and that the parent would have two choices following re-evaluation, either remove the student's after school services or remove the student from his state-approved nonpublic school (id. at p. 3). The parent argued that the choice was attributable to a directive made by the State Education Department, which advised school districts and state-approved nonpublic school programs that students cannot stay in a nonpublic school unless the school can provide all of the services on the student's IEP (id.). The parent maintained that this policy was illegal because there were no schools available that offered the after-school related services previously recommended for the student (id.).

The parent asserted that in December 2017, the impartial hearing regarding the 2017-18 school year was resolved; however, the district failed to comply with the IHO's directive to convene a CSE meeting and recommend a specific program for the student (Parent Ex. A at pp. 4-5). Further, the parent asserted that the CSE has not convened since 2016 to make a program recommendation for the student and no CSE has been convened for the 2019-20 school year and no placement or program recommendation has been made (id. at p. 5). The parent also alleged that following the March 2019 IHO decision regarding the 2018-19 school year, the district again failed to convene a CSE pursuant to the IHO's order (id.).

The parent argued that she disagreed with the 2019 reevaluation of the student (Parent Ex. A at p. 5). The parent averred that the district never offered parent training and counseling, even though the student is classified as autistic, nor has the student received the transition services and assistive technology wo which he is entitled (id. at p. 6). Further, the parent asserted that the student is entitled to a more intensive staff ratio than he is currently receiving under his stay-put services and that he continues to require home-based ABA and related services in order to make progress (id.).

Additionally, the parent asserted that she was concerned the student's pendency placement was not adequately implemented, as the student was not provided with sufficient 1:1 instruction or ABA during the school day (Parent Ex. A at p. 6).[4]

For relief, the parent requested an immediate pendency order for the 2019-20 school year and the remainder of the 2018-19 school year not covered under the March 2019 IHO decision to include the same services as ordered in the March 2019 IHO decision (compare Parent Ex. A at pp. 7-8, with Parent Ex. B at p. 5). In addition to these pendency services, the parent also requested that pendency include a push-in "1:1 teacher trained in ABA services to work with [the student] during the day, who is supervised by a licensed behavior analyst;" transitional/vocational services and planning; an increase of home-based ABA services from seven to ten hours per week; and funding for "SKIP training" (id. at p. 8).[5]

[4] The parent asserts that the requirement that ABA providers who are not employed by school districts be certified as licensed behavior analysts, combined with the district's refusal to recommend ABA services on an IEP, has created a shortage of licensed behavior analysts available to implement ABA services ordered as part of an impartial hearing (Parent Ex. A at p. 7).

[5] The parent's post-hearing brief described "SCIP (or SCIP-R)" as "Strategies for Crisis Intervention and

As additional relief, the parent requested a "declaration of rights in favor of the Parent, declaring the [district's] conduct to be illegal as alleged," a finding that the district failed to provide the student with a FAPE, and a finding that the district subjected the student to "discrimination based upon his disability" (Parent Ex. A at p. 8). The parent also requested that if a licensed behavior analyst is unavailable due to the alleged current shortage of licensed providers, the district be directed to fund 1:1 instruction with behavioral support (id.). The parent further requested independent educational evaluations, including: an FBA and BIP; a transitional/vocational evaluation; and an assistive/adaptive technology evaluation (id.).

Finally, the parent requested compensatory education, described as additional and/or make-up ABA and related services based on the district's failure to implement the student's pendency and a denial of FAPE for the 2018-19 and 2019-20 school years after the March 2019 IHO decision (Parent Ex. A at p. 9).

B. Facts Subsequent to Initial Due Process Complaint Notice

The CSE convened in August 2019 to develop an IEP for the student (see Dist. Ex. 1).[6] The IEP included references to a June 2019 educational counseling progress report, a 2019 educational progress report, a May 2019 educational and counseling report, a May 2019 OT progress report, and a June 2019 PT progress report (Dist. Ex. 1 at pp. 1, 3, 5, 6).[7] The CSE recommended individual direct SETSS for fifteen periods per week and a 6:1+3 special class in a State-approved nonpublic day school for eight periods per day (id. at p. 43). For related services, the CSE recommended two 60-minute sessions of individual counseling services per week, four 30-minute sessions of individual OT per week, four 30-minute sessions of individual PT per week, nine 30-minute sessions of individual speech-language therapy per week, and four 45-minute sessions of individual speech-language per week (id.). The CSE also recommended parent counseling and training once monthly for 60 minutes (id.). Further, supplementary services of a full-time daily individual behavior support paraprofessional and a daily individual transportation paraprofessional were recommended (id. at pp. 43-44). The student was not recommended for assistive technology but was recommended for a 12-month program (id. at p. 44).

Prevention, which is a form of physical intervention that may be used as part of an individual's 'behavior plan or in an emergency to address challenging behaviors that pose a risk of harm to self or others'" (IHO Ex. I at p. 1 n. 1). In the hearing record it is described as "a technique where you can safely restrain or protect an individual from either hurting themselves or hurting others" (Tr. p. 186).

[6] The August 27, 2019 prior written notice indicated that the CSE convened on May 31, 2019 (Dist. Ex. 3 at p. 1). The attendance page was dated May 31, 2019 (Dist. Ex. 1 at pp. 50). However, the parties conferred during the hearing and agreed that the CSE actually convened on August 15, 2019 to create an IEP for the 2019-20 school year (Tr. pp. 131-33). This CSE and the resultant IEP will be referred to throughout this decision as the August 2019 CSE meeting and August 2019 IEP.

[7] The August 27, 2019 prior written notice indicated that the CSE reviewed eleven evaluations and/or reports (Dist. Ex. 3 at p. 2). These reports were listed as: an April 3, 2019 vocational assessment; an April 12, 2019 classroom observation; an April 16, 2019 assistive technology evaluation; a May 2, 2019 psychoeducational evaluation; a May 29, 2019 OT progress report; a May 30, 2019 counseling progress report; a June 7, 2019 PT progress report; a June 20, 2019 educational counseling report; an August 9, 2019 educational progress report; an August 15, 2019 BIP; and an August 27, 2019 FBA (id. at p. 3).

The parties proceeded to impartial hearing on August 29, 2019 (see Tr. pp. 1-10). At the outset of the hearing, the parties agreed that the student's pendency placement should be based on the March 2019 IHO Decision (Tr. pp. 4, 6). In an August 30, 2019 decision, the IHO found that the student's pendency program, effective from July 2, 2019, consisted of the same program and services outlined in the March 2019 IHO Decision (compare August 30, 2019 IHO decision at p. 2, with Parent Ex. B at p. 5).

The parties then proceeded to a hearing on October 3, 2019 and had six days of proceedings between October 3, 2019 and March 2, 2020 (see Tr. pp. 11-68). At the hearing on November 6, 2019, the parent indicated that she intended like to file an amended due process complaint notice regarding the August 2019 CSE meeting (Tr. pp. 21-24).[8]

In the subsequent due process complaint notice dated March 2, 2020, the parent alleged that the district denied the student a FAPE for the 2019-20 school year and part of the 2018-19 school year (Parent Ex. E at p. 1). In addition to the allegations contained in the prior due process complaint notice, the parent noted that the student has been able to receive services through pendency; however, the parent argued that the student's program has remained substantially the same for many years and that the program is not the equivalent of a FAPE as the student's needs, particularly regarding his behaviors, have changed and the student is now entitled to transition services (id. at pp. 2-3).

The parent acknowledged that the district convened in August 2019, which the parent described as the first CSE meeting for the student since 2016 (Parent Ex. E at p. 2).[9] The parent argued that the August 2019 CSE process and August 2019 IEP were substantively and procedurally defective (id. at pp. 7-8). Regarding the 2019 CSE meeting, the parent claimed that the meeting was conducted by the district's "summer team" and "was repeatedly stopped in order for the summer team members to confer with each other and their supervisor, outside the Parent's presence" (id. at p. 6).[10] Among other things, the parent asserted that the IEP indicated that the student needed a BIP and positive behavior supports, yet none were identified in the IEP and the IEP did not address the student's self-injurious and dangerous behaviors and failed to provide relevant information regarding the student, notably regarding the use of restraints (id.). According to the parent the FBA and IEP failed to adequately address the primary causes for the student's behaviors and triggers (id.). The parent alleged that the CSE failed to recommend 1:1 instruction and failed to provide ABA and BCBA/LBA services at home or school and it failed to recommend indirect training for staff working with the student and failed to include peer-reviewed research-based methods (id.). According to the parent's allegations, the district did not offer a sufficient level of special education and related services for the student, did not consider a 52-week program,

[8] The hearing record indicated that the parent filed the amended due process complaint notice with the district in November 2019 (Tr. p. 30). However, there were issues with the district's system that prevented acceptance (Tr. pp. 30, 36-37, 42, 53, 55-56). Due to the district being unable to accept the amended due process complaint for months, the IHO directed the parent to re-file the complaint and she would consolidate the cases together (Tr. pp. 61, 65). The order of consolidation was dated March 10, 2020 (see Order of Consolidation).

[9] The parent asserted that the CSE was held on August 15, 2019; however, the IEP is erroneously dated May 31, 2019 (Parent Ex. E at p. 2).

[10] The parent asserted that the August 2019 CSE was not properly constituted as the summer team did not possess the required knowledge, training, or independence to formulate the IEP (Parent Ex. E at p. 8).

did not address the student's at home behaviors and transitional needs, and it did not address the need for planning and coordination between school and home providers (id.). The parent asserted that the CSE failed to provide for services to help with generalization outside of school, which the parent argued were critical for effective transition between settings (id.). The parent alleged that the IEP lacked adequate transition and vocational services (id.). In addition, the parent alleged that the IEP failed to address the student's communication needs, ADL skills, and need for assistive technology (id.). The parent contended that the IEP did not adequately describe the student's present levels of performance and needs and that the recommendations were not based on sufficient evaluations or an FBA (id. at p. 8). Moreover, the parent contended that the IEP goals were not appropriate, not sufficient to address the student's needs, and not measurable as they did not address the issues the student was working on at home (id.) The parent argued that the evaluation, IEP, and placement processes did not meet the standards for providing FAPE to a student with autism (id.). Further, the parent asserted that the IEP did not include goals or criteria for parent counseling and training and did not consider the short-term and long-term effects of the FAPE deprivations over the years (id.).

The parent requested the same relief as in the July 2019 due process complaint notice (compare Parent Ex. E at pp. 9-10 with Parent Ex. A at pp. 8-9). Additionally, the parent requested funding for an appropriate augmentative and alternative communication device for use in school, at home, and in the community along with training for the parent and the student's school, home, and community providers (Parent Ex. E at p. 10).[11]

The IHO consolidated the July 2019 and March 2020 due process complaint notices in a March 2020 decision (March 2020 Order on Consolidation).

C. Impartial Hearing Officer Decision

After the amended due process compliant notice was consolidated, the parties proceeded to another four hearing dates, which concluded on June 25, 2020 (Tr. pp. 70-230).

In a decision dated September 22, 2020, the IHO found that the district denied the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at p. 4).[12] The IHO held that the lack of testimony prevented the district from meeting its burden as "[f]acts must be established by testimony and documentary evidence" and without testimony there was no explanation, "let alone a cogent and responsive explanation" as to why the CSE made its recommendations (id.).

Further, the IHO held that the parent's evidence demonstrated that the recommendations made by the CSE were "neither appropriate nor sufficient" (IHO Decision at p. 4). Specifically, the IHO found that the CSE did not address the student's severe behaviors because the CSE did not recommend the level of ABA and SETSS services that he required (id.). The IHO determined that the student's current State-approved nonpublic school placement, which the CSE

[11] In addition, the request for "SKIP training" was changed to a request for "SCIP-R training" (compare Parent Ex. A at p. 9 with Parent Ex. E at p. 10).

[12] The IHO filed a corrected decision on September 22, 2020 (see IHO Decision). The corrected decision reformatted the original decision.

recommended, was not appropriate as it "was unable to address the Student's severe behavioral needs" (id.).

The IHO found that the CSE failed to appropriately evaluate the student (IHO Decision at p. 4). Moreover, the IHO noted that the district did not oppose the requested IEEs nor did the district assert that its evaluations were sufficient or appropriate (id. at p. 5). The IHO held that the requested IEEs were "necessary and appropriate" (id.). The IHO granted the parent's request for an FBA and BIP to be performed by a Board-Certified Behavior Analyst (BCBA), a transitional assessment, and an assistive technology evaluation (id.). The IHO also directed the CSE to reconvene within 30 days of receipt of the IEEs to review the evaluations and create a new IEP that "incorporates the results of the IEE[s] and that includes appropriate assistive technology and assistive technology training" (id. at pp. 6, 8).

The IHO held that, since the district failed to develop an appropriate program, the student "must continue to receive his prior agreed upon program, which is his pendency program" (IHO Decision at p. 5). The IHO held that the "IEPs prepared by the CSE are inadequate" and granted the parent's request for a declaration that specific services be included in the student's next IEP (id. at p. 6). The IHO directed the CSE to prepare a BIP until the independent FBA and BIP were completed and that the next IEP "must include all of the services in the Pendency Order, and must include an additional ten hours per week of ABA/SETSS and three additional hours per week of Counseling/BCBA services" (id.).

Further, the IHO held that due to the student's "increasingly self-injurious behaviors, and the extent to which his behaviors pose a serious threat to others," the parent's needed to be provided with SCIP-R training as a form of parent counseling and training and the IHO ordered the district to authorize funding for this training within 30 days (IHO Decision at p. 6).

Finally, the IHO addressed the district's reported refusal to pay for the student's July 1, 2019 pendency services because these services were provided the day before the due process complaint notice was filed (IHO Decision at p. 6). The IHO acknowledged that the district was not obligated to fund those services as part of pendency; however, the IHO held that this did not relieve the district of its obligation to fund all of the student's services for the 2019-20 school year (id.). The IHO found that since the district's recommendations for the 2019-20 school year were inadequate, the student "required a continuation of services that he had had been receiving as of the end of the prior school year;" and therefore, the district must fund three hours of SETSS/ABA services, one hour of BCBA services, one session of OT, one session of PT, and two sessions of speech-language therapy for July 1, 2019 (id. at pp. 6-7).

The IHO ordered the district to fund an FBA and a BIP to be performed by a BCBA, a transitional assessment, and an assistive technology evaluation (IHO Decision at p. 7).[13] The IHO further ordered the district to provide the student with the same services as previously ordered in the pendency order together with the following additional services: 10 hours per week of home-based ABA/SETSS services, three hours per week of home-based BCBA services, and a new BIP that addresses the Student's self-injurious behaviors (id. at pp. 7-8). The IHO also directed the CSE to convene a meeting within 30 days of receipt of the IEEs "in order to consider the IEE

[13] The evaluations were to be conducted by providers of the parent's choosing (IHO Decision at p. 7).

evaluation reports and to develop a new IEP that incorporates the results of the IEE and that includes appropriate assistive technology and assistive technology training" (id. at p. 8). In addition, the IHO ordered the district to issue an authorization for funding for SCIP-R training for the parents (id.).

Finally, the IHO ordered the district to "promptly fund all services provided pursuant to the Pendency Order in this proceeding" and further directed it to "fund all services provided to the Student on July 1, 2019, up to the following maximum level of services: three hours of SETSS/ABA services, one hour of BCBA services, one 30-minute session of [OT]y, one 30-minute session of [PT], and two 30-minute sessions of speech-language therapy" (IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO erred by failing to award compensatory education for the district's failure to implement pendency during the 2018-19 and 2019-20 school years.

The parent contends that the IHO erred by failing to deem all factual allegations in the due process complaint notices as admitted by the district. The parent asserts that although the district submitted some documentary evidence, it failed to produce any witnesses and "did not address or rebut the majority of allegations in the" due process complaint notices "or any of the Parent's evidence." As such, the IHO erred as a matter of law by failing to deem the factual allegations as admitted because the district "failed to contest the provision of FAPE and IDEA compliance other than in a general fashion." More specifically, the parent contends that the district failed to defend the matter with any specificity, only asserting that it offered a FAPE. Notably, the parent argues that the district did not address the parent's allegations regarding failure to implement pendency.

The parent argues that the IHO erred by failing to award compensatory education services for the pendency services that were not implemented by the district during the 2018-19 and 2019-20 school years. The parent asserts that the IHO order directing that the district "'promptly fund all services'" pursuant to pendency was "insufficient to address the entire aspect of relief." The parent contends that she is entitled to compensatory relief, in addition to the funding of these services. The parent requests an order that the district is required to fund all services that were not provided during the school years at issues.

The parent asserts the district failed to meet its burden of proof and persuasion for establishing the appropriate remedy for the failure to offer a FAPE and provide pendency services. According to the parent because the facts alleged in the due process complaint notices should have been deemed admitted, "the IHO should have found that the [district] violated [the student's] pendency and ordered appropriate relief." The parent argues that the IHO should have ordered the district to conduct an accounting of the missed pendency services and awarded compensatory education banks.

Further, the parent contends that the IHO failed to render a decision on all of the issues raised in the due process complaint notices. The parent argues that the IHO failed to address the parent's claims related to systemic violations and the district's application of blanket policies as well as the parent's claims regarding Section 504.

Finally, the parent argues that although the school years in question have now ended, these issues are not moot. The parent asserts that her request for compensatory education remains live and that these claims are capable of repetition and evading review. The parent notes that she has had to litigate multiple school years and due to the timing of these decisions, the student "has not received a complete remedy for each of the school years in issue." As such, the parent contends that "the program and placement issues, even for a school year that ended, is not moot or meeting the exception to the mootness doctrine."

In an answer, the district asserts that the parent is not entitled to a default judgement for all relief sought. The district contends that the parent's request that to have all facts deemed as admitted serves no purpose as it amounts to a request for a default judgement, which does not support an award of compensatory education. Notably, the district argues that it did not concede FAPE and the IHO found that the district failed to meet its burden, not that it conceded FAPE. Even if the district did concede FAPE, it argues that this does not automatically entitle the parent to her requested relief. Further, the IHO was not required to grant compensatory education "automatically upon a finding that the" district did not offer a FAPE.

The district contends that the parent's request for compensatory education "amounts to double dipping." The district asserts that the record demonstrates that the student received his pendency services, but that the provider was not paid. The district does not dispute its obligation to fund pendency services and the parent did not present any evidence that the district has refused to fund these services or terminated the pendency order. Since the student received pendency services and the IHO ordered the district to issue payment for the outstanding invoices for the pendency services, the request for compensatory education for an alleged failure to implement services is unfounded. The district argues that if the parent's request for compensatory education was granted, the student "would receive services in excess of which he is presently entitled."

The district asserts that the parent is not entitled to additional compensatory FAPE relief because the services provided to the student were the same services as directed by the prior IHO in the March 2019 finding of fact.[14] The district contends that for the remainder of the 2018-19 and 2019-20, the student received the educational program that the parent sought and was awarded. The IHO found that the district deprived the student of a FAPE because it failed to properly address the student's evolving behavioral needs, not that the district failed to provide the student with services. As such, there "is no evidence in the record demonstrating how the program received by [the student] was otherwise deficient and set the Student back." Therefore, the IHO's decision comprehensively addresses the student's needs and her determination not to include compensatory education should be affirmed.[15]

[14] The district also argues that the parent is requesting enforcement of a prior favorable decision and that it is well established that enforcement of an administrative order is not within the jurisdiction of the SRO. Further, the district noted that the parent has filed a complaint in district court asserting that the district failed to implement pendency services. As the issue is now being litigated at the federal level, the district argues that the SRO should deny the parent's request for compensatory education and dismiss the claim.

[15] Additionally, the district, while noting that it was not cross appealing the IHO decision, argues that the "amount of services awarded to the Student is excessive, unreasonable, and infeasible." The district notes that the student receives a total of 41.5 hours of afterschool services per week after a full school day and that on "top of this

Finally, the district argues that the neither the IHO nor the SRO have jurisdiction to review the parent's claims that the district applied blanket policies as that is a systemic violation, which is the sole jurisdiction of the courts. Regarding Section 504, the district contends that an SRO does not have jurisdiction over those claims and therefore, the appeal should be dismissed.

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).

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burden," the parent is seeking more compensatory education hours. The district contends that it "begs the question, how can the Student be expected to meet these services and complete additional compensatory education services sought by the Parent?" The district argues that as a "purely practical consideration," it would be "nearly impossible" for the student to complete these hours.

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]).[16]

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

[16] 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).

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).

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. Scope of Review

The parent contends that the IHO erred by failing to deem all facts raised in the due process complaint notices as admitted. The district argues that the request for facts to be deemed admitted amounts to a default judgement, to which the parent is not entitled.

Initially, the parents' argument that the IHO should have deemed all of the factual allegations contained in the due process complaint notices as admitted by the district is another way of asserting that the IHO should have issued a default judgment against the district, which can only be plausibly grounded in the State's statute governing the burden of proof in IDEA due process hearings (Educ. Law § 4404[1][c]). However, default judgments are disfavored by the federal courts (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]; see also G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). The IDEA itself is clear that 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]). Whether a parent is seeking tuition reimbursement or compensatory relief, administrative hearing officers should not be rendering default judgments based on an absence of evidence regarding the student (see Application of a Student with a Disability, Appeal No. 20-203.

Additionally, in this matter, the IHO found that student was not offered a FAPE because the student's IEP did not adequately address the student's behaviors (IHO Decision at p. 4). In the introductory statement of the request for review, the parent stated that she was seeking reversal of the IHO decision for "the IHO's failure to award the full amount of requested [ABA]" services (Req. for Rev. at p. 1). However, the parent did not mentioned this request again in the request for review and she has not identified a specific service or request that was not granted by the IHO other than in her arguments related to pendency. In her post-hearing brief, the parent had requested an additional 13 hours per week of ABA/BCBA services (IHO Ex. I at pp. 4, 24, 28). The parent testified that she was seeking an increase of ten hours per week, to a total of 25 hours per week, of ABA/SETSS services and an increase of three hours per week of counseling services provided by a licensed behavior analyst to a total of five hours per week (Tr. pp. 216-19). As the IHO ordered an additional ten hours of home-based ABA/SETSS services and an additional three hours per week of home-based BCBA services (IHO Decision at p. 7), it is unclear what the parent is appealing from. Accordingly, the IHO determined the issue of FAPE in the parent's favor and awarded the parent all of the relief she was requesting for the denial of FAPE.

The IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). As noted above, the IHO's decision resolved the issue of FAPE entirely in the parent's favor awarding all of the relief requested (IHO Decision at p. 4). Therefore, the parent is not entitled to appeal this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). As such, the parent is not entitled to appeal the IHO's finding on the issue of FAPE (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]).

2. Section 504 and Systemic Violations

The parent asserts that the IHO failed to rule on all of her claims raised in the due process complaint notices, specifically regarding the allegations that the district applied blanket policies with respect to the services available in the district and the student's right to FAPE and that the IHO failed to address the parent's Section 504 claims. The district asserts that the SRO has no jurisdiction to determine these claims.

In both due process complaint notices, the parent alleged that the district "violated Section 504 and the IDEA by adopting and implementing systemic and blanket policies regarding special education service delivery that have affected the services offered to [the student]" (Parent Exs. A at p. 2; E at p. 2). To the extent that these allegations are an assertion that the district did not offer the student a FAPE, as discussed above, the parent has already been awarded all of the relief requested as a remedy for the denial of a FAPE to the student. To the extent that these allegations involve systemic violations by the district, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL

8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and such claims will not be further addressed.

B. Compensatory Education

Turning to the parent's claim that the IHO erred in directing that the district fund all pendency services instead of awarding compensatory education services for any failure to implement pendency services, the parent does not provide a sufficient basis to depart from the IHO's determinations on these issues.

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [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"]; see Student X, 2008 WL 4890440, at *25, *26 [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]).

In this matter, the district did not arrange for or implement the student's pendency services (Tr. p. 202). However, the parent testified that the student has been getting his services through pendency although there have been delays in funding for these services (Tr. pp. 198, 201). The student's BCBA counselor testified that she has continued to provide the student with services, but that she has not been timely or fully paid for the services she has provided (Tr. p. 187). The parent testified that the student did not receive school services in March and April 2020 due to covid-19; however, she did not assert that the student missed any at-home pendency services (Tr. p. 199). Accordingly, upon review of the hearing record, the issue of pendency in this matter does not appear to be one of implementation, which the parent has arranged for and overseen in terms of retaining providers, but rather one of funding by the district of pendency services already provided. The IHO addressed the issue of funding by ordering that the district immediately fund all of the student's pendency services (IHO Decision at pp. 7-8).

Given that the funding due for pendency services already provided was addressed by the IHO, the parent has been awarded relief for any outstanding payments owed to the student's providers by the district. Accordingly, given the dearth of information in the hearing record concerning any actual missed pendency services, as opposed to services that were provided but for which payment was not made by the district, the parent's request for compensatory education for the district's failure to implement pendency services is denied.

Further, the parent has not identified any specific pendency service that the student has not received, but asks for a presumption that the student has missed pendency services and that the district should conduct an audit of any missed pendency services. As there is no evidence in the hearing record, or even specific allegations, that the student did not receive any pendency services, granting the parent's request to order an audit of such services is not an appropriate remedy,

particularly in light of the fact, that the parent, who has been arranging these services, is presumed to have this information in her possession, not the district.

However, in the event the parent identifies a specific service that the student was due under pendency, which was not provided during the pendency of this proceeding, the parent may pursue any such allegation by either filing a new due process complaint notice alleging a non-speculative implementation failure, by filing a State complaint against the district through the State complaint process for failure to implement the IHO's pendency decision, or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

VII. Conclusion

Having determined that the only issue before me on appeal is whether the student is entitled to compensatory education services for the district's failure to implement pendency for the 2018-19 and 2019-20 school years, and having found insufficient basis to depart from the IHO's decision on this issue, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them at this time in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 16, 2021

STEVEN KROLAK
STATE REVIEW OFFICER