The University of the State of New York

The State Education Department
State Review Officer
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No. 20-170

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., and Elisa Hyman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services for her son. Respondent (the district) cross-appeals from that portion of the IHO's decision that ordered it to fund interim compensatory services for the student for the 2019-20 school year. The appeal must be dismissed. The cross-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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

This student has been the subject of a prior State-level administrative proceeding (see Application of a Child with a Disability, Appeal No. 07-054), as well as prior impartial hearings (see Parent Exs. B; N). The student has received diagnoses of autism spectrum disorder, oral apraxia, mood disorder, and reactive airway disease and has been described as having "global developmental delays" that "interfere with his functioning in all areas" (see Dist. Ex. 3 at pp. 1,

12-13). The student has continuously attended the Eden II School for Autistic Children (Eden II), a State-approved nonpublic school, since he was eight years old (Dist. Ex. 3 at p. 5).

On June 15, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the student's 2016-17 school year (tenth grade) (see Dist. Ex. 1 at pp. 1, 39). Finding that the student remained eligible for special education as a student with autism, the June 2016 CSE recommended a 12-month school year program in an 8:1+3 special class placement at a State-approved nonpublic school with a full-time 1:1 paraprofessional and parent counseling and training, along with the following to be delivered in the student's home: special education teacher support services (SETSS) 15 times per week, occupational therapy (OT), physical therapy (PT), speech-language therapy, and counseling services (id. at pp. 1, 33-35).[1] According to the parent, during the meeting, the district members of the CSE indicated that the CSE would defer the student's case to the central based support team (CBST) and that the student could not stay at Eden II and have his home-based services (Parent Ex. A at p. 4; see Parent Ex. R at p. 2).

After the June 2016 CSE meeting, a CSE did not convene to develop an IEP for the student for the 2017-18, 2018-19, or 2019-20 school year (see Parent Exs. B at pp. 9, 11; R at p. 3). The parent pursued an impartial hearing related to the 2017-18 school year, and, in a decision dated June 21, 2018, an IHO ordered the district to fund the student's placement at Eden-II, along with the home program, for the 12-month 2017-18 school year (Parent Ex. N). Following an impartial hearing regarding the student's 2018-19 school year (2018-19 proceeding), an IHO, in a decision dated July 2, 2019, ordered the district to fund the student's placement for the "[t]welve-month 46 week" 2018-19 school year, including placement at Eden II along with a full-time crisis management paraprofessional, 15 hours per week of home-based SETSS using applied behavior analysis (ABA), OT four times per week for 30 minutes on an after-school basis, PT two times per week for 30 minutes on an after-school basis, speech-language therapy eight times per week for 30 minutes on an after-school basis, counseling two times per week for 60 minutes on an after-school basis, and special education transportation with a transportation paraprofessional (Parent Ex. B at pp. 12-13). The July 2, 2019 IHO decision also indicated that the district would be required to fund the "ABA SETSS" and counseling at an enhanced rate of no more than $150 per hour and provide related service authorizations (RSAs) and/or direct funding for the home-based related services of OT, PT, and speech-language therapy at the rate of $85 per 30 minutes (id. at p. 13). The IHO indicated that the service providers and paraprofessionals both in and out of school would be chosen by the parent (id.). Additionally, the July 2019 IHO decision ordered the district to fund an independent functional behavioral assessment (FBA) and behavioral intervention plan (BIP) prepared by a Licensed Behavior Analyst (LBA) or Board Certified Behavior Analyst (BCBA) selected by the parent at a reasonable market rate and strategies for crisis intervention and prevention (SCIP) training for staff in school and at home and for the parent (id. at pp. 13-14).[2] Finally, the IHO ordered the district to convene a CSE within 30 days of the decision to develop an IEP that incorporated the ordered services (id. at p. 14).

[1] The student's eligibility for special education as a student with autism is not in dispute (see Parent Ex. A at p. 2; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] According to the hearing record, SCIP references techniques, training, and methodology for the safe and

A. Due Process Complaint Notice

In a due process complaint notice dated July 18, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Ex. A at pp. 1, 8). Initially, the parent alleged that the district had not convened a CSE to develop an IEP for the student for over three years, since June 15, 2016, or re-evaluated the student for over five years (id. at p. 2).

For the 2018-19 and 2019-20 school years, the parent argued that, by failing to have an IEP in place for the student, the district "grossly, recklessly and intentionally discriminated" against the student in violation of section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (Parent Ex. A at p. 7). The parent further argued that the student was entitled to assistive technology in the form of a communication device and/or iPad as well as transition services, vocational supports, and transition assessments (id.). In addition, the parent argued that the district failed to offer her parent counseling and training services (id.). The parent also argued that the district "historically" made decisions about the student's special education services based upon "blanket policies" and that the district employed "illegal blanket practices" for the past three school years (id.). In addition, the parent asserted that ABA licensing was not required for a school district to provide ABA on a student's IEP; however, the parent indicated that the district would not offer ABA on an IEP and that this, combined with new State licensing requirements for LBAs, resulted in a "shortage of LBAs" (id. at p. 8).[3]

Next, the parent indicated that the district illegally refused to "implement payments for last-agreed upon/pendency placements and services . . . without an order from an [IHO]" in undisputed pendency placements (Parent Ex. A at p. 8). As a result, the parent argued she was "required to retain counsel and incur legal fees" (id.). The parent further argued that should the district refuse to implement the student's pendency placement in this proceeding based on the July 2, 2019 unappealed IHO decision, and "insist[ed] upon the issuance of an interlocutory decision from an [IHO]," the parent requested an "immediate pendency hearing" (id. [emphasis in original]).

The parent requested an interim decision on pendency to include an enumerated placement and services, which mirrored the placement and services set forth in the July 2019 IHO decision (compare Parent Ex. A at p. 9, with Parent Ex. B at pp. 12-13). As relief for the district's denial of a FAPE, the parent requested the district be required to provide the enumerated services and memorialize said services on a "legally valid IEP" (Parent Ex. A at p. 9). The parent also sought compensatory educational services, consisting of additional and/or makeup ABA, related services, and transitions services, and /or extended eligibility based on any failures of the district to implement the student's pendency and to remedy the gross denial of FAPE for the 2018-19 and 2019-20 school years (id.). The parent also requested funding for an independent transition

effective use of restraints (Parent Ex. R at p. 4).

[3] Specific to the 2018-19 school year, the parent also alleged that the student's classroom did not have a qualified teacher assigned for most of the year and that paraprofessionals and aids were used to deliver instruction (Parent Ex. A at p. 7).

services assessment with a provider selected by the parent at market rate; appropriate transitional, vocational, and travel training services; assistive technology in the form of a communication device and/or iPad and training for the student and the student's providers; and funding for consultation and coordination between the student's school, job, and home-based team (id.). The parent also requested that the district fund 1:1 instruction with behavioral support if the district was unable to locate an LBA to deliver services to the student (id.).

B. Impartial Hearing Officer Decision

On August 31, 2019, the IHO rendered an interim decision on pendency (see Aug. 2019 Interim IHO Decision). It appears that, although the parties agreed that the student's pendency placement was based on the unappealed July 2019 IHO decision resulting from the 2018-19 proceedings, the parties disagreed whether the student was entitled to a pendency placement between July 2, 2019 (the date of the IHO's decision in the 2018-19 proceeding) and July 19, 2019, the date of the parent's due process complaint notice in the present matter (id. at pp. 3-4; see Parent Exs. A; B). The IHO found that, although the July 2019 unappealed IHO decision was dated July 2, 2019, the actual date that the IHO disseminated the decision was July 17, 2019 (Aug. 2019 Interim IHO Decision at p. 3). The IHO opined that an IHO decision is not rendered until it is mailed or sent electronically to the parties (id.). The IHO further indicated that, unless a party receives confirmation from the opposing party that they do not intend to appeal an IHO decision, the decision becomes final if neither party files a notice of intension to seek review within 25 days after the date of the IHO decision (id. at pp. 3-4). Based on this, the IHO found that the student's pendency placement for the 2018-19 proceeding continued 25 days after July 18, 2019, through August 3, 2019 (id. at p. 4). The IHO further found that, because the due process complaint notice in the instant case was filed on July 18, 2019, there was no lapse in the student's entitlement to a pendency placement (id.).

An impartial hearing convened on September 13, 2019, during which the IHO reviewed the August 2019 interim decision and the parent's attorney indicated that the district had not yet funded the student's pendency placement and services and requested that the IHO issue an order addressing the student's pendency placement from July 18, 2020 going forward (see Tr. pp. 1-12). Therefore, the IHO issued a second interim decision on pendency dated September 15, 2019, and reiterated that the parties were in agreement that the student's pendency lay in the unappealed July 2019 IHO decision (Sept. 2019 Interim IHO Decision at p. 12). Initially, the IHO held that "where there is indeed no dispute of law or fact, the district's insistence that it will not continue the student's pendency program and placement absent a hearing and an Order constitutes a systematic, intentional, substantive violation of this student's right to a public education, as well as a violation of the family's procedural rights under the law that rises to the level of a denial of FAPE in and of itself" (id. at pp. 9-10). For the period commencing July 18, 2019, the IHO ordered the district to provide the student with the agreed upon pendency, consisting of the placement and services set forth in the unappealed July 2019 IHO decision, until the matter was finally resolved or the parties agreed otherwise (id. at pp. 12-13).

The parties continued with the impartial hearing on April 15, 2020 and September 23, 2020 (see Tr. pp. 13-38). In a decision dated September 27, 2020, the IHO found that the district denied

the student a FAPE for the 2019-20 school year because the district failed to meet its burden and that it affirmatively demonstrated that it could not meet its burden (IHO Decision at p. 2). Initially, the IHO noted that the student remained entitled to the pendency placement and services derived from the July 2019 unappealed IHO (id. at p. 4). However, the IHO noted that he lacked the power to enforce his pendency orders (id. at pp. 5, 7-8). The IHO further noted that any failure on the part of the district to comply with the unappealed July 2019 IHO decision arising from the 2018-19 proceeding or the interim decisions on pendency in the present matter had to be litigated in State or federal court (id. at p. 5).

The IHO did, however, find that he had power to award prospective and compensatory relief for the denial of FAPE for the 2019-20 school year (IHO Decision at p. 5). Accordingly, the IHO ordered the district to continue the program and services detailed in the July 2019 IHO decision (id. at p. 7). With respect to the parent's request for additional ABA services, transitional and vocational services and SCIP-R training, the IHO indicated that he "lack[ed] adequate clinical basis" to award such relief and dismissed the parent's claim without prejudice pending results of the independent evaluations ordered by the previous IHO or by him (id. at p. 8). However, the IHO ordered the district to fund an additional five hours of ABA services per week to be delivered by a BCBA on an "interim basis" until an FBA was conducted and a BIP implemented due to the "diminution of direct service caused by the Covid-19 crisis" and the year-long delay in conducting a FBA/BIP as ordered by the prior IHO (id. at pp. 8, 9).[4]

The IHO ordered the district to fund the following IEEs for the student with providers chosen by the parent at "reasonable market rates": an FBA, BIP, and a transitional/vocational evaluation (IHO Decision at p. 8). The IHO noted that, in the July 2019 decision, the prior IHO ordered the district to fund an independent FBA and BIP and that, though the hearing record did not reflect the reason such evaluations were not completed, an FBA and BIP were "urgently needed in order to assess remedies for other aspects of the student's legitimate demands"; therefore, the IHO "reaffirm[ed]" the order and "order[ed] it afresh" (id. at. p. 8). The IHO also ordered the district to convene within 30 days to develop a provisional IEP for the student that reflected the student's "current ordered program and placement" and to reconvene the CSE within 15 days after completion of each ordered evaluation to modify the IEP to reflect the transitional/vocational services recommended and to implement the BIP ordered (id. at p. 9). The IHO also found that, if the CSE determined that the student needed physical restraints to appropriately address the student's behaviors, then the district should develop the IEP and BIP consistent with State and federal requirements for the use of restraints (id.).

IV. Appeal for State-Level Review

The parent appeals arguing that the IHO erred by failing to deem the factual allegations in the due process complaint notice admitted and to hold the district to its burden of production and

[4] The IHO indicated that, if the district was unable to locate a BCBA with appropriate credentials within 30 days of his decision, the district would be required to fund a qualified provider selected by the parent at market rate (IHO Decision at p. 9). The IHO also provided that, if the parent was unable to locate an ABA provider with appropriate credentials within 45 days of his decision, then the parent could choose an individual to provide the student with 1:1 behavioral support until an appropriately credentialed ABA provider was located (id.).

persuasion in establishing an appropriate remedy. The parent further argues that the IHO failed to rule on all of her claims raised in the due process complaint notice, including her claims related to the district's application of "blanket policies" and violations of section 504. Next, the parent contends that the IHO erred in failing to award compensatory educational services to remedy the district's failure to implement pendency services for the 2018-19 and 2019-20 school years. The parent argues that she was not seeking enforcement of the pendency order but rather sought compensatory educational services based on the district's failure to implement pendency for the 2018-19 and 2019-20 school years.

Next, the parent asserts that the IHO failed to remedy the district's denial of a FAPE and requests the following: (a) an additional five hours per week of 1:1 ABA; (b) transitional and vocational services; and (c) SCIP parent training to address the student's maladaptive behaviors. The parent also argues that the IHO's dismissal of compensatory relief was an error of law and abuse of discretion because the parent presented evidence regarding the specific compensatory measures needed for the student. More specifically, the parent argues that the IHO erred in awarding five hours per week of 1:1 ABA on an "interim basis" and that the student is entitled to 1:1 ABA hours in the amount of 260 hours (five hours of 1:1 ABA per week for 52 weeks) without any interim time limitation. The parent also argues that the IHO should have awarded a bank of 72 hours of transitional coaching hours (six hours per month for 12 months) and 416 hours of 1:1 vocational training (eight hours per week for 52 weeks). The parent argues that the student is entitled to the above-requested relief because the hearing record contains unrebutted evidence. The parent also argues that the record contained clinical information to formulate relief and that the IHO erred in not following the recommendations made by the parent's witnesses. The parent also asserts that the IHO should have ordered independent evaluations on an interim basis and then ruled upon her request for compensatory education relief. With her request for review, the parent also submits as additional evidence two documents for consideration identified as SRO exhibits A and B (see generally SRO Exs. A, B).[5]

In an answer with cross-appeal, the district generally denies the parent's allegations. Initially, the district argues that the parent's factual allegations should not be deemed admitted because the parent is not entitled to a default judgment as the district did not concede that it failed to offer the student a FAPE. The district also argues that the parent's pendency implementation claims were speculative and that the parent abandoned any compensatory education relief related

[5] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, SRO exhibit A is the due process complaint notice for the instant case dated July 18, 2019, which was entered into evidence at the impartial hearing as parent exhibit A and district exhibit 4 (Tr. pp. 18-19). Therefore, as SRO exhibit A is duplicative of evidence already in the hearing record, it need not be accepted as additional evidence. SRO exhibit B is a due process complaint notice dated September 28, 2020 relating to the student's 2020-21 school year. Although the September 2020 due process complaint notice could not have been offered at the time of the impartial hearing, the student's 2020-21 school year is not before me and, therefore, the document is not necessary to render a decision in this matter; thus it will not be considered.

to the 2018-19 school year during the impartial hearing. With the respect to the IHO's interim award of additional ABA services, the district opines that the IHO awarded the additional ABA as a remedy for a FAPE violation and not as relief for any pendency violation. The district also argues that the IHO properly determined to not award interim evaluations because the IHO believed the record was sufficiently developed to review the claims raised by the parent. Next, the district argues that the SRO has no jurisdiction to review any of the parent's "systemic" or section 504 claims. In a cross-appeal, the district argues that the IHO erred in citing the diminution of direct services caused by the Covid-19 crisis as a ground for his award of compensatory education, arguing that the parent's due process complaint notice "cannot be reasonably read" to contain allegations that the student's level of services were affected by Covid-19 or that the student was entitled to compensatory services on that basis.

In answer to the district's cross-appeal, the parent argues that the district's answer and cross-appeal should be dismissed for failure to provide a "clear and concise statement for the issues presented for review." The parent also argues that the IHO did not raise the issue of the diminution of services during the Covid-19 crisis on a sua sponte basis as the parent requested compensatory services based on the district's failure to implement pendency. The parent argues that the IHO correctly ordered compensatory educational services for the district's pendency violations during Covid-19.

V. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

First, I will address the parent's contention that the district's answer and cross-appeal must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.8[c][2]). Specifically, the parent argues that the district failed to provide a clear and concise statement of the issues presented with each issue numbered and set forth separately and argues that the answer and cross-appeal is "infirm."

State regulation provides that the answer and cross-appeal "must conform to the form requirements in section 279.8 of this Part" (see 8 NYCRR 279.5[a]). Section 279.8 of the State regulations requires, in relevant part, that an answer and cross-appeal shall set forth "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 identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). In general, the failure to comply with the practice requirements of Part 279 State regulations may result in rejection of submitted documents at the discretion of an SRO (8 NYCRR 279.8[a]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In the instant case, review of the district's answer and cross-appeal does not support the parent's assertions. The district's answer sets forth clear and concise statements of its positions in response to the parent's request for review, referring to its positions as "defenses" and numbering

them "first" through "fourth" (Answer & Cross-Appeal ¶¶ 6-17). Additionally, the district's cross-appeal sets forth separately under a bolded heading the one issue presented for review, specifying the precise ruling of the IHO with which it disagrees in a single paragraph with citation to the IHO's decision (id. at ¶ 18). It appears that the parent takes issue with the district's failure to expressly address each allegation in the parent's request for review in separate paragraphs, instead opting to set forth a general denial and thereafter articulating defenses (see Answer to Cross-Appeal ¶¶ 21-23). However, the district's answer was consistent with State regulation. Lastly, it does not appear that the parent was prejudiced in her ability to respond to the district's answer and cross-appeal. To the contrary, the parent formulated an answer responsive to the specific issue raised in the district's cross-appeal. In light of the above, I decline to reject the district's answer and cross-appeal or otherwise deem any facts admitted or defense waived.

2. Scope of Review

The parent asserts that the IHO failed to rule on allegations regarding the district's application of "blanket policies" 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. As noted above, in her due process complaint notice, the parent alleged that the district violated Section 504 and also set forth allegation relating to the district's "blanket policies" and "illegal blanket practices" (Parent Ex. A at pp. 1, 7-8). An SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504 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]). 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 or systemic violations or policy claims, and such claims will not be further addressed.

Next, the parent's argument that the IHO should have deemed all of the factual allegations contained in her due process complaint notice 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). Moreover, here, the IHO made a specific determination based on the evidence in the hearing record that, by submitting only a 2016 IEP into evidence, the district failed to meet its burden to show that it offered the student a FAPE for the 2019-20 school year (see IHO Decision at p. 2). It was not necessary for the IHO to go beyond this determination in order to address the parent's requests for relief in this instance.

Relatedly, the district argues that the parent did not appeal the IHO's finding that the district denied the student a FAPE on limited grounds and is, therefore, "bound on appeal" (Answer & Cross-Appeal ¶ 13). Specifically, the district asserts that the IHO found a denial of a FAPE due to a diminution of services as a result of circumstances surrounding the Covid-19 pandemic and the district's delay in conducting an FBA and developing a BIP for the student. While the IHO cited these grounds as underlying his award of compensatory education (see IHO Decision at pp. 8-9), his finding that the district denied the student a FAPE was broader (see id. at p. 2). That is, the IHO found that the district failed to meet its burden of production and persuasion and, by offering only an IEP from 2016 into evidence, affirmatively demonstrated that it could not meet its burden (id.). Therefore, the district's argument is without merit, and the parent is not precluded from arguing that the IHO should have awarded more relief to remedy the district's failure to offer the student a FAPE on the grounds asserted in the due process complaint notice.

As for the IHO's compensatory award, the IHO ordered the district to fund an additional five hours per week of ABA services to be delivered by a BCBA on an "interim basis" until an FBA was conducted and a BIP implemented due to the "diminution of direct service caused by the Covid-19 crisis" and the year-long delay in conducting a FBA/BIP as ordered by the prior IHO (IHO Decision at pp. 8, 9). The parent has appealed the award to the extent that she seeks more compensatory education; however, while the district has cross-appealed, in part, the grounds for the IHO's award (i.e., to the extent they are intended to make-up for a diminution of services resulting from the Covid-19 pandemic), the district has not appealed the award itself.[6, 7] As such, the IHO's order requiring the district to fund five hours per week of ABA services on an interim basis is final and binding and will not be disturbed (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v];

[6] Indeed, in reference to the other reason cited by the IHO for the award of interim compensatory education, the district states that "the IHO's award – compensatory ABA until the CSE develops an IEP implementing the ordered FBA/BIP – is properly tailored to the specific denial of FAPE – previously failing to conduct and implement the FBA/BIP" (Answer & Cross-Appeal ¶¶ 14-15).

[7] As for the district's argument that the IHO sua sponte reached the question of the level of services the student received during the Covid-19 pandemic, absent an appeal of the resulting award, a discussion of the IHO's rationale is largely academic. In any event, I note briefly that, as the parent's due process complaint notice was dated July 18, 2019, before the pandemic, she could not have raised this issue. Assuming an issue with the district's provision of or funding of the student's pendency placement arose during the course of the hearing (either due to the pandemic or otherwise), which as discussed above, the parent has alleged in this matter, it would be an appropriate topic for the IHO to address if the evidence in the hearing record warranted such a finding.

279.8[c][4]). Further, the IHO ordered that the district fund IEEs for the student with providers chosen by the parent, including an FBA/BIP and a transitional/vocational evaluation (IHO Decision at p. 8). The IHO also ordered that the district reconvene the CSE within 30 days to develop a provisional IEP for the student to include a specified placement and services and that the CSE convene within 15 days after each ordered evaluation was conducted (id. at p. 9). Since neither party has challenged the IHO's orders requiring IEEs and CSE reconvenes, these determinations have also become final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; 279.8[c][4]).[8]

Finally, on appeal, the district argues that the parent's request for compensatory education to remedy the district's alleged failure to implement pendency during the student's 2018-19 school year was abandoned because the parent's attorney indicated during the impartial hearing that the 2018-19 school year was covered in a prior decision. The parent's due process complaint notice explicitly requested compensatory education related to pendency implementation during both the 2018-19 and 2019-20 school years (Parent Ex. A at p. 9). Further, the parent's attorney indicated during the impartial hearing that the 2018-19 school year "might have just been regarding pendency" and that the prior IHO decision covered the issues for the student's 2018-19 school year (Tr. p. 35). On appeal, the parent continues to pursue compensatory education services to remedy the district's alleged failure to implement the student's pendency for the 2018-19 and 2019-20 school years (Req. for Rev. at pp. 4-6). Thus, there is no evidence in the hearing record to support the district's argument that the parent abandoned her claim related to implementation of the student's pendency placement and services during the 2018-19 school year.

B. Relief—Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a 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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the

[8] Also, the parent requested relief in the form of assistive technology in her due process complaint notice (Parent Ex. A at p. 9). However, the parent has not requested assistive technology as a form of relief in her request for review (see Req. for Rev.). Thus, to the extent the parent does not request assistive technology as relief on appeal, it will be deemed abandoned and will not be further addressed.

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

The parent's request for compensatory education fall into two categories: compensatory education award for the district's failure to implement the student's pendency services for the 2018-19 and 2019-20 school years and a compensatory education award for the deprivation of FAPE for the 2019-20 school year. They are addressed in turn below.

1. Pendency Compensatory Education

Turning to the parent's claim that the IHO erred in failing to award compensatory education services for the district's failure to implement the student's stay-put placement and services during the 2018-19 school year and during the pendency of this proceeding, the parent does not provide a sufficient basis to depart from the IHO's determinations on this issue.

As noted above, the July 2019 IHO decision arising from the 2018-19 proceeding ordered the district to fund the student's placement for the "[t]welve-month 46 week" 2018-19 school year, including placement at Eden II along with a full-time crisis management paraprofessional, 15 hours per week of home-based SETSS using applied behavior analysis (ABA), four 30-minute sessions per week of OT after school, two 30-minute sessions per week of after school, eight 30-minute sessions per week of speech-language therapy after school, two 30-minute sessions per week of counseling after school, and special education transportation with a transportation paraprofessional (Parent Ex. B at pp. 12-13). The July 2019 IHO decision further provided that the parent could choose the providers and paraprofessionals for both in and out of school and the decision set maximum rates for the services (id. at p. 13). According to the July 2019 decision, the order largely represented "a continuation of [the student's] pendency program" to which the student was entitled during the 2018-19 proceeding (id. at pp. 5, 8, 9; see Parent Ex. N). The July 2019 IHO decision formed the basis of the student's pendency placement during the present proceedings (see Aug. 2019 Interim IHO Decision; Sept. Interim IHO Decision). Accordingly, there can be no dispute that the student was entitled to district funding of this constellation of services for the 2018-19 and 2019-20 school years pursuant to pendency and now pursuant to final orders of IHOs in the 2018-19 proceeding and the current matter.

The IHO deemed the parent's request for compensatory education for the district's failure to implement pendency during the 2018-19 and 2019-20 school year as one for enforcement over which he did not have jurisdiction (see IHO Decision at pp. 5, 7-8). The parent argues, instead, that the student is entitled to make-up services. Indeed, 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 [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"]; see 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]).

However, this is not a case in which a district was required to provide pendency services to the student and, having failed to have done so, an order of reimbursement for services the parent obtained or for compensatory make-up services from private providers (as opposed to district providers) may have been warranted (see E. Lyme, 790 F.3d at 456). Rather, the pendency orders which the parent alleges were not implemented required the district to fund the student's placement and services (see Parent Ex. B; Sept. 2019 Interim IHO Decision) and, as such, the compensatory relief sought by the parent appears to be identical to the district's existing obligation. As such, the IHO is correct that the parent's request is more akin to a request for enforcement (see IHO Decision at pp. 5, 7-8), and neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). However, to the extent the district has not appealed the IHOs' orders in the 2018-19 matter or the present matter, the district's "only lawful course of action is to implement those Orders, full stop" and, having failed to do so, the parent will likely succeed in her efforts to compel enforcement (LV v. New York City Dep't of Educ., 2021 WL 663718, at *8 [S.D.N.Y. Feb. 18, 2021]).

Relatedly, the parent has not identified any specific pendency service(s) that the student has not received or which the district has not funded but requests that the district conduct an audit of the pendency services delivered to determine if any were missed. While the district did not meaningfully deny that it had failed to fund all of the student's pendency services, granting the parent's request to order an audit of such services is not an appropriate remedy at this juncture, particularly in light of the fact, that the parent, who has been arranging these services, is presumed to have this information in her possession.

As alluded to above, the parent is not without recourse at this juncture. If the district has failed to fund any aspect of the program or services that have been ordered in the 2018-19 proceeding or the in the present matter, the parent may file a State complaint against the district

through the State complaint process for failure to implement the IHOs' pendency decisions and/or final decisions, 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., 407 F.3d at 78 n.13).

2. Compensatory Education for Denial of FAPE

Based on the IHO's final and binding determination that the district failed to offer the student a FAPE for the 2019-20 school year, it is next necessary to determine what more compensatory education relief, if any, the student may be entitled to as a remedy for the district's failure to offer the student a FAPE for the 2019-20 school year.

As noted above, the district did not specifically cross-appeal the IHO's order requiring it to fund an additional five hours of ABA services per week on an "interim basis" until an FBA is conducted and a BIP implemented (IHO decision at pp. 8, 9). However, the parent argues that the IHO erred in awarding five hours per week of ABA services on an interim basis and argues that the student is entitled to 1:1 ABA hours in the amount of 260 hours (5 hours of 1:1 ABA per week for 52 weeks) without any interim time limitation. In addition, the parent also argues that the IHO should have awarded a bank of 72 hours of transitional coaching hours (6 hours per month for 12 months) and 416 hours of 1:1 vocational training (8 hours per week for 52 weeks).

A BCBA who worked with the student for several years recommended that the student receive five more hours per week of home-based ABA services to total 20 hours per week (Parent Exs. P at p. 2; Q at pp. 2-3). The BCBA further opined that the student required at least eight hours of vocational training per week and six hours of supervision per month to oversee the vocational training (Parent Ex. Q at p. 4). However, the rationale for the BCBA's recommendations is not fully explained and there is no data or evaluative information in the hearing record to support the recommendation. While the district bears responsibility for the insufficiency of the hearing record, given the educational program and services which the student was entitled to receive during the 2019-20 school year, I decline to order further equitable relief in this instance. That is, the student was entitled to the full program, including district funding of the student's attendance at Eden II and the home-based program of ABA and related services, pursuant to the July 2019 IHO decision arising from the 2018-19 proceeding, both by the terms of the July 2019 IHO decision and by the terms of the interim decision on pendency in the present matter, which remained in effect for the entirety of the 2019-20 school year (see Sept. 2019 Interim IHO Decision at pp. 12-13; Parent Ex. B at pp. 13-14). Moreover, in his final decision in the present matter, the IHO ordered the district to convene the CSE to memorialize the placement and program on a going forward basis at least until the student is re-evaluated (IHO Decision at p. 9).

As noted above, the purpose of awarding compensatory additional services is to provide an appropriate remedy for a denial of a FAPE (Newington, 546 F.3d at 123). In determining appropriate relief, the compensatory services should place the student in the position she would have occupied had the district complied with its obligations under the IDEA (see id.). As the district is obligated to fund the student's attendance at Eden II as well as the home-based program, it is not clear what additional services would be warranted to place the student in the position he

would have been but for the district's denial of a FAPE. In other words, no compensatory education is required for a district's denial of a FAPE if the deficiencies were already mitigated (see 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 also 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]). While the parent's frustration with the district in this case is understandable, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] ["The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). At this juncture—and as the IHO observed—the best course is for the student to be evaluated before any further services are added to an already dense educational placement and program, which could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Thus, I decline to modify the IHO's decision to require more than the five hours per week of compensatory ABA services on an interim basis.

As a final matter, the parent also requests SCIP training as compensatory education. A review of the hearing record does not indicate a reason for the parent's request for SCIP training as compensatory education for the district's denial of a FAPE for the 2019-20 school year. In her affidavit testimony, the parent described the student's aggressive and self-injurious behaviors and detailed the physician restraints employed by staff and the parent (Parent Ex. R at pp. 3-4). The parent indicated that "[m]any of the staff at Eden II who work with [the student] have SCIP training" (id. at p. 4). The parent does not allege that the SCIP techniques used with the student by the Eden II staff or the home providers were administered improperly on the student (see Parent Ex. R). Further, SCIP training for the parent and school staff was ordered in the July 2019 IHO decision related to the 2018-19 proceeding (Parent Ex. B at p. 9). Specifically, the IHO in that matter ordered that the district fund "SCIP (Strategies for Crisis Intervention and Prevention) to both staff and school and at home, and also to [to the parents] on a date/time selected by the parent within 30-days of this Order" (id.). In her affidavit testimony, the parent states that the district failed to provide SCIP training pursuant to the IHO decision (Parent Ex. R at p. 4). However, the July 2019 decision ordered the district to fund the training; therefore, it would appear that the parent is entitled to obtain the training at district expense. If the parent wanted the training ordered in the 2018-19 proceeding in a different form (i.e., for the district to provide the training rather than fund it), her recourse was to appeal the July 2019 decision. At this juncture, she may seek enforcement of the July 2019 decision but there is no evidentiary basis for an award of compensatory SCIP training in the present matter.

VI. Conclusion

The IHO's determination that the district failed to meet its burden to show that it offered the student a FAPE for the 2019-20 school year has become final and binding on the parties. For the reasons outlined above, there is insufficient basis in the hearing record to depart from the IHO's award of compensatory education and no further relief is warranted.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 1, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER