The University of the State of New York

The State Education Department
State Review Officer
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No. 21-009

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 Noelle Boostani and The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Noelle Boostani, Esq., and Elisa Hyman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Hae Jin Liu, 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 dismissed parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years as barred by the IDEA's statute of limitations and which did not order all of the relief sought by the parent to remedy respondent's (the district's) failure to provide her son with an appropriate educational program for at least the 2016-17, 2017-18, and 2018-19 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after the matter had been remanded by an SRO for further development of the hearing record (see Application of a Student with a Disability, Appeal No. 19-026).

According to the evidence in the hearing record, the student moved to this country in fall 2011 (Dist. Ex. 3 at p. 3).[1] The student began attending second grade for the 2011-12 school year (id.). For the 2012-13 school year, the student was retained in the second grade and received English as a second language (ESL) services (Dist. Exs. 3 at p. 3; 19 at p. 1). The parent initially referred the student for an evaluation to determine his eligibility for special education in September 2012 (Dist. Exs. 1; 2; 4).

A CSE convened on November 19, 2012 to conduct the student's initial review (Dist. Ex. 19 at p. 17). Having found the student eligible for special education as a student with a learning disability, the CSE recommended that the student attend a 12:1 special class in Spanish for academic courses in a community school and receive speech-language therapy (id. at pp. 1, 13, 17). During the 2013-14 school year (third grade), a CSE convened on November 6, 2013 to conduct the student's annual review and recommended a 12:1+1 special class in a community school along with speech-language therapy (Dist. Ex. 17 at pp. 1, 13, 16-17). During the 2014-15 school year (fourth grade), a CSE met on February 24, 2015 and recommended that the student continue to attend a 12:1+1 special class in a community school and receive speech-language therapy but added the support of a full-time Spanish-speaking paraprofessional to the student's program (Dist. Ex. 15 at pp. 1, 11, 15-16).

The hearing record does not include an IEP developed during the 2015-16 or during most of the 2016-17 school years (fifth and sixth grades). According to a February 2017 psychoeducational evaluation report, at the time of the evaluation in January 2017, the student was attending a charter school (Dist. Ex. 12 at p. 1). A March 2017 progress report from the charter school indicated that the student was receiving integrated co-teaching (ICT) services, along with support from a "[t]ransition [p]araprofessional," and speech-language therapy during the 2016-17 school year (Dist. Ex. 14 at p. 1).

A CSE convened on April 4, 2017 to develop an IEP for the student for the 2017-18 school year (seventh grade) (Dist. Ex. 10 at pp. 1, 30). The April 2017 CSE found the student eligible for special education as a student with an intellectual disability and recommended that he attend a 12-month school year program in a 12:1+1 special class in a specialized school and receive speech-language therapy (id. at pp. 24-25, 27). During the meeting, the parent expressed concern that "the last time [the student] was in a public school[,] [h]e was supposed to have a 12:1+1 setting but was placed in a smaller class setting" (id. at p. 30). As for the recommendation that the student attend a specialized school, the parent expressed concern about the student's access to nondisabled peers (id.). The hearing record does not include an IEP developed for the 2018-19 school year (eighth grade).

[1] Although some documents were received into evidence prior to remand, upon remand, the parties offered documentary evidence anew with some exhibits duplicating those introduced before remand and with some letter and number designations overlapping with the exhibits in evidence before remand (see Parent Exs. A-H; Dist. Exs. 1-20; see also Tr. pp. 126-27). For purposes of this decision, only the exhibits received into evidence upon remand are cited.

A. Due Process Complaint Notice and Impartial Hearing Officer and State Review Officer Decisions

In a due process complaint notice dated July 3, 2018, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. A). As relief, the parent requested independent educational evaluations (IEEs) including a bilingual neuropsychological evaluation, a bilingual speech-language evaluation, an auditory processing evaluation, an occupational therapy (OT) evaluation, an "[a]ssessment by a PhD-level Board Certified Behavior Analyst," an academic and social observation, and an assistive technology evaluation; an order directing the CSE to reconvene within ten business days following completion of the IEEs; compensatory educational services; transportation; funding for a private school; interpreter services in the parent's native language at all meetings and translation of all written documents; prospective funding of monthly language access services; and extended eligibility beyond age 21 for the student (id. at pp. 25-26).

The impartial hearing convened on July 24, 2018 and concluded on October 31, 2018 after three days of proceedings (Tr. pp. 1-110). During the impartial hearing, the IHO (IHO I) indicated that he had issued an email decision to the parties on October 8, 2018, finding that the parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years were barred by the statute of limitations (Tr. pp. 49-50).[2] In a final decision dated February 27, 2019, IHO I acknowledged that the district had conceded FAPE, then continued to make findings that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (Feb. 27, 2019 IHO Decision at pp. 2, 5-8). However, as to relief, IHO I indicated that he did not have a sufficient record to determine the amount of compensatory education that the student required and, therefore, declined to award any compensatory education to the student "at this time" (id. at p. 10).[3]

The parties appealed IHO I's decision and, in a decision dated May 9, 2019, an SRO remanded the matter to the IHO for further administrative proceedings (see Application of a Student with a Disability, Appeal No. 19-026). Regarding the statute of limitations, the SRO determined that the parent's claims pertaining to the 2012-13, 2013-14, 2014-15, and 2015-16 school years accrued just prior to or contemporaneously with the evaluation and CSE processes scheduled for those school years or when the CSE meeting was due to reconvene for an annual review and that, therefore, the claims were not within the two-year statute of limitations when the parent filed the due process complaint notice on July 3, 2018. The SRO further found that the

[2] IHO I did not include his October 8, 2018 decision in the hearing record.

[3] IHO I directed the district to reimburse the parent or directly pay the cost of the following IEEs: a neuropsychological evaluation, a bilingual speech-language evaluation, an auditory processing evaluation, an OT evaluation, a functional behavioral assessment (FBA), an academic and social observation, and an assistive technology evaluation (Feb. 27, 2019 IHO Decision at p. 11). IHO I further ordered the CSE to reconvene "forthwith" upon receipt of the student's evaluations and to produce a new IEP for the 2019-20 school year after considering all of the student's "relevant evaluations" and information (id.). IHO I also ordered the district to provide a Spanish interpreter at all meetings with the parent and to provide Spanish translation of all "notices, educational documents and district documents belonging to the student or sent to the Parent" (id.).

specific misrepresentation exception did not apply to extend the parent's timeline to request an impartial hearing. However, the SRO determined that "additional evidence regarding the district's transmittal of a procedural safeguards notice [wa]s required on remand to determine whether the withholding information exception applie[d] to the parent's claims that were beyond the two year statute of limitations."

As for compensatory education, the SRO determined that "the manner in which the hearing" was conducted did not permit the parties the "opportunity to develop a sufficient evidentiary record on the issue of compensatory education relief" and, as a result, the hearing record was "insufficient to determine appropriate compensatory services to remedy at a minimum, the uncontested three-year denial of a FAPE." The SRO indicated that upon remand, the hearing record should be developed to include documentary evidence describing the student's needs, service delivery records and progress reports, including those for the period of time the student attended the charter school, as well as the IEEs ordered by IHO I.

B. Impartial Hearing Officer Decision after Remand

Upon remand, the matter was assigned to a different IHO (IHO II) (see Tr. p. 112).[4] On September 20, 2019, the parties resumed the impartial hearing, which concluded on November 19, 2020 after the 11th day of post-remand proceedings (see Tr. pp. 111-462).[5] The IHO issued a final decision dated November 27, 2020 (see Nov. 27, 2020 IHO Decision).

Regarding the statute of limitations, the IHO determined that the withholding of information exception did not apply to extend the timelines (Nov. 27, 2020 IHO Decision at pp. 21-22). As evidence showing that the parent was advised of her due process rights, the IHO relied on a September 2012 social history interview and consent form, an April 21, 2015 prior written notice, and a June 2016 procedural safeguards notice in Spanish (id. at p. 21). The IHO found the testimony of the district school psychologist "credible" (id.). In contrast, the IHO found that the parent could not recall everything asked of her, her testimony "was not always on point," and she did not have personal knowledge of some questions since her husband attended CSE meetings when she could not (id. at pp. 21-22). As the exception did not apply, the IHO held that the parent's claims for the 2012-13 through 2015-16 school years were barred by the statute of limitations (id. at p. 22).

Turning to relief to remedy the district's failure to offer the student a FAPE for the 2016-17 through 2018-19 school years, the IHO summarized the evidence received during the impartial hearing regarding an appropriate award of compensatory education and made several notes relevant to the weight he afforded the evidence (see Nov. 27, 2020 IHO Decision at pp. 17-20). For example, the IHO indicated that neither the neuropsychologist who conducted the June 2019 neuropsychological evaluation, nor a representative from the agency (Lindamood-Bell) that

[4] The remainder of this decision, "IHO II" will be referred to simply as "the IHO."

[5] During the first seven hearing dates upon remand, the IHO and the parties discussed the issues to be resolved and held status conferences; the matter was adjourned several times so that the parties could explore the possibility of settlement, the IEEs could be finalized and shared, the student's placement for the 2019-20 could become known, and the parent could change counsel (see Tr. pp. 111-203).

prepared an October 2018 evaluative summary testified at the impartial hearing and, therefore, the recommendations in the reports were not subject to cross-examination and the documents would be afforded less weight (id. at pp. 17-19). As for the speech-language evaluation, the IHO took issue with the evaluator's upward revision of the recommended hours from 234 to 840 (id. at pp. 19-20). The IHO also made several notes about the rates to be charged for compensatory education services from the parent's preferred providers (id.).

Based on the foregoing, the IHO ordered the following compensatory education services: 234 hours of speech-language therapy at a rate not to exceed $100 per hour and 750 hours of tutoring services at a rate not to exceed $100 per hour (Nov. 27, 2020 IHO Decision at p. 22). As for the tutoring, the IHO indicated that 750 hours represented "over six hours a week of tutoring for three years for 40 weeks" (id.). The IHO indicated that the student could use the compensatory award over a period of four years (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in several of his determinations. First, the parent alleges that the impartial hearing was conducted in a manner that denied the parent a full opportunity to develop "an unbiased [r]ecord" and that the IHO improperly shifted the burden of proof to the parent. Regarding the statute of limitations, the parent asserts that the IHO improperly held that the district did not withhold information regarding the student's right to an impartial hearing without making determinations as directed by the SRO on whether the district provided the parent with procedural safeguard notices and prior written notices for each school year. The parent asserts that the IHO should have issued findings regarding the parent's claims for the 2012-13 through 2015-16 school years and that the district failed to meet its evidentiary burden to demonstrate it offered the student a FAPE for these years.

As for relief, the parent alleges that the IHO failed to give due weight to the parent's evidence and mischaracterized the circumstances surrounding the availability of a witness from Lindamood-Bell, the content of the neuropsychological evaluation, and the reason for the different recommendations for compensatory speech-language therapy in the speech-language evaluation. The parent asserts that the IHO awarded insufficient compensatory education services to remedy the district's failure to provide the student with a FAPE. The IHO, argues the parent, failed to consider the student's history of services and progress, his skills both during the school years at issue and at the time of the impartial hearing, or the effect of the denial of a FAPE on the student's cumulative delays. Further, the parent asserts that the district failed to present evidence relevant to computing relief. The parent also cites to State regulation and argues that the IHO should have awarded 1:1 compensatory hours for all services to which the student was entitled to but for which the district failed to present evidence that it implemented. As to the maximum rate for the compensatory education services, the parent asserts that the IHO erred by sua sponte reducing the rates compared to the rates requested by the parent and did so without evidentiary basis. The parent requests a compensatory education award of at least 1200 hours of academic instruction and 840 hours of speech-language therapy, as well as transportation fees. In addition, the parent seeks a finding that the student is entitled to extended eligibility.

In an answer, the district responds to the parent's allegations with admissions and denials and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues

that additional evidence submitted with the parent's request for review should not be considered as it is either already in the hearing record or is unnecessary to render a decision.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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. Bias / Conduct of the Impartial Hearing and Development of the Hearing Record

Regarding the conduct of the impartial hearing, the parent argues that the IHO denied the parent the opportunity to discuss anticipated evidentiary presentations prior to the hearing dates, failed to conduct the hearing on consecutive dates, and failed to schedule sufficient time for the parties to conclude each hearing date, thereby causing delays. The parent further alleges that the IHO failed to exclude irrelevant or improper evidence, improperly made and sustained his own objections, improperly excluded evidence as well as the parent's testimony regarding her receipt of mail notices thereby depriving the parent of the opportunity to offer evidence to support her

[6] 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).

representations, and made an improper negative inference regarding the parent's purported failure to call a witness from Lindamood-Bell without notice. The parent also alleges that the IHO "made derogatory remarks indicating bias," disregarded the SRO's remand instructions, and improperly shifted the burden of proof to the parent. Related to these alleged errors, the parent offers additional evidence on appeal to supplement the hearing record.[7]

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

Regarding the IHO's calendaring practices and preferences regarding the conduct of the hearing, including that the parties discuss evidentiary matters amongst themselves and that certain communications with the parties be on the record rather than over emails (see Tr. pp. 200-01; SRO Ex. E), unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of

[7] 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]). Among the documents submitted by the parent are the July 2018 due process complaint notice (SRO Ex. A), a district events log with entries between September 13, 2012 and May 29, 2018 (SRO Ex. B), a November 2012 district speech-language evaluation (SRO Ex. C), and a September 2020 subpoena for the testimony of the center director of Lindamood Bell (see SRO Ex. D); however, these documents are already a part of the hearing record (Parent Exs. A; F-H) and, therefore, do not constitute additional evidence. One of the documents submitted by the parent relates to the conduct of the impartial hearing (see SRO Ex. E), and has been considered to the extent necessary to fully address the parent's allegations regarding the IHO's bias and the conduct of the impartial hearing. The documents submitted by the parent related to the district's purported "delay tactics" during the impartial hearing (see Req. for Rev. at p. 3; SRO Exs. H-L; O), the parent's efforts to procure additional witnesses to testify at the impartial hearing (see SRO Ex. F; G; M; N), or regarding the applicability of the exception to the statute of limitations (see SRO Exs. P-S) were available at the time of the impartial hearing and are not necessary in order to render a decision in this matter.

witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

While the parent may not have liked the IHO's preferences or manner of managing the hearing process, review of the hearing record shows that she was afforded sufficient opportunity to present evidence and to state her objections and arguments on the record. Therefore, there is no indication in the hearing record that she was deprived due process as a result of the IHO's management of the hearing process.

Turning to the parent's allegations directed at the development of the hearing record, the parent argues that the IHO "failed to safeguard the Record from irrelevant and improper evidence" (Req. for Rev. at p. 1). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). The parent takes issue with the IHO's rulings allowing district documents, including copies of procedural safeguards notices and SESIS events logs and the testimony of the district school psychologist, despite the objection of the parent's attorney on relevancy grounds (see Tr. pp. 221-24, 243, Dist. Exs. 5; 7; 8, 9). On appeal, the parent elaborates on rationales for her relevancy objections, arguing that the notices were dated after the relevant timeframe and the district failed to establish that the witness had personal knowledge of administrative processes at the district during the relevant time frame. However, review of the hearing record does not support a finding that the IHO abused his discretion in receiving the evidence during the impartial hearing, which was relevant to an issue remanded to the IHO. The documentary and testimonial evidence at issue is discussed further below in the discussion of the applicability of the exception to the statute of limitations, including what weight, if any, should be afforded the evidence.

Regarding the parent's direct case, as the parent argues, the IHO examined the witnesses and objected and sustained his own objections in response to questions asked by the parent's attorney (see Tr. pp. 314-28, 353-54, 358-366, 391-395, 397-98, 409-19). State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Although the practice of an IHO of formally raising and sustaining his or her own objections has not been especially common, it has some basis in adjudication (see State v. Santos, 413 A.2d 58, 69 [R.I. 1980]). From time to time, it may leave open the possibility that the IHO will later be accused of bias or partiality, but neither the practice itself nor an adverse ruling inexorably leads to the conclusion that the IHO has acted with bias or renders the impartial hearing fundamentally unfair (see Menchaca v. Uribe, Jr., 2010 WL 3294249, *7 [C.D. Cal. Jun. 30, 2010]; U.S. v. Battles, 2003 WL 22227190, at *10-*11 [N.D. Ill. Sept. 26, 2003]). Here, the IHO also engaged in the practice of examining the witnesses and sustaining his own objections when the district's counsel was examining witnesses, thereby tending to disprove any notion that the IHO was biased against the parent (see Tr. pp. 237-39, 262-63, 266-74, 277-83, 419-20). Further, the IHO explained several of his objections on the record and requested that the parent's attorney

rephrase some of her questions, which the parent's attorney was on several occasions able to do (Tr. pp. 314, 318-19, 320-21, 326, 360-63, 365, 392, 397-98, 416-17).

The parent argues that the IHO improperly excluded the parent's testimony regarding her receipt of mail notices.[8] During the parent's testimony, the parent's attorney inquired what information the parent received from the district via mail (Tr. p. 317). The IHO sustained his own objection to this question. The parent's attorney did not ask the IHO for the grounds for the objection or attempt to rephrase the question and instead moved on with her examination of the parent. Based on this exchange, it is far from clear that the IHO "excluded" the parent's testimony regarding her receipt of mail notices. Further, during cross-examination, the district's attorney made inquiry regarding the parent's receipt of mail from the district (see Tr. pp. 328, 345-46), yet the parent's attorney did not follow up on the parent's receipt of mail during her redirect examination of the parent (see Tr. pp. 346-48). Accordingly, the parent's argument that the IHO excluded this testimony is not supported by a review of the hearing record and there is no indication that the parent was deprived of the opportunity to offer evidence to rebut the district's position that it provided that parent with a procedural safeguards notice.

To the extent the parent objects to the IHO's failure to include "off-the-record communications" that took place over email in the hearing record (Req. for Rev. at pp. 2-3), there is no indication that the parent attempted to admit the emails into evidence and review of the emails does not reflect that the emails included written requests for an order by the parties or rulings or orders by the IHO such that they were required to be included in the hearing record automatically (see SRO Exs. E; N; see also 8 NYCRR 200.5[j][5][vi][b], [c]; 279.9[a]).[9] Indeed, an email that the parent includes with her additional evidence shows that the IHO specifically admonished that the parent's attorney should not make objections or arguments in email and instead should state her positions on the record (SRO Ex. E).

As for the lack of a witness from Lindamood-Bell, the hearing record shows that, at the hearing on August 10, 2020, the IHO inquired whether the parent would be presenting a witness from Lindamood-Bell, and the parent's attorney indicated that the witness would have to be subpoenaed and that she would prepare and send the IHO a subpoena for that purpose (Tr. pp. 216, 284). On September 9, 2020, the IHO signed the subpoena for the center director at Lindamood-Bell to testify via teleconference on September 17, 2019 (see Parent Ex. F). As of the hearing date on October 20, 2020, the parent's attorney indicated that she had been informed that neither the then-current director nor the assistant director from Lindamood-Bell would be employees of the agency as of the October hearing date (Tr. p. 382). According to the parent's attorney, Lindamood-

[8] The parent also asserts that the IHO "arbitrarily excluded" three exhibits offered at the impartial hearing, citing SRO exhibits A-C (see Req. for Rev. at p. 2). However, as noted above, SRO exhibits A through C were admitted into evidence during the impartial hearing and are a part of the hearing record (see Tr. pp. 218, 430; Parent Exs. A; G; H).

[9] State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]; 279.9[a]).

Bell suggested that she obtain a new subpoena listing a representative from Lindamood-Bell by reference to a generic title, rather than a specific name, and indicated that such subpoena had to be served more than ten business days prior to the hearing date, making it challenging for the parent's attorney to obtain the witness particularly given some other policies of the Lindamood-Bell agency regarding testimony (Tr. pp. 382-83). The parent's attorney further indicated that, in any event, the more recent March 2019 neuropsychological evaluation included "better data" and that she expected the neuropsychologist who conducted that evaluation to testify (Tr. p. 382). Ultimately, the parent chose not to call a witness from Lindamood-Bell and clarified that she had intended to call the witness at the hearing prior to remand but that "[t]hey also would not appear at that hearing" and that she had "no issue with calling the witness" to testify at the hearing upon remand consistent with the IHO's stated expectation but that the agency had "added considerably more policies regarding witness preparation and presentation" (Tr. p. 383).

In the final decision, the IHO noted that: "Here the company who conducted the evaluation and presented a document recommending between 900 and 1500 hours of tutoring, failed to present a witness, even with a subpoena, to explain its assessment of the student and conclusions" (IHO Decision at p. 18). The IHO opined whether "anything but a negative inference [could] be drawn from a witness refusing to appear" (id.).[10] Putting aside the characterization that he was drawing an adverse inference, the IHO really weighed the documentary evidence taking into account the lack of testimony from a representative from Lindamood-Bell. In the decision remanding the matter, the SRO specifically discussed the appropriateness of an IHO according varying weight to evidence in the hearing record (see Application of a Student with a Disability, Appeal No. 19-026). In particular, the SRO noted that, rather than excluding evidence without foundational witnesses as IHO I had done: "A better result would be a starting point, to wit: admitting the Lindamood-Bell Learning Ability Evaluation Summary into evidence. Beyond that, the IHO as the trier of fact would be free to accord the proper weight to an evaluation that was unsupported by the preparer's testimony and not subject to cross-examination." (Application of a Student with a Disability, Appeal No. 19-026). This is what the IHO did. Moreover, as discussed below, putting aside the inference, the evidence in the hearing record as a whole supports the IHO's award of compensatory education.

Overall, an independent review of the hearing record demonstrates that the parent had a full and fair opportunity to present her case at the impartial hearing, which was conducted in a

[10] The IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" (Letter to Armstrong, 28 IDELR 303 [OSEP 1997]). IHOs and SROs may nevertheless assert appropriate discretionary controls over the due process and review proceedings; however, in New York they have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049).

manner consistent with the requirements of due process, and that the IHO did not exhibit bias against the parent.[11, 12]

B. Statute of Limitations—Withholding of Information Exception

The parent asserts that the IHO erred by finding that the parent's claims relating to the 2012-13 through 2015-16 school years were barred by that statute of limitations. The parent asserts that the district failed to demonstrate that it provided prior written notices and procedural safeguards notices in Spanish for each of the school years at issue and that, therefore, the withholding of information exception to the statute of limitations should have applied. More specifically, the parent contends that the IHO improperly relied on circumstantial evidence regarding transmission of the notices to the parent and disregarded the parent's testimony rebutting the district's evidence.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Exceptions to the timeline to request an impartial hearing apply if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

As noted above, prior to the remand of this matter, an SRO determined that the parent's claims related to the 2012-13 through 2015-16 school years accrued more than two years prior to the filing of the due process complaint notice (Application of a Student with a Disability, Appeal No. 19-026). In that appeal, the SRO also determined that the specific misrepresentation exception

[11] The IHO's statement that the parent's witnesses were "going to say, yes, yes, yes and pay us, pay us, pay us" (Tr. p. 283), while perhaps inappropriate also does not rise to the level of demonstrating that the IHO lacked impartiality.

[12] The parent also alleges that the IHO erred in failing to deem all claims raised in the due process complaint notice admitted, follow the SRO's directive for remand, hold the district to its burden of proof, and develop the hearing record, and further erred in relying on unreliable evidence offered by the district. As I am conducting an independent review of the hearing record, I find it unnecessary to examine in detail the merits of each of the parent's allegations relating to the adequacy of the IHO's reasoning and, therefore, the remainder of this decision will focus on the parent's specific procedural and substantive claims.

did not apply and remanded solely for a determination as to whether the withholding of information exception applied to the parent's claims (id.).

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at * 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulation, a district must provide parents with a copy of a procedural safeguards notice annually, as well as: upon initial referral or parental request for evaluation; the first occurrence of the filing of a due process complaint; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Upon remand, the hearing record reflects that the parent referred the student to the CSE for an initial evaluation by letter dated September 14, 2012 (Dist. Ex. 1). By letter dated September 14, 2012, the district responded to the parent's initial referral, in English and Spanish, requesting consent to evaluate the student (Dist. Ex. 2 at pp. 1-6). The district's response also referenced an enclosed copy of the procedural safeguards notice in both English and Spanish (id. at pp. 2, 3). A social history was completed on September 25, 2012, the report of which reflected that: "Due [p]rocess was reviewed with [the parent]. Parental [r]ights were explained and discussed in Spanish. Literature was provided prior to the meeting via mail, which receipt was verbally acknowledge[d] by the mother. The opportunity to ask questions was provided to the parent. Consent was reviewed and signed by [the parent]" (Dist. Ex. 3 at p. 3).[13]

A consent for evaluations in Spanish was obtained from the parent on September 25, 2012 (Dist. Ex. 4 at p. 1). The document includes a paragraph that indicates the parent's rights have been explained to her and that she received a copy of the parent's guide to special education (Tr. pp. 338-39; Dist. Ex. 4). The district's bilingual school psychologist testified that the document was completed as part of the social history interview and described the document as being where the parent signs consent "and acknowledges that the rights and the procedural safeguards have

[13] The parent's due process complaint notice alleged that the report of the social history interview did not "indicate that the Parent was advised of her due process rights"; however, that allegation is proven to be false by a reading of the social history report (Parent Ex. A at p. 5; Dist. Ex. 3 at p. 3).

been discussed and explained" (Tr. pp. 235-36, 247). The district's bilingual school psychologist further testified that the document also indicated that the parent received a copy of the procedural safeguards as well as the guide to special education services (Tr. p. 247).

The hearing record includes a prior written notice dated April 21, 2015 (Dist. Ex. 6). The prior written notice summarized the recommendations of a February 24, 2015 CSE meeting and included instructions for obtaining a copy of the procedural safeguards notice as well as contact information for assistance with understanding the special education process (id. at pp. 1-3). The April 21, 2015 prior written notice was also provided in Spanish (id. at pp. 5-7). The district's bilingual school psychologist described a prior written notice as the "document that we use when the entire process is complete" and that "it g[ave] a summary of the decision that was made and all the assessments that were used" and "most importantly, it remind[ed] the parent that they ha[d] the right to either agree or disagree with the entire process and the outcome" (Tr. pp. 251-52). Entries in the SESIS event log reflect that an IEP was changed from "draft" to " final" and a corresponding prior notice package for placement indicated "[l]etter sent today" on April 21, 2015 (Dist. Ex. 7 at p. 1). The district's bilingual school psychologist testified that the entry indicated that the prior notice package had been mailed to the parent (Tr. pp. 256-57). The hearing record also includes copies of the indexes of the July 2017 procedural safeguards notice in English and the June 2016 procedural safeguards notice in Spanish (Dist. Exs. 8 at pp. 1-4; 9 at pp. 1-3). The district's bilingual school psychologist testified that the indexes were accurate copies of the notices given to parents (Tr. p. 258). The bilingual school psychologist also testified that the indexes contained information on filing complaints and due process procedures in both English and Spanish (Tr. pp. 259-60). On cross-examination, the bilingual school psychologist testified that she had not personally met the parent, participated in a social history interview, CSE meeting, or personally explained any due process rights or procedural safeguards to the parent (Tr. p. 306).

The parent testified that she participated in the social history interview, but she did not remember having her due process rights explained to her and did not know what due process rights were (Tr. pp. 315-16). She later testified that she understood the term "parent's rights" to mean that she had "the right for a hearing, and . . . the right to fight for services" (Tr. p. 326). The parent reported that she spoke to a social worker at the student's charter school in 2018 because the district had recommended a "District 75" school and that is when she first learned of her rights (Tr. pp. 326-27). The parent testified that she participated in the 2012 social history interview and that she recalled reading and signing a consent form written in Spanish for an evaluation for the student (Tr. pp. 328-29).

The parent's attorney had attempted to ask the parent what information she received from the district prior to the social history update; however, the IHO sustained an objection to that question and the parent instead was asked what information the parent was provided "at the social history interview"; in response, the parent replied "none" (Tr. p. 317). Unfortunately, this line of questioning was not responsive to the information contained in the district's response to the parent's referral for an initial evaluation or the report of the social history interview which indicated the parent was provided with information, including the procedural safeguards notice prior to the social history update (see Dist. Exs. 2; 3). Confusing matters, the parent confirmed that she had received mail at the same address since 2012 and had received mail from the district (Tr. pp. 328, 345-46); however, the parent did not specifically testify that she did not receive the district's

response to the initial evaluation, the procedural safeguards notice, or copies of prior written notices.

The IHO found that the withholding of information exception to the statute of limitations did not apply to the 2012-13, 2013-14, 2014-15, and 2015-16 school years (Nov. 27, 2020 IHO Decision at p. 22). Although the IHO found the district's bilingual school psychologist's testimony to be credible and based on documents created and events generated contemporaneously in the district's SESIS log, and not based on the witness' memory (id. at p. 21); as noted above, the district's bilingual school psychologist's testimony was entirely based on a review of the district's records. The IHO noted that the parent understandably struggled to remember answers to questions relating to meetings and discussions as far back as 2012, however, he found the parent's acknowledgement of her signature on the consent form as well as her testimony that she read the form before signing it to be more reliable (id. at pp. 21-22; see Tr. p. 329).

Weighing the information contained in the hearing record, in accord with the IHO's ultimate determination, even if the parent did not receive every required procedural safeguards notice, she was made sufficiently aware of her procedural due process rights in her native language (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). The evidence in the hearing record indicates that the parent received at least some procedural safeguards notices over the course of the student's residence in the district. Additionally, the parent conceded that she received mail from the district and had maintained the same mailing address since 2012 (Tr. pp. 328, 345-46). In particular, the hearing record includes a September 25, 2012 Spanish language consent to evaluate form, which the parent specifically recalled signing and which included an acknowledgment that the parent was advised of her rights and that she received a copy of the parent's guide to special education (Dist. Ex. 4 at p. 1; see Tr. p. 329; see also Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 744 Fed. App'x 7, 11 [2d Cir. 2018] [finding withholding of information exception to the statute of limitations did not apply where parent signed a form acknowledging receipt of the procedural safeguards notice]; Avila, 2014 WL 5585349, at *8-*9 [declining to apply the withholding of information exception where the evidence showed that the parent signed an acknowledgement that she received a procedural safeguard notice]). Further, the hearing record includes an April 21, 2015 prior written notice in English and Spanish and corresponding mailing SESIS event logs (Dist. Exs. 6 at pp. 1-7; 7 at p. 1). Lastly, the parent did not testify that she never received a procedural safeguards notice from the district; rather, she indicated that she did not remember her due process rights being explained to her (Tr. p. 315). A district's delivery of a procedural safeguards notice suffices to impute to parents "constructive knowledge of their various rights" under the IDEA, whether or not the parents examined the contents of the notice to acquire the actual knowledge (C.P. v Krum Ind. Sch. Dist., 2014 WL 4651534, at *9 [E.D. Tex. Sept. 17, 2014], quoting Richard R., 567 F. Supp. 2d at 946). Based on the foregoing, I find that the IHO correctly determined that the withholding of information exception does not apply to the parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years and therefore, the parent's claims are barred by the IDEA's two-year statute of limitations.

C. Compensatory Education

It is next necessary to determine whether the IHO's award for compensatory educational services to remedy the district's denial of a FAPE to the student for the 2016-17, 2017-18, and

2018-19 school years was sufficient. The parent asserts that the IHO failed to consider the student's history of services and progress, his skills both during the school years at issue and at the time of the impartial hearing, or the effect of the denial of a FAPE on the student's cumulative delays. Further, the parent argues that the district failed to present evidence relevant to computing relief. The parent also asserts that the IHO erred by sua sponte reducing the provider rates and number of requested hours of compensatory educational services. The parent requests a compensatory education award of at least 1200 hours of academic instruction at a rate of $200 per hour (compared to the IHO's award of 750 hours at a rate of $100 per hour) and 840 hours of speech-language therapy at a rate of $250 per hour (compared to the IHO's award of 234 hours at a rate of $100 per hour), as well as transportation. In addition, the parent seeks a finding that the student is entitled to extended eligibility. The district argues that the IHO's award is sufficient to compensate the student for a three-year denial of a FAPE.

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]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

1. Tutoring

The parent obtained an October 9, 2018 Lindamood-Bell learning ability evaluation summary and a June 28, 2019 independent bilingual neuropsychological evaluation to ascertain the student's academic functioning (Parent Exs. C at pp. 1-5; D at pp. 1-42). [14]

According to the October 2018 Lindamood-Bell evaluation summary, the student demonstrated numerous areas of weakness (Parent Ex. C at p. 5). The evaluation summary reflected a recommendation for four hours of daily instruction, five days per week for 45 to 60 weeks to develop the student's language and literacy skills as well as mathematical concepts and computation skills (id.). The amount and range of the recommended instruction was "broad due to many variables and individual responses to sensory input during the instruction period" (id.). Anticipated progress was also "subject to many variables" (id.). Recommended instruction included three Lindamood-Bell programs (id.).

As part of the June 2019 independent bilingual neuropsychological evaluation, the parent completed an intake questionnaire, in which she stated she "would like [the student] to have a better education because she fe[lt] he c[ould] do better" (Parent Ex. D at p. 2). In a March 2019 report summarized within the neuropsychological evaluation report, the student's teacher indicated that the student attended an eighth grade ICT classroom and was far below grade level in reading, math, and written language and below average in social/emotional functioning (id. at p. 3). Among the teacher's concerns was the student's reading assessment, which was far below the eighth-grade level reading benchmark (id. at p. 4). The teacher also reported that the student's reading comprehension impacted his ability to write clear and coherent pieces (id.). The teacher stated she "worr[ied] about [the student]'s ability to independently seek support when he struggle[d] both academically and socially" (id.). According to the teacher, the student could often be disengaged during lesson times and reportedly took very little initiative during class, often waiting to see what others were doing or waiting for his paraprofessional to tell him what to do (id.).

The student's performance on cognitive and achievement testing conducted by the independent neuropsychologist and reported in the June 2019 bilingual neuropsychological evaluation was relatively consistent with prior testing conducted by the district in 2017 (compare Parent Ex. D at pp. 16-18, with Dist. Ex. 12 at pp. 2-5). The student's scores placed him within the range of extremely low to low average cognitive functioning and within the range of extremely low to average academic achievement, with processing speed, word attack, and sentence reading fluency as areas of relative strength for the student (Parent Ex. D at pp. 16-17). Consistent with speech-language testing discussed below, the neuropsychologist reported that the student had "marked difficulty" with expressive and receptive language skills, struggled to express his thoughts, and required frequent repetition and clear instructions (id. at p. 16). Also consistent with

[14] A number of independent educational evaluations were conducted as a result of IHO I's decision prior to remand that were not admitted into evidence as individual exhibits in this matter (see Tr. pp. 115-16; see also Feb. 27, 2019 IHO Decision at p. 11). The June 2019 independent bilingual neuropsychological evaluation recounted much of the student's educational history and available evaluative information and included summaries of the other IEEs, including an April 12, 2019 assistive technology evaluation, an April 11, 2019 auditory processing evaluation, an April 7, 2019 speech-language evaluation, and an April 6, 2019 OT evaluation, as well as summaries of the student's IEPs and evaluations conducted in 2012 and 2017 (Parent Ex. D at pp. 1-15).

the independent speech-language pathologist, the neuropsychologist noted that the student tended to make errors on easier tasks but answered correctly on more difficult tasks, indicating the student's "higher potential" (compare Parent Ex. D at p. 17; with Dist. Ex. 13 at p. 12 [noting the student's difficulty reading regular words but attempts to apply skills to decode unfamiliar words]). The neuropsychologist also indicated areas of relative strength for the student were spatial memory, ability to copy geometric forms, completing a pegboard in a timely manner with his dominant hand, visual working memory, and visual reasoning (Parent Ex. D at p. 29). The student's scores also placed him within the very low to low average range of functioning in processing speed, math fluency, and some areas of orthographic processing (id.). The neuropsychologist reported that "[a]ll other areas were at extremely low to very low level. Difficulties with inattention and sustained attention were apparent as well" (id.).

The neuropsychologist determined that the student met the criteria for diagnoses of an intellectual disability, an acute stress disorder, adjustment disorder with anxiety, developmental coordination disorder, and attention deficit hyperactivity disorder inattentive presentation (Parent Ex. D at p. 26). In conclusion, the neuropsychologist stated that many of the student's strengths were found in visual memory and visual reasoning (id. at p. 30). He opined that "overall verbal knowledge and reasoning, memory skills, fine motor skills, inattention and weaknesses in the underlying areas of word level reading are the areas that need to be strengthened for [the student] to function to his potential" (id.). The neuropsychologist further reported that the student's learning needs were complicated by internalization difficulties, difficulties with sustained attention, and significant language delays that interfered with his ability to progress academically (id.).

Due to the combination of the student's needs, the neuropsychologist recommended a nonpublic school setting that could address vocational training, adaptive skills, functional educational skills, and independent living instruction (Parent Ex. D at p. 30). The neuropsychologist opined that the "most urgent accommodation needed for [the student] [wa]s frequent repetition of whatever fact, concept or task need[ed] to be learned . . . . until initial learning takes place and [the item] can be retained about half hour later" (id.).

Turning to the recommendations relevant to the parent's requested relief at issue on appeal, the neuropsychologist recommended "additional tutoring outside the classroom setting . . . in pull out instruction at school [as well as] in tutoring centers . . . that conduct and/or utilize ABA skills assessment to determine the student's academic, functional, social, play/leisure, and communication skills as well as identifying interfering behaviors to develop a plan for addressing and improving these areas" (Parent Ex. D at p. 31).

During the impartial hearing, the parent offered the testimony of the managing director of a tutoring agency who described the cost his agency charged for the provision of tutoring services but did not provide any information relative to a recommendation for tutoring for the student (Tr. pp. 409-21). The district did not offer any evidence relevant to calculating an award of compensatory education. In her closing statement, the parent's attorney argued that the "best approach . . . to make up for seven years of lost educational time" was to rely on the evidence in the hearing record to fashion an award and cited the recommendation for 1200 hours of academic instruction set forth in the Lindamood-Bell evaluation summary, which was based on a recommendation for four hours per day, five days per week, for up to 60 weeks of reading and math instruction (Tr. pp. 451-52; see Parent Ex. C at p. 5). The parent's attorney further argued

that the neuropsychologist advocated for "the need for remedial after-school tutoring" and given that the district was required to provide approximately 660 hours of academic instruction annually to a 12-month student (or three hours per day in a 44 week school year), an award of 1200 hours was "a low estimate" of the student's needs given that the student was "delayed more than three grade levels in both reading and math due to seven years of inappropriate instruction" (Tr. pp. 452-53).

Nevertheless, according to the parent, 1200 hours of instruction represented remediation of seven years and four of those years have been dismissed as barred by the statute of limitations. Viewing the requested 1200 hours as the total award sought, the parent's request amounted to approximately 171 hours of tutoring per year. Had the IHO reduced the requested tutoring to result in a proportionate award to remedy a three-year (rather than seven-year) denial of a FAPE, the total would have been 514 hours of tutoring. The IHO's award of 750 hours exceeds this proportionate calculation and I decline to disturb the IHO's discretionary award, which he arrived at after weighing the evidence before him.

2. Speech-Language Therapy

Also consistent with IHO I's decision, an IEE in speech-language was conducted on April 7, 2019, to address parental concerns regarding the student's communication, reading and writing skills, expressive and receptive abilities (Dist. Ex. 13 at pp. 1, 12; see Feb. 27, 2019 IHO Decision at p. 11). The speech-language pathologist conducted a parent interview, administered standardized assessments, observed the student, and interviewed the student's school speech-language therapist (id. at p. 3). The evaluation report indicated that the student was in the eighth grade at a community charter school attending a 26:2 classroom (id. at p. 1). According to the student's in-school speech-language therapist, at the time of the evaluation, the student received speech-language therapy two times per week in a group and was working on goals in the areas of reading comprehension, grammar, and vocabulary (id. at p. 2). The student's speech-language therapist reported that the student had remarkable difficulty with reading comprehension and required significant prompting and cues to understand material with inconsistent accuracy (id.). The student also demonstrated difficulty with producing grammatical sentences (which was noted to be typical of a bilingual speaker) and benefitted from verbal and visual cues to accurately produce and revise grammatical sentences (id.). Further, the student's school speech-language therapist noted that the student was able to learn and retain new vocabulary, and accurately use it at a later time, but presented with remarkable difficulty producing a definition (id.). Additionally, the student was described as a very hard worker (id.).

The evaluating speech-language pathologist administered the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) and the Clinical Evaluation of Language Fundamentals Spanish - Fourth Edition (CELF-4 Spanish) to assess the student's expressive and receptive language skills in English and Spanish (Dist. Ex. 13 at pp. 4-6). Overall, the speech-language pathologist noted that the student demonstrated severely delayed expressive and receptive language in both English and Spanish across all subtest categories (id. at p. 6). The speech-language pathologist described that, receptively, the student was able to follow three and four step directions but was limited to following basic instructions with a breakdown in ability found with increased complexity (id.). The student further presented with "remarkable difficulty understanding spoken paragraphs and recalling sentences" (id.). The student appeared to perform

better on tasks with visually presented material such as selecting words that were semantically related and creating sentences with words or word groups (id.). Expressively, the student "demonstrated remarkable difficulty" with defining words and generating sentences when given specific words and context (id.). Notably, the student performed better on expressive language tasks in English than in Spanish and was often observed "code switching into English on the CELF-4 Spanish stating he did not know the Spanish vocabulary" (id.).

The speech-language pathologist informally assessed the student's receptive and expressive language using both the English and Spanish sets of the Crowley & Baigorri School-aged Assessment Measures (SLAM) cards, which required the student to sequence the cards into a story, narrate a story, and answer simple and complex "wh" questions about the cards (Dist. Ex. 13 at p. 7). In both English and Spanish, the speech-language pathologist indicated that the student required moderate verbal cues to sequence seven cards (id. at pp. 7, 9). In English, the student included an introduction, orientation, complicating action, evaluation, resolution, and coda with "main story grammar markers" with minimal prompting but presented with notable difficulty formulating cohesive ties, identifying characters, and "demonstrate[d] reduced lexical diversity which require[d] the listener to make assumptions given shared knowledge" (id. at p. 8). The student also reportedly demonstrated difficulty highlighting salient details (id.). The evaluator described the student's oral narrative skills in English as below average (id.). The evaluator indicated that the student was able to answer a variety of simple and complex "wh" questions in English; however, the lack of detail in his answers was suggestive of receptive language deficits (id.). As an example, the speech-language pathologist noted that when answering a question, the student tended to repeat the entire SLAM card narrative he had created, which caused the evaluator to wonder whether the student had understood the question posed (id.). In summary, the evaluator "judged" the student's receptive language skills in English to be below average (id.).

On the Spanish edition of the SLAM sequencing cards, the student made phonemic and semantic errors and used "made up words" (Dist. Ex. 13 at p. 10). The student reportedly was able to use a combination of simple, compound, and complex sentences but lacked "adequate coherence and cohesion and lexical diversity, which require[d] the listener to make assumptions given shared knowledge" (id.). The speech-language pathologist stated that the student's "oral narrative skills in Spanish" were below average (id.). In the area of receptive language, the student demonstrated difficulty with answering simple and complex "wh" questions in Spanish (id.). The evaluator noted that the student's use of nonspecific language when answering questions was indicative of expressive deficits (id.). As a result, the student's receptive language skills in Spanish were determined to be below average (id.). In summary, the speech-language pathologist determined that the student demonstrated severely delayed expressive and receptive language in English and Spanish, with greater difficulty in Spanish (id.).

The CELF-5 Reading and Writing Supplement was used to provide "preliminary information to compare to oral comprehension" (Dist. Ex. 13 at p. 11). According to the speech-language pathologist, the student demonstrated difficulty with both reading comprehension and structured writing with greater difficulty in structured writing tasks (id.). The student appeared to use vocabulary and phrases found in the sample text to formulate his responses, which was consistent with his performance in the reading comprehension exercise (id.). This was also consistent with the report of the student's school speech-language therapist who had advised that the student used words from the sample reading comprehension text to answer "wh" questions with

inconsistent accuracy (id.). As a result, it was unclear to the evaluator whether the student understood the written text presented, and she assessed the student's reading comprehension and writing skills to be below average (id.).

The student's fundamental literacy skills were assessed using the Word Identification and Spelling Test (WIST) (Dist. Ex. 13 at p. 11). Word identification assesses a student's ability to accurately read words aloud using the "Read Regular Words" item set and the "Read Irregular Words" item set (id. at p. 12). The student was able to read 46 out of 100 regular words and 22 out of 30 irregular words "(more familiar words)" with various types of errors (id.). The evaluator remarked that the student had notable difficulty reading regular words but attempted to apply skills to decode unfamiliar words, took his time to sound out the words, and frequently self-corrected (id.). According to the speech-language pathologist, the student also had remarkable difficulty with the spelling portion of the WIST (id.). The student was able to spell 6 out of 100 regular words and 20 out of 20 irregular words "(more familiar words)" (id.). The student reportedly demonstrated frequent letter-sound confusion for vowels (id.). On the "Sound-Symbol Knowledge" section of the WIST, the student again was described as performing with notable difficulty and the speech-language pathologist indicated that the student's phonemic awareness was below average and was impeding his literacy skills (id.).

The speech-language pathologist summarized that the student had "remarkable difficulty understanding and interpreting complex spoken language in English and Spanish" and difficulty "understanding various language concepts" (Dist. Ex. 13 at pp. 12-13). The student was unable to consistently follow multi-step directives of increasing complexity (id. at p. 13). The evaluator noted that the student's receptive language vocabulary repertoire was limited and that these skills were necessary for success in the classroom (id.). The student's development in these domains, as well as his literacy skills, were considered to be "severely disordered" (id.). The student's expressive language was also severely delayed in both English and Spanish with more difficulty noted in Spanish (id.). The evaluator determined that the student presented with significant delays in several areas of speech-language, literacy, and writing, which negatively impacted the student's ability to participate in his then-current curriculum (id.). The speech-language pathologist stated that it was "evident" that the student's current clinical interventions were not meeting his needs and were not allowing him to further develop his language skills (id.). According to the evaluator, it was imperative for the student to receive compensatory speech-language services to address his significant language delays (id.).

To address the student's delays, the speech-language pathologist recommended speech-language therapy two times per week individually for 45-60 minutes per session and one time per week in a group of two for 45-60 minutes per session, as well as a bank of 234 hours of speech-language therapy services representing three hours per week for one and one-half years (Dist. Ex. 13 at p. 13). She explained that the calculation was based "on what would be needed to give [the student] consistent access to therapeutic intervention that w[ould] address his significant deficits" (id.).

The speech-language pathologist also prepared a second evaluation report, which was identical to the first but for a recommendation for a bank of 840 hours of speech-language therapy representing three hours per week for seven years (compare Parent Ex. E at p. 13, with Dist. Ex. 13 at p. 13; see Tr. pp. 364-65). In his decision, the IHO opined that the increase in hours was not

based on the student's needs but was instead arbitrarily changed due to litigation (Nov. 27, 2020 IHO Decision at pp. 19, 20). During the impartial hearing, the speech-language pathologist who completed the April 2019 evaluation testified that compensatory education was for the purpose of "narrow[ing] the gaps in language delays that have been created in the past" (Tr. pp. 357, 360). She further indicated the April 2019 evaluation had been her first experience completing an evaluation for litigation and recommending compensatory education (Tr. p. 358). She testified that the president of Rachel Bouvin Speech Services, the agency for which she provided services, reviewed her evaluation and revised the recommendation for compensatory education (id.). In addition, she explained that she had not originally realized that the parent was challenging "six years of service" (Tr. p. 359). The speech-language therapist also made reference to the student's "significant gaps" but, the IHO interjected, and she did not further elaborate on this rationale (id.).

In considering this testimonial evidence, the IHO found that the speech-language pathologist and the president of Rachel Bouvin Speech Services were interested parties and that the recommendation for 840 hours was based on the fact that the matter was in litigation (Nov. 27, 2020 IHO Decision at p. 20). This amounts to a credibility determination and, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, viewing the speech-language pathologist's articulation of the rationale for her recommendation (i.e., to address the student's deficits and to narrow the gap in language delays), this describes a qualitative calculation based on the student's needs, rather than a quantitative calculation strictly tied to the number of years that the student was denied a FAPE (see Tr. pp. 357, 360; Dist. Ex. 13 at p. 13). Therefore, without more, the evidence in the hearing record does not support the parent's position that the number of hours increased due to the speech-language pathologist's realization that the parents were challenging more school years. Thus, in this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a conclusion contrary to the IHO's finding with regard to the credibility of the speech-language pathologist and the president of Rachel Bouvin Speech Services.

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's discretionary award of 234 hours of compensatory speech-language therapy.

3. Rate

Regarding the IHO's rate cap of $100 per hour for the compensatory education services, the parent argues that the IHO "[r]educed" the rates sought by the parent without evidentiary basis. At the outset of the impartial hearing, the parent had not requested that the tutoring or speech-language compensatory services be delivered by a particular provider (see Tr. pp. 181-82). During the impartial hearing, the IHO gave the parties notice, that he would expect a showing regarding "a particular rate" (Tr. p. 182). Ultimately, the parent's attorney indicated that the parent sought the tutoring services from MAIA Education Resource Center at the rate of $200 per hour and speech-language therapy services from Rachel Bouvin Speech Services at the rate of $250 per hour

(Tr. pp. 215-16). During the impartial hearing, the district did not offer any evidence regarding what reasonable rates for the requested compensatory education services would be or indicate that the district could or would arrange the delivery of the services to the student.[15] The district also did not challenge that the parent was authorized to select compensatory education service providers of her choosing at the impartial hearing.[16] The district's attorney did briefly cross-examine the president of Rachel Bouvin Speech Services regarding the what rate therapists were paid and regarding the appropriateness of the overhead costs that were part of the total rate charged by the agency but seemed largely to be following the IHO's lead on this particular issue rather than taking a hard stance that the rates charged by the private providers were excessive (see Tr. pp. 398-405). During the district's closing statement, the district's represenative did not argue that the rates sought by the parent for the compensatory education services were excessive (see Tr. pp. 456-61).

This is all notwithstanding that the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Here, the district failed to address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). If the district disagreed with the rates proposed by the parent's preferred providers, it was incumbent on the district to come forward with evidence demonstrating that the rates were not reasonable.

Given the district's failure to meet its burden of production or persuasion on the issue of the providers' rates, the evidence introduced by the parent is unrebutted. Specifically, the president of Rachel Bouvin Speech Services testified that the agency's established rates for speech-language therapy services was $250 per hour (Tr. pp. 393, 397). She testified that the rate was set by considering the services provided and to "reflect the market rate that's paralleled to other providers doing the same services, as well as typical business overhead" (Tr. pp. 395-96). The director of MAIA Education Resource Center testified that the agency charged $200 per hour for tutoring services (Tr. p. 412). He indicated that this was a market rate (id.). There is no other evidence to contradict these statements in the hearing record. Therefore, based upon the evidence, the IHO erred by ignoring relevant evidence establishing that the agencies' hourly rates of $250 per hour for speech-language therapy services and $200 per hour for tutoring services were reasonable.

In light of the fact that the district did not present any evidence to challenge or otherwise convincingly rebut the hourly rate requested by the parents, the IHO, nonetheless, limited the hourly rate awarded for the awarded compensatory education services. First, the IHO noted that, according to the director of MAIA Education Resource Center, another agency, EBL Coaching,

[15] The only comment by the district regarding the rates charged by private providers was in relation to the district's stated need for documentation of a rate for settlement negotiations (see Tr. pp. 181, 183-85).

[16] There is nothing that would prevent a district from being responsible for delivering compensatory education to a student, for example, through its own providers. However, in the present matter, there was no indication that the district had such an inclination.

charged $125 dollars per hour for services (IHO Decision at p. 20); however, there was no other evidence in the hearing record regarding rates charged by other agencies and the IHO did not further probe to inquire how the director came to know this other rate or whether the services provided by EBL Coaching were the same or similar to those provided by MAIA Education Resource Center (see Tr. p. 413).[17] The IHO also interpreted the testimony of the director of MAIA as stating that the agency did not charge $200 for all clients and implying that the agency would charge a lower rate if it were not the district paying (IHO Decision at p. 20); however, the imputed rationale for charging different rates was pure speculation from the IHO and is not based on evidence in the hearing record (see Tr. pp. 413-14). Finally, for both the speech-language therapy and the tutoring, the IHO noted that there was no documentation of administrative expenses and contrasted the rate paid to the actual providers compared to the total fee charged by the agency (IHO Decision at pp. 19-20); however, it was not necessary for the parent to present this type of evidence, particularly absent any evidence from the district tending to show that the rate charged by MAIA Education Resource Center or Rachel Bouvin Speech Services were excessive.

Consequently, given that the only evidence in the hearing record as to the hourly rate was produced by the parent and that the district made little effort dispute such evidence despite having the responsibility to carrying the burden of production and persuasion, I must reverse the IHO's determination regarding the maximum rate for the compensatory education services. Accordingly, the district is ordered to fund the student's compensatory education services at rates no greater than the rates evidenced by the parent during the impartial hearing.[18] Specifically, the district is ordered to pay for: 750 hours of compensatory tutoring services to be provided by a provider chosen by the parent at a rate not to exceed $200 per hour and 234 hours of compensatory speech-language therapy to be provided by a provider chosen by the parent at a rate not to exceed $250 per hour.

4. Extended Eligibility

The parent has also requested a finding of eligibility for IDEA services beyond the age of 21. The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza, 538 F.3d at 109 n.2 [emphasis added]; see French, 476 Fed. App'x at 471 [noting that "[a] disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). State law does not require school districts to provide students with a free public education past the age of 21 (Educ. Law § 3202[1]), yet compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction

[17] The IHO pursued the line of questioning related to the director's knowledge of the rates charged by other agencies; the director testified that he did not know the rate charged by Huntington Learning Center or Lindamood-Bell but that he believed EBL Coaching charged $125 per hour for tutoring (Tr. pp. 412-13).

[18] Had there been any further evidence, it may well been shown that the parent's requested rates were excessive, but the matter cannot rest on speculation about other agencies' rates, the rates the agencies' charged other clients, or the overhead of the agencies without evidence of the same.

under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).

In prior decisions, I reviewed some relevant authority on this type of remedy and observed that there was a distinction between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C., 595 F. Supp. 2d at 576 [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief]; Burr, 863 F.2d at 1078 [same]; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]).[19] As I alluded to in the previous decisions, this type of relief, if interpreted broadly to include an extension of the procedural due process entitlements set forth in the IDEA, including pendency, could result in many more years of eligibility than intended (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 17-021).[20]

However, in the present case, even assuming that I possess the authority to order the district to provide the student with a FAPE for school years beyond the year that the student's eligibility for special education under the IDEA expires, the hearing record does not support such relief. The student has years remaining of IDEA eligibility (see 20 U.S.C. § 1412[a][1][A]). As such, this matter is distinguishable from cases in which the students had already reached the age of 21 (M.W., 2015 WL 5025368, at *3; see Application of a Student with a Disability, Appeal No. 09-044). Given the compensatory education relief crafted by the IHO and upheld herein, the student is presently well equipped to reach the place he would have been but for the district's denial of a FAPE. Accordingly, I decline to modify the IHO's decision to provide for extended eligibility.

VII. Conclusion

The evidence in the hearing record shows that the IHO correctly determined that the withholding of information exception did not apply and that the parent's claims regarding the 2012-13, 2013-14, 2014-15, and 2015-16 school years were barred by the statute of limitations. Further, there is insufficient basis in the hearing record to disturb the IHO's award of compensatory education, consisting of 750 hours of tutoring and 234 hours of speech-language therapy to remedy the district's failure to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years. However, the IHO erred in capping the hourly rate for the awarded compensatory education

[19] At least one district court has found it improper to award extended eligibility under the IDEA as a component of compensatory education; however, in that case the IHO had ordered the district to award the student a diploma making an award of extended eligibility redundant (see Dracut Sch. Comm. v. Bur. of Special Educ. Appeals, 737 F. Supp. 2d 35, 53-55 [D. Mass. 2010]).

[20] The Third Circuit in Ferren C. acknowledged concerns that, by extending the district's obligations to provide an IEP beyond the student's 21st birthday, the district could be subjected to ongoing litigation "as challenges are made to the adequacy of the[] IEPs" developed after the student's 21st birthday" (612 F.3d 712, 720 [3d Cir. 2010]).

services at an amount lower than that requested by the parent. Therefore, the parent is awarded the compensatory education services at the requested maximum rates. Further, to the extent the compensatory education services are delivered somewhere other than the student's home, the district shall be required to provide the student with transportation to and from the services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's decision, dated November 27, 2020, is modified by vacating that portion which set maximum hourly rates for the compensatory education services; and

IT IS FURTHER ORDERED that the district shall be required to fund 750 hours of compensatory tutoring services to be delivered by a provider of the parent's choosing at a rate not to exceed $200 and 234 hours of compensatory speech-language therapy services to be delivered by a provider of the parent's choosing at a rate not to exceed $250 and provide the student with transportation to and from the location for delivery of such services.

Dated: **Albany, New York**
March 5, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER