The University of the State of New York

The State Education Department
State Review Officer
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No. 21-064

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Daniel Levin, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2018-19 and 2019-20 school years and ordered the district to fund compensatory education. 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

The hearing record reveals that the student has received diagnoses of attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD) (Dist. Ex. 11 at p. 1). With respect to the student's educational history, for the 2018-19 school year, the student began kindergarten in a local private school and transitioned to the district public school in January 2019 (Dist. Ex. 12 at p. 1). The student continued in the district public school for the 2019-20 school year (first grade) in a general education classroom (Dist. Ex. 24 at p. 1).

On March 1, 2019, the parent obtained a private psychological evaluation of the student (Dist. Ex. 11). The district subsequently conducted a social history evaluation and classroom observation on April 17, 2019 and May 3, 2019, respectively (Dist. Exs. 12; 13). The hearing record reveals that on May 22, 2019, the parent requested that the district conduct evaluations of the student due to the parent's concerns that the student's ADHD was having a negative impact on the student's academic and social/emotional progress (Tr. p. 233). In response, the district conducted a psychoeducational evaluation on September 9, 2019 (Dist. Ex. 15).

On September 20, 2019, a CSE convened for an initial eligibility meeting and found the student eligible for special education as a student with an other health impairment (Dist. Ex. 8 at pp. 1; 13).[1] The September 2019 CSE recommended a general education class placement in a district public school with individual and group counseling services (id. at pp. 9, 13-14). The CSE also recommended testing accommodations including, time and a half, motor breaks of up to five minutes between tasks or after 30 minutes of task completion, a separate location with no more than 15 students and with minimal distraction, and gestural prompts (two light taps on the desk every 15 minutes to refocus attention during testing, when off task) (id. at p. 11). Additionally, during the CSE meeting, the parent requested a 1:1 paraprofessional for the student based on the student's behaviors in the previous year (id. at p. 14). The CSE advised the parent that in order to consider a 1:1 behavior management paraprofessional, a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) should be conducted to determine the student's behavioral needs (id.). On October 11, 2019, the district conducted an FBA and developed a BIP for the student (Dist. Exs. 22; 23).

On November 1, 2019 the CSE reconvened to review the district evaluations including an FBA and psychological update conducted on October 18, 2019 (Dist. Exs. 16 at p. 16; 17; 24). The November 2019 CSE continued to recommend a general education class placement in a district public school along with individual and group counseling services (Dist. Ex. 16 at p. 12). The CSE also changed the student's classification from other health impairment to emotional disturbance (id. at p. 1).[2] The CSE also recommended testing accommodations including, motor breaks of up to five minutes between tasks or after 30 minutes of task completion, a separate location with no more than 15 students and with minimal distraction, and gestural prompts (two light taps on the desk every 15 minutes to refocus attention during testing, when off task) (id. at p. 13). Additionally, the CSE recommended a 1:1 behavioral support paraprofessional for the student (id. at p. 12).

On January 13, 2020, the student took the district's Gifted and Talented exam (G/T exam) for placement in a gifted and talented program operated by the district (Dist. Exs. 6 at pp. 9, 10; 7). The hearing record indicates that the student scored in the 95th percentile on the nonverbal portion of the exam and in the 52nd percentile on the verbal component of the exam (Parent Ex. N at p. 1).

On March 10, 2020, the district and the parent entered into a mediation agreement which set forth terms including: (1) the student's current paraprofessional would be trained; (2) a "P-4" (authorization) for special education teacher support services (SETSS) would be issued "[b]y" March 1, 2020 through June 1, 2020; and (3) every effort would be made to keep the student's current paraprofessional in place until June 1, 2020 (Parent Ex. P).

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute in this proceeding (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] The student's eligibility for special education as a student with an emotional disturbance is not in dispute in this proceeding. (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

A. Due Process Complaint Notice

In a due process complaint notice dated April 28, 2020, the parent alleged that the district failed to provide her with documentation regarding testing accommodations that should have been in place for the student (Dist. Ex. 1). More specifically, the parent argued that as it was essential that students not receive testing accommodations for the first time on State tests, and as the district failed to provide her with documentation that the "read aloud" testing accommodation had been provided to the student before the administration of the student's G/T exam, she alleged that the date of the G/T exam was the first time the student received this accommodation (id.). The parent further alleged that the proctor who administered the G/T exam to the student, did not have the ability to properly administer the verbal component of the exam because she was not provided professional development on testing accommodations and she was not familiar with the student's IEP so as to properly administer the student's testing accommodations (id.). Next, the parent alleged that due to the district's inability to appropriately administer the student's testing accommodations, the parent requested that the verbal component of the G/T exam "not count"; but rather that the non-verbal component and academic data be utilized to place the student in a gifted and talented class (id.). The parent also alleged that without appropriate accommodations, the student was intentionally discriminated against (id. at pp. 1-2). In an addendum to the due process complaint notice dated May 21, 2020, the parent requested that the student's paraprofessional be hired full-time by the district because the paraprofessional had "worked with the [student] the most" and could ensure that the student's behavior plan was "implemented with fidelity" (Dist. Ex. 2 at p. 1).[3] The parent also requested at least four hours of SETSS per week to supplement the academic standards that the student missed as a result of late placement in the district's gifted and talented program (id.).

B. Events Post-Dating the Due Process Complaint Notice

The hearing record contains an IEP dated October 28, 2020, in which the CSE developed an IEP for the student's 2020-21 school year (second grade) and changed the student's classification back to a student with an other health impairment (Parent Ex. C at pp. 1, 10). The CSE continued to recommend a general education class placement in a district public school along with individual and group counseling services and the same testing accommodations as the student's November 2019 IEP (id. at pp. 6, 7, 9, 10). The IEP indicated the parent's concern that the student needed an accelerated curriculum as well as her request that the student's paraprofessional continue to work with the student (id. at p. 11).[4]

On November 2, 2020, the student was placed in a gifted and talented class for the 2020-21 school year (Tr. 221; Parent Ex. U at p. 1).

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[3] The district argues in its closing brief and amended motion to dismiss that the parent's May 21, 2020 email should be treated as an amended due process complaint notice that supersedes the parent's April 28, 2020 due process complaint notice (IHO Ex. III at pp. 18-19; Dist. Ex. 32 at pp. 6-8). The IHO determined, during the hearing and in her final decision, that the May 21, 2020 email would be regarded as an "update or addendum" to the April 28, 2020 due process complaint notice and that "when read together, they shall be designated as one [c]omplaint" (IHO Decision at p. 15; see Tr. pp. 188-190).

[4] The hearing record also includes a draft IEP from the October 13, 2020 CSE meeting, which indicates an accelerated curriculum for the student for ELA, math, and science (Parent Ex. T at pp. 4, 7).

C. Impartial Hearing Officer Decision

After a prehearing telephone conference on September 23, 2020, the parties proceeded with an impartial hearing on October 5, 2020, which concluded on November 9, 2020 after four days of proceedings (Tr. pp. 1-413). The hearing record indicates that on September 29, 2020, the district moved to quash subpoenas submitted by the parent, and on November 5, 2020, the district moved to dismiss the parent's due process complaint notice based on numerous grounds, including, mootness, failure to state a cause a state of action and the IHO's lack of authority and subject matter jurisdiction for the parent's requested relief (see Dist. Ex. 32 at pp. 2-13).[5] The parent submitted opposition papers to one of the district's motions (see Parent Ex. F).[6] The IHO subsequently determined that she "has both the authority and jurisdiction to determine the matters relating to the identification, evaluation, educational placement, and/or the provision of FAPE for the student," thereby denying the district's motion to dismiss (Tr pp. 187-193).

In a final decision dated January 29, 2021, the IHO found that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at p. 33). Specific to the 2018-19 school year, the IHO found that the district "opened the door" to the issue of childfind during the impartial hearing (id. at p. 15). The IHO also noted that the parent provided fair notice to the district of a potential least restrictive environment (LRE) and child find violation in the parent's response to the district's motion to dismiss (id. at p. 16). The IHO further found that the district violated its child find obligations because the district failed to act "in the face of clear evidence" that the student might have had a disability in kindergarten due to the student's behavioral issues and struggles with the provision of general education supports (id.). More specifically, the IHO found that the district violated its child find duty by waiting nine months to evaluate the student for special education in September 2019, when the student's behavioral problems at the beginning of January 2019 and the district's inability to manage the student with general education interventions, put the district on notice of the need to evaluate the student (id. at p. 18). The IHO also noted that the hearing record reflected that during Kindergarten through the second grade, the student either eloped or was removed and isolated from his classroom on an average of four to eight time per day, which suggested that the district should have had a reasonable suspicion since he was first enrolled in kindergarten that the student may have had a disability and needed to be evaluated (id.). The IHO also found that the district possessed sufficient information obtained during the 2018-19 school year which should have triggered the district's child find obligation to refer the student to the CSE for evaluation due to the student's social/behavioral concerns (id.).

Turning to the parent's argument that the student's recurrent periods of isolation away from his general education classroom denied the student a FAPE because it was not the student's LRE, the IHO found that the district failed to show that it satisfied the LRE mandate for the second half

[5] The hearing record also includes an "amended" motion to dismiss made by the district dated November 2, 2020 (see Dist. Ex. 5).

[6] It appears that the parent was responding to the district's motion to quash the parent's subpoena requests (compare Dist. Ex. 3, with Parent Ex. F; see Dist. Ex. 4). The district submitted a reply to the parent's opposition papers (Dist. Ex. 4). During the hearing, the parent repeated some of the allegations included in her opposition papers in responding to the district's amended motion to dismiss (Tr. pp. 177-181). The district objected to allegations that were not raised in the parent's due process complaint notice (Tr. pp. 182-84).

of the 2018-19 school year through the entire 2019-20 school year (IHO Decision at pp. 20, 23). The IHO found that the frequency of the "isolation events" transpired for at least 18 months and indicated that either the BIP or the 2019 IEP was inappropriate or that district employees failed to effectively implement the BIP or the 2019 IEP with fidelity, which caused the student's interfering behaviors to impede his academic instruction (id.). The IHO further found that the district failed to offer evidence that the isolation was required to enable the student to receive an educational benefit during the 16-month academic period between January 2019 and October 2020 (id.). The IHO also found that it did not appear that the district adequately pursued less restrictive environments for the student or that the district had a proposed plan to transition the student to a less restrictive setting, thus finding that the district failed to show that it satisfied the IDEA's LRE mandate for the second half of the 2018-19 school year through the entire 2019-20 school year (id.). Next, the IHO found that the neither the behavioral paraprofessional nor testing accommodations from the student's 2019-20 IEP were satisfactorily provided to the student between September 2019 and October 2020 (id. at p. 20). Thus, the IHO found that the district failed to offer the student a FAPE from September 2019 through October 2020 because the district failed to fully implement the student's IEP as mandated (id.). The IHO also found that the district failed to provide the student with a trained behavioral paraprofessional to assist in the implementation of the BIP, as mandated in the 2019 IEP, resulting in a denial of FAPE for the 2019-20 school year (id. at p. 27). The IHO further found that the district's failure to provide the student with all of his testing accommodations as mandated by the 2019 IEP, particularly during the non-verbal component of the G/T exam, constituted a denial of a FAPE (id. at p. 28).

As relief for the district's denial of a FAPE for the 2018-19 and 2019-20 school years, the IHO determined that the student was entitled to compensatory educational services consisting of 624 hours of SETSS, to be provided by a credentialed provider at the parent's choosing at the applicable market rate (IHO Decision at p. 32). The IHO noted that the award was an "approximate quantitative and qualitative recompense" for the educational instruction that the student did not receive during his periods of removal and isolation from his classroom, during the 64 week period from January 2019 through June 2019; September 2019 through June 2020; and September 2020 through October 2020 (id.). The IHO also determined that the award was determined by awarding ten hours per week multiplied by 64 weeks, less 16 hours of SETSS the student was allotted pursuant to the March 2020 mediation agreement (id.). The IHO noted that the format of the compensatory SETSS services (i.e., frequency and duration, individual, group or hybrid) to be provided to the student shall be made by the SETSS provider in collaboration with the parent (id.). The IHO ordered that the district shall timely pay the credentialed SETSS provider of the parent's choosing, upon remittance of each invoice, payable at the SETSS provider's applicable market rate, with the SETSS to be redeemed within four years from the date of her decision (id. at p. 33-4). The IHO also found that the parent's requests for continued employment of the student's current paraprofessional, pendency placement in a gifted and talented class, and modification of the student's IEP to include an accelerated program were outside of her jurisdiction and were denied (id. at p. 34). Lastly, the IHO found that the parent was not restricted by res judicata or otherwise from filing a due process complaint notice to address issues that were not properly raised in this proceeding (id.).

IV. Appeal for State-Level Review

The district appeals arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years. Initially, the district argues that the IHO

exceeded the scope of the impartial hearing and erred in finding that the district failed to comply with its child find obligations for the 2018-19 school year. The district argues that the parent did not raise the issue of child find in her due process complaint notice nor did the district open the door during the impartial hearing. The district also argues that the IHO improperly justified her child find determination by stating that the district took six months to develop an IEP after the parent's initial referral, while the parent did not raise the issue of an untimely initial IEP review in her due process complaint notice. The district further argues that the IHO erred in finding that it failed to place the student in the LRE for the 2019-20 school year as the student was placed in a general education class. Next, the district argues that the IHO erred in finding that it did not provide appropriate testing accommodations for the student during the G/T exam and that it did not provide a trained paraprofessional to implement the student's BIP. As to relief, the district argues that the IHO's award of compensatory SETSS to a student placed in an accelerated class is not an equitable remedy. Lastly, the district argues that the IHO incorrectly found that the parent was not restricted by res judicata if the parent wanted to address issues in a new due process complaint notice that were not properly raised in this proceeding.[7]

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

[7] The parent did not file an answer to the district's request for review.

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]).[8]

[8] 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).

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

VI. Discussion

A. Preliminary Matters—Scope of the Impartial Hearing

On appeal, the district asserts that the IHO exceeded the scope of the impartial hearing when she determined that the district denied the student a FAPE for the 2018-19 school year because it failed to comply with its child find obligation.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

At the outset, it must be noted that neither the parent's due process complaint notice nor the amended due process complaint notice included any allegations related to child find; they did not indicate a dispute regarding the initial evaluation of the student; they did not include any allegations related to the 2018-19 school year; in fact, the parent only included allegations related to the provision of testing accommodations to the student and the provision of paraprofessional services (see Dist. Exs. 1; 2). Although the IHO determined that the parent raised the issue of a child find violation in her response to the district's motion (see IHO Decision at p. 16), the parent's response to the motion is insufficient to trigger the district's burden to defend this claim or place the district on notice of this claim. The parent did raise allegations in her opposition to the district's motion; including allegations that the district did not evaluate the student within the applicable timeframe after a request (Parent Ex. F at p. 1). The IHO found that during the impartial hearing,

the parent indicated that she sent a letter to the district on May 22, 2019 requesting that the student be evaluated; however, the evaluations were not completed by the district until November 2019 (IHO Decision at p. 17).[9] However, the parent had not requested any relief in association with these allegations and it was unclear how the allegations may have connected with the claims included in the parent's due process complaint notice, which were exclusively related to the provision of testing accommodations (see Dist. Ex. 1). Additionally, to the extent that the IHO determined the district was on notice of the parent's claims, the district replied to the parent's opposition papers and noted that the parent raised allegations that were not included in the due process complaint notice or the amended due process complaint notice (see Dist. Ex. 4). Further, there is no indication that the parent sought to amend the due process complaint notice again to raise a child find claim during the impartial hearing or that the district agreed to expand the scope of the impartial hearing.

Additionally, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).

Here, the IHO found that the district "opened the door" to a child find violation during the district's cross-examination of the district principal (IHO Decision at p. 15). The IHO found that when the district "strategically attempt[ed] to elicit an admission" from the district principal as to whether a student who performs academically at or above grade level has any entitlement to receive SETSS, the district introduced an extensive line of testimony relating to the mediation process, in which the principal indicated that the student did not receive academic instruction and paraprofessional services as mandated by the student's 2019 IEP (id.). However, a review of the hearing record reveals that the issue of the student not receiving academic instruction and paraprofessional services was first addressed as part of the parent's direct examination of the district principal who appeared pursuant to the parent's subpoena (Tr. pp. 245-248). Specifically, during direct examination, the parent questioned the district principal regarding the amount of time the student was out of the classroom (Tr. p. 245). Furthermore, the parent also initiated questioning with respect to the mediation agreement and why the district provided SETSS for the student in order to make up for the loss of classroom instruction (Tr. pp. 259-260). Only after the IHO overruled the district's objection to the discussion of the mediation agreement, did the district cross-examine the district principal regarding the student receiving SETSS through the mediation agreement (Tr. pp. 332-33). Therefore, the district could not be deemed to have "opened the door," under the holding of M.H., to the issue of child find on which the IHO based her determination that the district had failed to offer the student a FAPE for the 2018-19 school year (see B.M., 569 Fed. App'x at 59; A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9). Assuming arguendo that the district's attorney was the first to address the mediation agreement during cross-examination and initiated testimony from the district principal that the student received SETSS through the mediation agreement based on missed instruction in the classroom, it is difficult to

[9] The parent's May 22, 2019 letter was not included in the hearing record.

conclude that the solicited testimony can be reasonably read to include a claim of child find. Additionally, the issue of the student's missed instruction in the classroom was already resolved in the mediation agreement between the parties. Accordingly, the IHO erred in finding that the district "opened the door" to a child find violation and that the district denied the student a FAPE for the 2018-19 school year based on the district's failure to satisfy its child find obligation.

B. 2019-20 School Year

The district argues on appeal that the IHO erred in finding that it denied the student a FAPE for the 2019-20 school year. More specifically, the district appeals from the IHO's determinations that the district failed to provide a placement in the student's LRE, failed to provide the student with a trained behavioral paraprofessional, and failed to provide recommended testing accommodations.

1. Least Restrictive Environment

The district appeals from the IHO's determination that the district denied the student a FAPE by not providing the student with instruction in the LRE asserting that the student was placed in a general education class. However, the IHO's finding regarding LRE was not related to the recommendation of a general education class as contained in the September 2019 IEP and the November 2019 IEP; rather, the IHO determined that the implementation of the student's BIP led to the student being removed from class and isolated from the rest of his class (IHO Decision at pp. 20-23).

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

Accordingly, in this matter, as there was no dispute that the educational program outlined in the student's IEPs set forth the student's LRE and the IHO's determination pertained to whether the student's IEPs were implemented in a manner consistent with LRE principals, the district has not sufficiently provided grounds for reversal of the IHO's LRE determinations and the IHO's finding that the implementation of the student's BIP violated LRE principles is final and binding on the parties.[10]

2. Supplementary School Personnel

While not set forth as a special factor in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR

[10] The district also does not appeal from the IHO's decision to address LRE as an issue in this proceeding as it did with the IHO's child find determination (see Req. for Rev.).

200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

In reviewing the parent's assertion that the student's paraprofessionals were not adequately qualified to address his needs, the IDEA requires that services must be provided by appropriately certified or licensed personnel, but the only further relevant inquiry is whether the personnel are able to implement the IEP, not whether they have specific training in teaching students with the student's disabilities (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]).

The IHO determined that the district failed to provide the student with paraprofessionals trained in behavioral management, which effectively denied the student meaningful educational benefits because it led to the BIP not being "implemented with fidelity" and to the student not receiving behavior management strategies that would have prevented him from being "consistently removed from the classroom and becom[ing] isolated from his peers" (IHO Decision at pp. 26-27). In making this determination, the IHO appears to have relied on testimony by the school principal, who testified that the student had four paraprofessionals assigned to him at one time and she was uncertain if they all had behavior management training; however, when the student received services from one paraprofessional full-time, that paraprofessional did not have behavior management training (see IHO Decision at pp. 10, 26; Tr. pp. 272, 277). The IHO also noted that the principal testified that when the student began receiving services consistently from the one paraprofessional, the student's behaviors improved (IHO Decision at p. 22). This reference appears to relate to the principal's testimony that she did not believe the student needed make-up SETSS because the consistent provision of paraprofessional services limited the student's behavior of

leaving the classroom and there were no gaps to be made up (Tr. p. 317; see IHO Decision at p. 10). Additionally, without citation to the hearing record, the IHO found:

> Specifically, the untrained Paraprofessionals were neither capable of adequately providing assistance in remediating the Student's interfering and disruptive behaviors; instructing the Student; redirecting the Student; nor implementing the appropriate strategies to address the Student's academic and social/emotional management needs, so that he would not be consistently removed from the classroom and become isolated from his peers during the 2019/2020 school year. (IHO Decision at p. 27).

In the request for review, the district appeals from the IHO's determination that the district did not provide the student with "a full-time adequately trained Behavioral Paraprofessional" during the 2019-20 school year and notes that two of the student's paraprofessionals received training to be a paraprofessional and were effective in implementing the student's BIP (Req. for Rev. ¶20; IHO Decision at p. 33). Reviewing the testimony cited by the district, the school principal testified that implementing the BIP was a part of the paraprofessionals' job and she assumed that they were qualified to do it (Tr. p. 273). She further testified that the paraprofessionals received in-house staff training and that two of the student's paraprofessionals were effective in implementing the student's behavioral supports (id.). In addition, she testified that when the student left the classroom, the student's paraprofessionals went with him to redirect him, and if they were unsuccessful, they would call for assistance (Tr. p. 276).

In this instance, while the district appeals from the IHO's finding that the paraprofessionals were not adequately trained, the district has not offered a compelling argument to overturn the IHO's determination that district staff were unable to implement the student's BIP; citing only to general testimony indicating that some district staff implemented the BIP effectively. Accordingly, similar to the district's slipshod appeal of the IHO's LRE findings, the district has not set forth grounds for reversal or modification of the IHO's findings on this matter " (see 8 NYCRR 279.4[a]; 279.8[c][2], [4]).

3. Testing Accommodations

The district argues that the IHO erred in finding that the district denied the student a FAPE by failing to provide testing accommodations during the administration of the student's G/T exam. The district further argues that the IHO's award of SETSS as compensatory educational services is not appropriate to remedy a situation where the student is placed in an accelerated classroom.

In this matter, the student's November 2019 IEP recommended the following testing accommodations: motor breaks of up to five minutes between tasks or after 30 minutes of task completion, a separate location with no more than 15 students and with minimal distraction, and gestural prompts (two light taps on the desk every 15 minutes to refocus attention during testing, when off task) (Dist. Ex. 16 at p. 13). The IHO reviewed the testimony of the teacher who proctored the G/T exam, noting that the student took the exam in a group of five students, that the student had breaks during the verbal portion of the exam while waiting for questions to be posed, and that she did not recall if the student got up to take motor breaks (IHO Decision at pp. 7-8). Reviewing the G/T exam log, the IHO determined that the student only received one break for the duration of the G/T exam which consisted of 1 hour and 40 minutes (id. at p. 28). Specifically,

the G/T exam log indicated that the student took a five-minute bathroom break at the conclusion of the nonverbal portion of the G/T exam (Dist. Ex. 7 at pp. 1-2). Weighing the testimony against the exam log, the IHO found that the district denied the student a FAPE because the district failed to provide the student with any other testing accommodations as mandated by the November 2019 IEP.

Based on the above, even if the district failed to implement the student's testing accommodations as described by the IHO, it does not constitute a material or substantial deviation from the student's IEP such that it would constitute a denial of a FAPE (see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]). Accordingly, the IHO's determination on this point must be overturned.

4. Relief

Having found that the scope of the impartial hearing did not include claims related to the 2018-19 school year and that there was an insufficient basis presented by the district to overturn the IHO's findings related to LRE and the implementation of the student's BIP for the 2019-20 school year, I next turn to the district's appeal from the IHO's award of compensatory SETSS.

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 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also 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]). 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"]).

Initially, the parent's request for compensatory SETSS in this matter was directly related to the parent's request that the student be placed in a gifted and talented class (Dist. Ex. 2). The parent specifically requested that the student receive "at least 4 hours of SETTS services per week to supplement the academic standards that he would have missed as a result of late placement [in a gifted and talented class]" (id.). The parent repeated this request at the hearing (Tr. pp. 3-4). At the conclusion of the hearing, the parent then requested 1,644 hours of SETTS for the student due to "lost instructional time from the end of his Kindergarten year, his entire first grade year, up to the beginning of his second grade year" (IHO Ex. II at p. 10). Based on the IHO's determinations that the district denied the student a FAPE for the 2018-19 and 2019-20 school years, the IHO found that the student was entitled to an award of 624 hours of SETSS as compensatory educational services based on the district's failure to offer the student a FAPE from January 2019 through October 2020 (IHO Decision at p 32).

However, throughout the hearing, the hearing record, as well as the parent, indicated that, academically, the student excelled (Tr. pp. 315-16, 376, 381-82, 395-96; Parent Exs. J; K; Q; Dist. Exs. 30; 31; IHO Ex. II at pp. 4-5). In particular, the student's report card for the 2019-20 school year shows that the student was proficient or excelled in the standards for reading, writing, and mathematics (Parent Ex. K; Dist. Ex. 31). Additionally, as the student was excelling academically, it is unclear how SETSS would be an appropriate compensatory remedy. SETSS typically refers to special education teacher support services; however, the term SETSS is not defined by State regulation and cannot currently be found in any published federal or State policy documentation (see, e.g., Application of a Student with a Disability, Appeal No. 16-056). In this matter, the school principal described SETSS as "extra help outside the classroom for someone who might be struggling academically" (Tr. p. 377). The hearing record indicates that the student received SETSS pursuant to a mediation agreement in order to make up for instructional time lost during the 2019-20 school year (see Tr. pp. 260-65; Parent Exs. O; P; Q). The SETSS provider worked on reading and writing with the student and reported that as of July 2020 (end of first grade), the student had mastered a number of 2nd and 3rd grade writing processes and was able to "navigate all work on a 2nd and 3rd grade level" (Parent Ex. Q at p. 2).

Considering the above, and the IHO's determinations regarding FAPE, the hearing record supports a conclusion that the student already occupies "the same position [he] would have occupied but for the school district's violations of IDEA" (Reid, 401 F.3d at 518). Accordingly, the IHO's decision denying the parent's request for compensatory SETSS must be overturned.

Additionally, the parent's main contention in her due process complaint notice and her amended due process complaint notice was that the district failed to provide appropriate testing accommodations for the student during the G/T exam and the student should have been placed in a gifted and talented class (**see** Dist. Exs. 1; 2). In the instant matter, the more appropriate remedy, to make up for what the parent described as her issue with the district's placement, would have been for the student to re-take the G/T exam with appropriate test accommodations in place. However, the hearing record indicates that the student is currently attending a gifted and talented class as of November 2, 2020 (Tr. 221; Dist. Ex. U at p. 1). Furthermore, the school principal testified that the district did not see the need to move the student from the gifted and talented classroom as all of the students who are currently in the program are "grandfathered in" (Tr. p. 308). Further, she testified that typically, it is not the school's practice to pull the students out of these classes (id.). Thus, it appears that based on the parent's originally requested relief, the student "may be deemed 'whole'," making further award of educational services unnecessary (Smith v.

Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]). A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Accordingly, I find that the IHO's award of SETSS in this matter is unnecessary and not appropriate as addressed above, and must be reversed.

C. Res Judicata

The district appeals from the IHO's finding that the parent is not restricted by res judicata from filing a new due process complaint notice to address issues that were not properly raised in the due process complaint notice for this matter. The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]). Accordingly, in order to make such a finding, an analysis must be made comparing the claims raised this proceeding to whatever claims are raised by the parent in a subsequent proceeding; as there is no subsequent proceeding pending, the IHO's finding is premature. An IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]). Thus, the IHO's finding as to a potential subsequent due process complaint notice to be filed by the parent is reversed.

VII. Conclusion

As discussed above, the evidence in the hearing record demonstrates that the IHO erred in addressing claims related to the 2018-19 school year and in finding that the district failed to offer the student a FAPE for the 2019-20 school year based on implementation of testing accommodations, but there is insufficient support provided by the district to overturn the IHO's findings regarding LRE and the implementation of behavioral supports for the student during the 2019-20 school year. However, considering the student's performance in the district's program, the IHO's award of compensatory SETSS is not an appropriate compensatory education award for the student.

I have considered the parties' remaining contentions and find they need not be addressed in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 29, 2021 is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2018-19 school year, found that the district's failure to implement testing accommodations resulted in a denial of FAPE for the 2019-20 school year, ordered the district to fund compensatory educational services consisting of 624 hours of SETSS, and directed that the parent is not restricted by res judicata.

Dated: **Albany, New York**
March 25, 2021

STEVEN KROLAK
STATE REVIEW OFFICER