The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-065

Application of the BOARD OF EDUCATION OF THE SUFFERN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq.

Gina DeCrescenzo, PC, attorneys for respondents, by Benjamin Brown, 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 determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2017-18, 2018-19, and 2019-20 school years were not appropriate and which ordered prospective relief. The parents cross-appeal from that portion of the IHO's decision which denied their requests for tuition reimbursement and compensatory educational services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

In this case, the parties' familiarity with the student's educational history is presumed; as such, this decision will only refer to those facts essential to explain the resolution of the limited issues raised in either the district's appeal or the parents' cross-appeal. Briefly, the student—who has primarily attended district public schools since kindergarten—has continuously received special education services through the Early Intervention program, the Committee on Preschool Special Education (CPSE), and the CSE (see Dist. Ex. 22 at p. 2). During elementary school, the hearing record reflects that the student, who presented with global developmental and cognitive

deficits, began receiving varying levels, frequencies, and combinations of special education services, including resource room, direct and indirect consultant teacher services, a 12-month school year program, speech-language therapy, occupational therapy (OT), counseling, and the assistance of a paraprofessional within the classroom settings (see generally Dist. Exs. 2; 12-22).[1] In addition, the student began receiving academic intervention services (AIS) for reading in kindergarten (see Dist. Ex. 22 at p. 2).

The parties' dispute in this case concerns the special education programs recommended in the student's IEPs created for middle school during the 2017-18 school year (sixth grade), 2018-19 school year (seventh grade), and 2019-20 school year (eighth grade) (see generally Dist. Ex. 1). The hearing record reflects that, over the course of these three school years, a subcommittee of the CSE convened for requested reviews, program reviews, or annual reviews and developed the following IEPs as a result of those meetings: a November 2017 IEP, a February 2018 IEP, an August 2018 IEP, a January 2019 IEP, an April 2019 IEP, and a June 2019 IEP (see generally Dist. Exs. 6-11). In addition to providing the student with the special education programs recommended in the IEPs during sixth, seventh, and eighth grade, the district also provided the student with a support class, AIS reading support, and three to five hours per week of after-school tutoring in reading (1:1 setting), which were services not recommended in the IEPs (see Tr. pp. 56-60, 92-99, 130, 200-08, 232-34, 238-42, 289, 314-15, 372, 477-81, 490-92, 498-500, 508-10, 797-98, , 813-16, 844, 868-69, 871-73, 879-80, 888, 916-17, 919, 921-22, 933-34; see generally Dist. Exs. 6-11).[2]

[1] Over the course of three dates in July 2017 (at the conclusion of fifth grade), the parents obtained a neuropsychological evaluation (July 2017 neuropsychological evaluation) of the student to "gain an updated understand of [her] cognitive, academic, and psychological profiles to inform ongoing educational and treatment planning" (see Dist. Ex. 22 at p. 1). In addition to gathering and reporting the student's developmental history, medical history, educational history, evaluation and treatment history, family history, and behavioral observations, the evaluator administered a battery of assessments to measure the student's intellectual functioning, language functioning, visual and motor functioning, attention and executive functioning, learning and memory, academic functioning (reading, written expression, mathematics), social/emotional functioning, and adaptive functioning (id. at pp. 4-13). The student's scores reflected a full-scale intelligence quotient (IQ) of 67 (extremely low range) and, overall, that a vast majority of the student's scores fell below the 10th percentile, with notable exceptions for the student's adaptive functioning (id. at pp. 18-23 [comprising the test data summary sheets]). Given the student's testing results, the evaluator recommended, among other things, individualized learning supports in English language arts to include a "systematic, phonics-based, multi-sensory reading instruction" (at least three times per week), as well as individualized learning support in mathematics (multi-sensory instruction that included the "use of manipulative and concrete, real-life examples," and a "spiral learning approach") (id. at pp. 15-17). Testimony at the impartial hearing reflected that the evaluator's recommendation for reading instruction was not incorporated into the student's IEPs because the district had already been implementing the same via the AIS reading support and individual after-school tutoring services (see Tr. pp. 232-34, 372; see also Tr. pp. 509-10 [reflecting testimony that the student's after-school tutoring services were not recommended in an IEP because the witness had never known any other student to receive similar tutoring]; Tr. pp. 523-24 [reflecting additional testimony that neither the support class, nor AIS reading support or after-school tutoring would be placed in an IEP because these services were not considered to be special education services]).

[2] At the impartial hearing, the support class—which was not recommended as a service in the student's IEPs—was described as being programmatic and similar to resource room (Tr. pp. 40, 130, 308, 313, 523-27; see generally Dist. Exs. 6-11). In addition, testimony reflected that the support class was taught by a special education teacher (see Tr. pp. 287-89).

Throughout the CSE subcommittee meetings held for middle school, the parents raised concerns about the student's progress and, more particularly, the difficulties encountered by the student, including but not limited to, her continued difficulties in the area of reading (see Dist. Ex. 6 at pp. 1-2, 6; 7 at pp. 1-2, 8; 8 at pp. 1-3, 8-9; 9 at pp. 1-2; 10 at pp. 1-2; 11 at pp. 1-2). By a due process complaint notice dated November 12, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (see Dist. Ex. 1 at pp. 1-2). Relevant to this appeal, the parents asserted that the district failed to assess the student's vocational skills, aptitudes, and interests consistent with its obligation under State regulation; the district failed to offer any methodologies or strategies based on peer reviewed research; the district failed to provide the student with appropriate instruction in reading (i.e., language arts) and mathematics; and the student's IEPs were not reasonably calculated to enable the student to make progress appropriate in light of her circumstances (id. at pp. 12-16). As relief, the parents requested, in part, that an IHO find that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (id. at p. 17). Additionally, the parents requested, as relevant to this appeal, an order directing the district to conduct a vocational evaluation of the student, provide the student with compensatory educational services in reading (1:1 tutoring using an Orton-Gillingham program), provide the student with instruction in "functional academics" and counseling using the cognitive behavioral therapy (CBT) modality, and reimburse the parents for the costs of the student's unilateral placement at boarding camp during summer 2018 and summer 2019 (id. at pp. 4, 17-18).

A. Impartial Hearing Officer Decision

On December 16, 2019, the parties proceeded to an impartial hearing, and the IHO conducted a prehearing conference on this date (see IHO Ex. I; IHO Decision at p. 1). The impartial hearing resumed on April 28, 2020 and concluded on September 3, 2020, after nine days of proceedings (see Tr. pp. 1-2015; IHO Decision at p. 1). On or about October 12 and 13, 2020, each party submitted a closing brief to the IHO for consideration (see IHO Exs. IX at p. 29; X at p. 1; IHO Decision at p. 1).

In a decision dated January 6, 2021, the IHO found that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years; however, the IHO denied the parents' request for compensatory educational services and reimbursement for the costs of the student's unilateral placement at boarding camp for summer 2018 and summer 2019 (see IHO Decision at pp. 42-60).[3] As relief, the IHO ordered the district to conduct a vocational assessment of the student (unless it had already done so) and to convene a CSE meeting to consider the results of that assessment and to modify the student's IEP to include the following: individualized instruction in reading and mathematics (for at least three 50-minute sessions per week), individual speech-language therapy (for at least two 30-minute sessions per week), and to develop a transition plan (including post-secondary goals and appropriate instruction, services, and supports) (IHO Decision at pp. 60-61).

[3] For the purpose of analysis, the IHO noted that the parents' challenged a portion of the 2017-18 school year based upon the November 2017 IEP and the February 2018 IEP, the entire 2018-19 school year based on the September 2018 IEP and the January 2019 IEP, and the entire 2019-20 school year based upon the April 2019 IEP and the June 2019 IEP (see IHO Decision at p. 5).

In reaching the determination that the district failed to offer the student a FAPE, the IHO concluded that, substantively, the student's IEPs were not reasonably calculated to enable the student to make progress in reading and mathematics appropriate with her abilities or circumstances, consistent with the standard enunciated in Endrew F. v. Douglas County School District RE-1, 580 U.S. __, 137 S. Ct. 988, 1001 (2017) (see IHO Decision at pp. 48-52). Specifically, the IHO concluded that the district failed to sustain its burden to establish that the reading and mathematics services it provided to the student "as part of her IEP[s] were reasonably calculated to allow her to make progress in reading [and math] that was appropriate in light of her circumstances" and "denied her a FAPE" (IHO Decision at p. 51).

As part of the analysis of whether the district offered the student a FAPE, the IHO preliminarily concluded that, based upon the evidence, the district "provided services to [the student] that were not specifically listed as programs and services" in the IEPs (IHO Decision at p. 48). According to the IHO, these programs and services included "after-school tutoring, AIS, and [a] support class" (id.). After noting the limits the Second Circuit placed on the use of "testimony about services that [were] not on a student's IEP in order to demonstrate that the IEP provided a FAPE" in R.E. v. New York City Department of Educ., 694 F.3d 167, 185-87 (2d Cir. 2012), the IHO concluded that the support class was "part of [the student's] program of special education and related services" and thus, would be included in the analysis of whether the district offered the student a FAPE (id. at pp. 48-49). The IHO also found, however, that the hearing record failed to contain any similar evidence that the AIS and after-school tutoring services provided to the student could be considered as part of the student's program and thus, would not be part of the FAPE analysis (id. at p. 49). More specifically, the IHO found that although the evidence in the hearing record established that the student made inconsistent progress in reading, the student "regressed" in all areas of mathematics (id. at pp. 50-52). The IHO also found that any progress in the student's reading was attributable to services provided to the student outside of her IEPs, namely, the AIS and after-school tutoring services, and that the district failed to establish that the student's progress was a "result of the reading instruction" provided through her IEPs—meaning, as delivered within the ICT placement, the 15:1 special class placement, or through use of "balanced literacy instruction," an "'eclectic approach,'" or the use of "Achieve 3000" (id. at pp. 51-52). Relatedly, the IHO determined that, with respect to the reading instruction provided to the student through AIS and after-school tutoring services, the evidence did not support the parents' contention that the district failed to implement strategies or methodologies based on peer-reviewed research (id. at p. 53).

As a separate analysis, the IHO considered the parents' request to be reimbursed for the costs of the student's attendance at boarding camp during summer 2018 and summer 2019 (see IHO Decision at pp. 57-58). The IHO initially concluded that the district failed to establish that the recommendation for a 15:1 special class placement with counseling and speech-language therapy services at a BOCES site for summer 2018, and the recommendation for a 15:1 special class placement with counseling, speech-language therapy services, OT, and vision services at a different BOCES site for summer 2019, were appropriate to meet the student's needs (id. at p. 57). Thus, the IHO found that the district failed to offer the student a FAPE (id.). Next, the IHO turned to the question of whether the boarding camp the student attended during both summer 2018 and summer 2019 was an appropriate unilateral placement (id.). The IHO concluded that the parents failed to sustain their burden of proof on this issue because the hearing record contained "limited evidence" concerning the educational services the student received, and failed to contain any

evidence regarding the student's "classroom setting, her instruction services, or the frequency and duration of the tutoring sessions" she received at boarding camp for either summer 2018 or summer 2019 (id.). With respect to equitable considerations, the IHO found that, even if the parents had prevailed in demonstrating that the boarding camp was appropriate to meet the student's needs, the evidence reflected that the parents did not consider the district's recommended placements for summer 2018 or summer 2019, and they failed to inform the district "accordingly" (id. at p. 58). In addition, the IHO found that the amount of reimbursement requested was not reasonable, and moreover, that the hearing record failed to contain any evidence that the student required a residential placement, as offered by the boarding camp (id.). As a result of the foregoing, the IHO denied the parents' request to be reimbursed for these costs (id.).

With regard to the parents' request for compensatory educational services, the IHO first noted that although the parents' due process complaint notice included a request for Orton-Gillingham instruction and CBT counseling, the parents specified in their closing brief to the IHO that they sought 700 hours of literacy instruction and "added a claim for 140 hours of executive functioning instruction," but failed to reiterate any request for CBT counseling services (IHO Decision at p. 58). Because the parents failed to request executive functioning instruction in the due process complaint notice and because the evidence in the hearing record did not support such an award, the IHO denied the newly added request for compensatory educational services in this area (id. at pp. 58-59). The IHO also denied the parents' request for CBT counseling, noting there was no evidence presented to support it, it was not raised in the parent's closing brief, and the student received CBT counseling in the seventh and eighth grades (id. at p. 59).

Next, the IHO explained the rationale underlying his determination to deny the parents' request for 700 hours of literacy instruction as compensatory educational services (see IHO Decision at pp. 59-60). The IHO explained that the aim of an award of compensatory educational services was to "bring the [student] to the place [the student] would have been but for the school district's failure to provide her with a FAPE" (id. at p. 59). The IHO also noted that equitable considerations were relevant to fashioning an award of compensatory educational services (id.).

Initially, the IHO found that, given the student's cognitive deficiencies, it was "not possible to determine exactly what [the student's] progress w[ould] be or to establish a reasonable final benchmark" (IHO Decision at p. 59). According to the IHO, it would therefore be "difficult, if not impossible, to determine where [the student] would have been had the [d]istrict not denied her a FAPE" (id.). The IHO further noted that the parents failed to "present consistent and coherent evidentiary support for an award of compensatory literacy instruction," and pointed to testimonial evidence from one witness, who described the student's need for "at least forty to fifty minutes per day of reading instruction for a period of two-to-four years" and who thereafter testified that the student needed "three or six years of such instruction" and "'hours and hours and hours'" of instruction (id.). According to the IHO, the same witness then testified that the student required "'magnitudes of hundreds of hours of intensive reading instruction'" (id.). The IHO then pointed to another witness's testimony, which indicated that the student required 45-minute to 60-minute sessions of daily reading instruction—or up to 90 minutes per day—"for three years at a minimum" (id.).

As to equitable factors, the IHO indicated that the student had received AIS and after-school tutoring services from the district for the school years in question, which helped the student

make progress in reading (see IHO Decision at p. 59). The IHO opined that, through these additional services, the district was "providing compensatory education in real time to [the student] for its failure to provide her appropriate reading instruction through her IEP" (id.). As the evidence in the hearing record demonstrated that the student made progress in reading "commensurate with her unique circumstances," the IHO concluded that compensatory educational services in reading were not warranted (id.).

As a final point, the IHO indicated that the parents "resisted" the district's efforts, as well as the "sound judgment of the other members of the CSE and [the evaluator who conducted the July 2017 neuropsychological evaluation of the student]," in recommending a 15:1 special class placement for the student for sixth grade and a 12:1+1 special class placement for the student for seventh and eighth grades (IHO Decision at p. 59). In addition, the IHO noted that the parents "withheld" the July 2017 neuropsychological evaluation report from the district for "several months" due to the fact that the evaluator recommended a "small classroom setting" for the student within the evaluation report (id.). According to the IHO, although the parents were "otherwise cooperative with the CSE, this d[id] not outweigh the importance of [the parents'] resistance to placing [the student] in a small classroom setting in connection with determining whether [the student] [was] eligible for an award of compensatory education" (id. at pp. 59-60).

Ultimately, although the IHO denied the parents' requests for tuition reimbursement for boarding camp and compensatory educational services consisting of literacy services, the IHO ordered the district to provide the following relief: conduct a vocational assessment of the student (unless it had already done so) and convene a CSE meeting to consider the results of that assessment and modify the student's IEP to include individualized instruction in reading and mathematics (for at least three 50-minute sessions per week), individual speech-language therapy (for at least two 30-minute sessions per week), and develop a transition plan (including post-secondary goals and appropriate instruction, services, and supports) (IHO Decision at pp. 60-61).[4]

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO—while properly finding that the district "offered [the student] educational services that were reasonably calculated to enable her to make appropriate gains in the area of reading"—erred by concluding that the district failed to offer the student a FAPE "on the basis that some of the identified reading services were general educational supports that were provided outside of her IEP." The district also argues that the IHO erred by finding that the district failed to sustain its burden to demonstrate the appropriateness of the mathematics supports recommended in the student's IEPs. In addition, the district contends that the IHO exceeded his jurisdiction by directing the district to develop an IEP for the upcoming 2020-21 school year that included specific programs and supports. Next, the district asserts that the IHO erred by directing the district to conduct a vocational assessment of the student and to convene a CSE to review the assessment results absent a violation of the IDEA. Finally, the district contends that the IHO erred by finding that the speech-language therapy recommendation for one

[4] To be clear, the IHO ordered the district to conduct a vocational evaluation of the student consistent with its obligations to do so under State regulation given the student's age, not because the absence of such an evaluation violated the IDEA or otherwise constituted a basis upon which to conclude that the district failed to offer the student a FAPE (see IHO Decision at pp. 45-46, 60).

30-minute session of individual therapy and one 30-minute session of therapy in a small group was not appropriate to meet the student's needs. As relief, the district seeks to overturn the IHO's findings.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision on the issues appealed by the district. The parents also argue to dismiss the district's request for review for the failure to timely serve the notice of request for review.[5] As a cross-appeal, the parents argue that the IHO erred by finding that the support class was part of the student's special education program together with the recommendations in IEPs, and therefore, the IHO erred by considering the supports and services delivered to the student via the support class when analyzing whether the student's IEPs offered the student a FAPE. Next, the parents argue that the IHO erred by finding that the student made progress in reading that was appropriate in light of her circumstances. The parents also argue that the IHO erred by finding that the district provided the student with methodologies or strategies based on peer-reviewed research. In addition, the parents contend that the IHO erred by finding that the student was not entitled to compensatory educational services and that equitable factors weighed against their request for compensatory educational services as relief. Finally, the parents assert that the IHO erred by failing to order the district to reimburse them for the costs of the student's unilateral placement at boarding camp for summer 2018 and summer 2019.[6] As relief, the parents seek an order granting the relief the parents requested in the "underlying proceeding."

In an answer to the parents' cross-appeal, the district responds to the allegations and generally argues to uphold the IHO's findings concerning the issues raised in the parents' cross-appeal and to dismiss the parents' cross-appeal. The district also argues, however, that the parents failed to properly serve the notice of intention to cross-appeal, and therefore, the parents' cross-appeal must be dismissed on this basis. In a reply to the parents' answer to the request for review, the district acknowledges that the notice of request for review was mistakenly omitted when the

[5] A notice of request for review accompanies a request for review and generally informs the opposing party of its obligation to appear and respond to the allegations in the request for review, where to locate available forms for this purpose, information concerning the service of said responses upon a party, and information concerning the filing of those papers with the Office of State Review (see 8 NYCRR 279.3).

[6] Many of the IHO's findings in the final decision—to wit, those related to parent participation; the failures to conduct a functional behavioral assessment (FBA), develop a behavioral intervention plan (BIP), or conduct a vision assessment; the failure to implement the student's IEPs; the failure to provide the student with appropriate speech-language therapy; the failure to meet the student's social/emotional needs; the failure to provide the student with appropriate support to retain material; the failure to accommodate the student's visual impairment; the failure to provide the student with adequate instruction, supports, and services; the failure to appropriately classify the student; the failure to educate the student in the least restrictive environment (LRE); the failure to reimburse the parents for the full costs of the July 2017 neuropsychological evaluation of the student; the failure to order independent educational evaluations (IEEs) in neuropsychology, speech-language, OT, and behavior; and the failure to order reimbursement for the costs of OT provided at the parents' expense—were adverse to the parents (see IHO Decision at pp. 44-48, 52-56, 58-60). To the extent that the parents do not cross-appeal these adverse findings, the IHO's determinations on those issues are final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

district served the request for review upon the parents on February 15, 2021, but that this error was corrected when discovered on February 17, 2021 (see Reply & Answer to Cr. App. ¶¶ 1-6).

Finally, in a reply to the district's answer to the cross-appeal, the parents argue that the notice of intention to cross-appeal was properly served pursuant to State regulations. Alternatively, the parents contend that the district had actual notice of their intention to cross-appeal.

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]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

[7] 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).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters—Improper Service

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party . . . a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]). A respondent who wishes to cross-appeal to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party, in the manner prescribed for the service of a request for review pursuant to section 279.4 of this Part, a notice of intention to cross-appeal within 30 days after the decision of the impartial hearing officer. (8 NYCRR 279.2[d]). In addition, "[e]very . . . notice of intention to cross-appeal shall be accompanied by a case information statement, which shall identify those issues the party wishes to be reviewed by a State Review Officer, and may be made on a form prescribed by the Office of State Review." (8 NYCRR 279.2[e]). Whether the petitioner is a school district or a parent, the notice of intention to cross-appeal (along with the accompanying case information statement) provides a petitioner with advance notice of a respondent's imminent challenge to an IHO's determination, which may give a petitioner additional time to contemplate a position to be stated in an answer to a cross-appeal—time that is particularly valuable in light of the short time frame allotted for a petitioner to answer a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[b]).

The district asserts that the parents' service of the notice of intention to cross-appeal upon the assistant superintendent of human resources was improper, as he was not an individual described by State regulation and was not otherwise designated by the board of education to accept service (see Reply and Answer to Cross-Appeal ¶¶ 7-12). The district attaches an affidavit by the assistant superintendent of human resources, attesting to his version of the events that occurred at the district's administrative offices on February 5, 2021, when an individual appeared with "papers" to give to the district clerk, the superintendent of schools, or to himself—asking for him by name (Reply and Answer to Cross-Appeal Aff. at ¶¶ 1-2). Notably, the assistant superintendent of human resources attested that he was not—either at that time or currently—designated by the board of education to accept service on the district's behalf (id. at ¶ 3). He also attested that he "made no statements or took any actions to in any way suggest that [he] had been so authorized" to accept service on the district's behalf (id. at ¶ 4).

In response, the parents assert that the notice of intention to cross-appeal was properly served and also produce an affidavit by the process server who served the document (see Reply Ex. C). The process server's version of events differed slightly from that attested to by the assistant superintendent of human resources (compare Reply and Answer to Cross Appeal Aff., with Reply Ex. C). According to the process server's affidavit, when she told the assistant superintendent of

human resources "what the documents were and when asked, he stated that he was authorized to accept service" on behalf of the district (Reply Ex. C at p. 2). In addition, the process server attested that, having reviewed the assistant superintendent of human resources' affidavit, she did not—contrary to his statement—ask for him by name (id.).

The parents also provided a copy of the affidavit of service completed by the process server on or about February 10, 2021, which noted that the notice of intention to cross-appeal had been served upon the "Assistant Superintendent" on February 5, 2021 and that he was "authorized to accept service on behalf" of the district (Reply Ex. B). In light of the foregoing, the parents contend that they relied in good faith upon the representations made when serving the document and met the State regulation requirements.

Alternatively, the parents contend that even if the service of the notice of intention to cross-appeal was not technically proper, the district had actual notice by virtue of an email communication with the district's attorney and through the interactions with the assistant superintendent of human resources. The parents argue that, prior to attempting personal delivery of the notice of intention to cross-appeal upon the district, they sought consent from the district's attorney to accept service on the district's behalf in an email dated February 4, 2021; the district's attorney advised he was not authorized to accept service (see Reply Ex. A at pp. 1-2).[8] As such, the parents argue that the district cannot now claim surprise or prejudice.

Here, under the circumstances presented, it is difficult, if not impossible, to discern with any precision the events that took place on February 5, 2021, based solely upon the affidavits presented of those events. Yet, assuming for the sake of argument that the parents' failed to properly serve the district with the notice of intention to cross-appeal, the district has not asserted that the parents' failure to properly serve the notice of intention to cross appeal (or case information statement) prevented it from properly responding to the parents' cross-appeal or that it was otherwise unduly prejudiced by the parents' lack of proper service of the notice of intention to cross-appeal (see Answer & Reply ¶¶ 7-12). An unintentional defect in the service of the notice of intention to seek review that is technical in nature only may cause disruptions or delays in the State-level review process, but rarely results in outright dismissal of a party's pleading, at least in the first instance. (see Application of the Dep't of Educ., Appeal No. 21-049; Application of a Student with a Disability, Appeal No. 18-083).[9] However, counsel for the parents is cautioned that a process server must be given explicit direction—i.e., the names, addresses, and titles of individuals who may be served to comply with State regulation—and that, in the future, a process server's failure to locate and identify the proper individual to serve may be held against the party who engaged those services. Additionally, if non-compliance with State regulation requirements becomes a pattern, counsel will risk dismissal of his clients' claims. Accordingly, in my discretion, I will review the parents' cross-appeal, to the extent necessary below, notwithstanding any alleged

[8] At the time the attorney for the district advised the parents that he was not authorized to accept service on behalf of the district (February 4, 2021), the attorney for the district already had the parents served with a notice of intention to seek review and case information statement (January 26, 2021), which the attorney executed on behalf of the district.

[9] Service defects related to a party's request for review that initiates a proceeding in accordance with 8 NYCRR 279.4 or other subsequent pleadings can and sometimes do have more severe legal consequences.

failure to properly serve the district with a notice of intention to cross appeal (or a case information statement).

B. FAPE

With respect to whether the district offered the student a FAPE for the school years in question, the IHO concluded that the district failed to sustain its burden of proof to establish that the reading and mathematics services it provided to the student "as part of her IEP[s] were reasonably calculated to allow her to make progress in reading [and math] that was appropriate in light of her circumstances," and thus, failed to offer the student a FAPE (IHO Decision at p. 51).[10]

With respect to reading, the district contends that the IHO erred by concluding that the district failed to offer the student a FAPE "on the basis that some of the identified reading services were general education supports that were provided outside of her IEP[s]" (District Mem. of Law at p. 17). In support of this contention, the district argues that while the evidence in the hearing record provides "overwhelming support" for the IHO's conclusion that the "collective general and special education services offered to [the student] during the time period at issue enabled her to make progress that was 'appropriate in light of her circumstances,'" the IHO erred by concluding that "such appropriate reading progress was not attributable to IEP reading supports," but was instead, "attributable" to the reading supports—such as AIS and after-school tutoring—provided to the student outside of the IEPs (id.). The district asserts that the IHO's conclusion on this point was "wholly speculative and ignored the fact that school districts almost invariably use a combination of general and special education supports in meetings [their] legal mandate to provide FAPE to students with disabilities in the [LRE]" (id.). As such, the district asserts that the IHO's description of the holding in R.E. as precluding the "'introduc[tion of] testimony about services that [were] not on a student's IEP in order to demonstrate that the IEP provided a FAPE' . . . was wrong on both the law and on the facts" (id., citing IHO Decision at p. 49). While the district claims that the AIS reading support and after-school tutoring in reading were provided to the student "both during and outside of the regular school day in an effort to reach some middle ground with [the student's] mother were an important component of the reading services" provided to the student, the district argues that these services were "certainly not the only reading services [the student] received" during the 2017-18, 2018-19, and 2019-20 school years (see District Mem. of Law at p. 17). The district also argues that the AIS reading supports and after-school tutoring were provided to the student "in addition to the reading services described in [the student's] IEPs" (id.).[11] Consequently, the district contends that nothing in R.E. "negate[s] the importance of general

[10] The district's appeal with respect to the IHO's conclusion that the district failed to offer the student a FAPE is limited specifically to findings made pertaining to reading and mathematics, notwithstanding that the IHO also found, adverse to the district, that the district failed to establish that the special education programs recommended for the student for summer 2018 and summer 2019 were appropriate, and thus, denied the student a FAPE (compare Req. for Rev., with IHO Decision at p. 57).

[11] To be clear, the district fails to point to any specific reading services described in the student's IEPs in support of this contention, or more to the point, any reading services recommended in any of the student's IEPs for the three school years at issue (see Parent Mem. of Law at p. 17). This argument is wholly without merit because even a cursory review of the six IEPs in question reveals that the district never recommended any reading instruction or services as part of the student's special education programs (compare Parent Mem. of Law at p. 17, with Dist. Exs. 6-11).

education supports in the provision of FAPE in the [LRE]" or, as applied to this case, the district's provision of general education reading services to the student "that the parent would support" (id. at pp. 17-18).

In response, the parents argue that the district's position is "inconsistent" with R.E. and moreover, that the Second Circuit's holding in L.O. v. New York City Department of Education, 822 F.3d 95 (2d Cir. 2016) reaffirmed "R.E.'s rule that 'the IEP must be evaluated prospectively as of the time of its drafting' applie[d] even when the student 'was actually educated at the IEP placement'" (Answer & Cross-Appeal at ¶ B, citing L.O., 822 F.3d at 114-15).

A review of the IHO's thorough and well-reasoned decision reflects that, contrary to the district's argument, the IHO did not err in analyzing whether the district offered the student a FAPE based upon the special education programs and services recommended in the student's IEPs and without the services delivered outside of the IEPs—here, the AIS reading supports and the after-school tutoring services. The district's argument regarding the student's progress appears to be results oriented, focusing on the student's progress made after development of the IEP and after the provision of the AIS reading supports and after-school tutoring outside of the IEPs, which the Second Circuit rejected in R.E. and subsequently, in L.O.—a decision that the district's wholly ignores on appeal (R.E., 694 F. 3d at 184-88; L.O., 822 F.3d at 114-15). In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). In so holding, the Court further explained that "[t]his rule recognize[d] the critical nature of the IEP as the centerpiece of the system, ensure[d] that parents w[ould] have sufficient information on which to base a decision about unilateral placement, and put[] school districts on notice that they must include all of the services they intend to provide in the written plan" (R.E., 694 F. 3d at 188). In L.O., the Second Circuit rejected a district's attempt to establish that a student received sufficient speech-language therapy services under an IEP through testimonial evidence that a special education teacher provided the student with "'language acquisition in the class . . . curriculum' by 'collaborat[ing] with the speech and language teacher" (L.O., 822 F.3d at 114). The Court held that the district court's reliance on this testimonial evidence "regarding the provision of additional speech-language instruction in the classroom was error, as it was impermissibly retrospective" (L.O., 822 F.3d at 114, citing R.E., 694 F. 3d at 186). The Court explained that, "although we have previously allowed testimony 'that explain[ed] or justifie[d] the services listed in the IEP,' . . . , this exception [was] not applicable [in the instant matter]" because the special education teacher's testimony reflected a "service that was not provided for in the IEP" (L.O., 822 F.3d at 114-15).

In light of the foregoing, the IHO properly excluded the AIS reading supports and after-school tutoring services from his analysis of whether the student's IEPs were reasonably calculated to enable the student to make progress appropriate in light of her circumstances in the area of reading. As such, there is no reason to disturb the IHO's conclusion that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years on this basis. Given this determination, there is no need to address the district's challenge to the IHO's finding that it also

failed to sustain its burden of proof to establish that the student's IEPs were reasonably calculated to enable the student to make progress appropriate in light of her circumstances in the area of mathematics.[12]

C. Relief

Having found that, consistent with the IHO's decision, the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, the inquiry now turns to the question of relief—and specifically, tuition reimbursement for boarding camp and compensatory educational services—as raised in the parents' cross-appeal.[13]

---

[12] Having dismissed the district's appeal related to the question of FAPE, there is similarly no need to review or discuss the parents' arguments asserted as alternative bases for concluding that the district failed to offer the student a FAPE in the cross-appeal, such as whether the IHO erred by including the support class as part of the FAPE analysis, whether the IHO erred by finding that the student made progress in reading that was appropriate in light of her circumstances, and whether the IHO erred by finding that the district provided the student with methodologies or strategies based on peer-reviewed research (see Answer and Cross-Appeal at pp. 6-8).

[13] To assist in determining what relief, if any, may be appropriate in this case, the undersigned SRO sought additional evidence consisting of any and all IEPs developed for the student for the 2020-21 school year. In response, the district provided the Office of State Review with five IEPs (identified herein as SRO Exs. 1, 2, 3, 4, and 5 consistent with the chronological dates of the IEPs), created in June 2020, August 2020, September 2020, November 2020, and January 2021 for the SRO's consideration. In a letter dated March 25, 2021, the parents indicated that they did not object to the consideration of this additional evidence, but noted that at least a portion of the district's appeal had been rendered moot by virtue of the district's compliance with some of the IHO's directives ordered as relief in the IHO's decision, dated January 6, 2021. Based upon a review of the five IEPs—all of which reflected implementation dates from July 2020 through June 2021—it appears, consistent with the parents' stated position, that a portion of the district's appeal has now been rendered moot. For example, the district appealed the IHO's directives to conduct a vocational assessment of the student and to modify the student's IEP to include reading instruction and speech-language therapy at specific frequencies and durations, as well as a transition plan (compare IHO Decision at pp. 60-61, with Req. for Rev. pp. 8-10). The student's August 2020, September 2020, November 2020, and January 2021 IEPs all include a recommendation for three 60-minute sessions per week of individual reading instruction and include a transition plan (or coordinated set of transition activities) (see SRO Exs. 2 at pp. 1, 11, 18; 3 at pp. 1, 12, 19; 4 at pp. 1, 12, 18-19; 5 at pp. l, 12-13, 19). Upon receipt of the IHO's decision, the CSE convened in January 2021 and recommended an additional, individual speech-language therapy session and reviewed and discussed a recently completed vocational assessment of the student (see SRO Ex. 5 at pp. 1-2, 5). Based upon the foregoing, it is no longer necessary to review that portion of the district's appeal challenging the IHO's directives to conduct a vocational assessment of the student and to modify the student's IEP to include reading instruction and two individual sessions per week of speech-language therapy, as well as a transition plan, as the district's compliance with these directives renders such issues moot. With respect to the district's appeal of the IHO's directive to modify the student's IEP to include individualized instruction in mathematics for a minimum of three 50-minute sessions per week, generally, an award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Upon an independent review and due consideration of the evidence in the hearing record in this matter, I find that the IHO, in a thorough and well-reasoned decision, correctly determined that the student was not entitled to an award of compensatory educational services to remedy the district's failure to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years or to be reimbursed for the costs of the student's tuition at boarding camp for summer 2018 or summer 2019 (see IHO Decision at pp. 57-60). Here, the parents' contention that the student was entitled to an award to cover all three school years is unavailing. This is especially true, where, as here, the evidence in the hearing record supports the IHO's determination that the district's provision of AIS reading supports and after-school tutoring—which, in combination, offered the student reading instruction that ranged between approximately four to seven total hours per week during the school years in question—acted as "real time" compensatory educational services for the failure to provide the student with "appropriate reading instruction through her IEP" (IHO Decision at p. 59). In addition, an independent review and due consideration of the evidence in the hearing record also supports the IHO's determination that, given the student's consistently inconsistent progress in reading and her cognitive deficiencies—and absent sufficient "consistent and coherent evidentiary support for an award of compensatory literacy instruction"—an award of 700 hours of compensatory educational services in literacy (reading) was not warranted as it would not effectuate the purpose of such an award (id.). More specifically, the IHO accurately recounted the relevant facts pertinent to the question of fashioning an award of compensatory educational services, as well as the purpose of this equitable remedy, and he set forth and relied upon the proper legal standard to determine whether the student was entitled to an award of compensatory educational services (id. at pp. 58-60). Moreover, the parents are reminded that, under certain scenarios—as presented by the circumstances in this matter—a district may not be required to provide compensatory educational services as a remedy if the deficiencies have already been mitigated (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]; see generally Application of a Student with a Disability, Appeal No. 17-015).

Thus, overall, the decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions in declining to award compensatory educational services in the area of reading (see generally IHO Decision). Consequently, the parents' arguments do not warrant disturbing the IHO's decision.[14]

[14] Understandably, while the parents believe that the student should receive an hour-for-hour award, the IHO was not obligated to direct such relief and the evidence in the hearing record did not otherwise support this formulation of, or amount of, relief (see Bd. of Educ. of Fayette County, KY v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). While I am sympathetic to the parents' frustration with the district, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). In addition, the purpose of any award of

With respect to the IHO's determination that the parents failed to sustain their burden to establish that the parent's unilateral placement of the student at boarding camp for summer 2018 and summer 2019 was appropriate, an independent review of the evidence in the hearing record supports this conclusion. As found by the IHO, the parents failed to demonstrate that the "'placement provide[d] educational instruction specifically designed to meet the unique needs'" of the student primarily because the hearing record lacked evidence regarding the student's "classroom setting, her instructional services, or the frequency and duration of the tutoring sessions" (IHO Decision at p. 57). Moreover, a review of the evidence in the hearing record reveals that, consistent with the IHO's ultimate finding that equitable considerations weighed against an award of tuition reimbursement, the hearing record failed to include any written notice from the parents to the district concerning their intentions to unilaterally place the student as a boarding camp for either summer 2018 or summer 2019 or to seek public funding for such placement.[15] Similar to the IHO's analysis and conclusions regarding compensatory educational services, an independent review and due consideration of the evidence in the hearing records reflects that the IHO accurately recounted the relevant facts pertinent to the question of an award of tuition reimbursement, including equitable considerations, and that the IHO carefully considered the testimonial and documentary evidence presented by both parties, carefully marshaled and weighed the evidence in support of his conclusions (see generally IHO Decision).

VII. Conclusion

Having determined that that much of the underlying relief granted by the IHO has been provided by the CSE and, therefore, I will vacate the IHO's particular directives to prospectively modify the student's IEP while leaving intact the IHO's findings of fact. The evidence in the hearing record supports the IHO's conclusions that the district failed to establish that it offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, that the parents failed to sustain their burden to establish that the student's unilateral placement at boarding camp for

compensatory educational services is not to maximize the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need. Thus, it would, for certain, be a pyrrhic victory if the delivery of an award of compensatory educational services only served to overwhelm the student or outpace the student's ability to make progress.

[15] Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]).

summer 2018 and summer 2019 was appropriate, and that the IHO properly declined to award compensatory educational services or tuition reimbursement, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 6, 2021, is modified to vacate that portion which portion which directed the district to prospectively modify the student's IEP for the current school year to include specific programs and services.

Dated: **Albany, New York**
April 19, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER