The University of the State of New York

The State Education Department
State Review Officer
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No. 21-097

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq. and Elisa Hyman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her request for compensatory educational services and other relief. The district cross-appeals from that portion of the IHO's decision which awarded relief for the 2018-19 school year. The appeal must be sustained in part, and the cross-appeal must be sustained.

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

Given that the issues in this matter are nearly limited to relief, the parties' familiarity with the detailed facts and procedural history of the case is presumed and, therefore, only a brief summary of events will be recited here. The student transitioned from the Early Intervention Program and began receiving services as a preschool student with a disability during the 2013-14 school year (Parent Exs. VV at p. 2; XX at p. 1). A Committee on Preschool Special Education convened on August 3, 2013 and recommended that the student be placed in a 6:1+3 special class with the related services of individual speech-language therapy, individual occupational therapy

(OT), and individual physical therapy (PT), each two times per week for 30-minute sessions (Parent Ex. XX at pp. 1, 12). The August 2013 CPSE IEP was to be implemented beginning on February 26, 2014 (id.).

According to the parent, a CSE convened on July 2014 and recommended placement in a 10:1+2 special class with related services of speech-language therapy, OT, and PT, each two times per week for 30-minute sessions (Parent Ex. CC at p. 3).[1]

A CPSE convened on March 19, 2015 and recommended placement in an 8:1+2 special class with the related services of individual speech-language therapy, individual OT, and individual PT, each two times per week for 30-minute sessions (Parent Ex. F at p. 13). The March 2015 CPSE IEP was to be implemented on March 19, 2015 and included a recommendation for 12-month services for the 2015-16 school year (id. at pp. 13-14).

Thereafter, a CSE convened on April 14, 2015 to conduct the student's "turning five" review and found the student eligible for special education and related services as a student with autism (Parent Ex. YY at pp. 1, 11). The April 2015 IEP recommended 12-month services and placement in a 6:1+1 special class with the related services of individual speech-language therapy, individual OT, and individual PT, each two times per week for 30-minute sessions (id. at pp. 7-8, 11). The April 2015 IEP was to be implemented beginning on September 9, 2015 (id. at pp. 7-8).

According to the parent, the district provided the parent with prior written notice, dated May 31, 2015, which identified the public school the student would attend for the 2015-16 school year (Parent Ex. CC at p. 7).[2] The parent further indicated that a CSE convened on October 20, 2015 and recommended the same program the student was receiving (id. at pp. 7-8).

A CSE convened on October 11, 2016, continued to find the student eligible for special education and related services as a student with autism, recommended 12-month services and placement in a 6:1+1 special class with the related services of individual speech-language therapy, individual OT, and individual PT, each two times per week for 30-minute sessions (Parent Ex. ZZ at pp. 15-16, 17, 22-24).

A CSE convened on September 15, 2017, continued to find the student eligible for services as a student with autism, recommended 12-month services and placement in a 6:1+1 special class with the related services of individual speech-language therapy, individual OT, and individual PT, each two times per week for 30-minute sessions (Parent Ex. AAA at pp. 9-10, 13-14).

A. Due Process Complaint Notices

The parent filed an initial due process complaint notice on October 19, 2017, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 and 2015-16 school years (Parent Ex. AA at p. 1). In a November 15, 2017 amended due process complaint notice, the parent additionally alleged that the district failed to offer the student a FAPE

[1] The hearing record does not include a July 2014 IEP.

[2] The hearing record does not include the May 31, 2015 prior written notice.

for the 2016-17 school year (Parent Ex. C at pp. 1-2).[3] The parent amended her due process complaint notice a second time on March 26, 2018 (Parent Ex. CC). The parent alleged that the district committed procedural and substantive violations relating to the February 2014, July 2014, and March 2015 CPSEs and the April 2015, October 2015, and October 2016 CSEs and the resultant IEPs, that the district did not appropriately implement the recommended programs, and that the student regressed (id. at pp. 3-10). The parent further asserted that the two-year IDEA statute of limitations did not apply to her claims because the district never provided prior written notice, the district misrepresented that ABA was not offered in district schools, the parent had no way of knowing she could challenge this policy at a hearing and that the district withheld information it was obligated to provide pursuant to the IDEA (id. at pp. 5, 13-14).[4]

In a separate due process complaint notice dated November 15, 2017, the parent asserted that the district failed to offer the student a FAPE for the 2017-18 school year and alleged that the September 2017 IEP was procedurally and substantively deficient and that the district did not properly implement the IEP (Parent Ex. A at pp. 1-2, 6-8).[5, 6]

As relief for denials of FAPE for the 2014-15, 2015-16, 2016-17 and 2017-18 school years, as well as to remedy the alleged "denial of the student's pendency rights," the parent requested compensatory educational services of 1:1 ABA to be provided to the student in school, in the home and in the community, assistive technology and assistive technology training, behavioral support services, OT, PT, speech-language therapy and feeding services, each to be provided at enhanced rates by a provider of the parent's choosing (Parent Exs. A at p. 10; CC at p. 14). The parent also

[3] The November 15, 2017 amended due process complaint notice was entered into evidence twice as parent exhibits C and BB. For purposes of this decision, parent exhibit C will be cited.

[4] The parent also alleged systemic violations of section 504 of the Rehabilitation Act of 1973 (section 504), (29 U.S.C. § 794[a]), the Americans with Disabilities Act (ADA), (42 U.S.C. § 12101 et seq.) and further stated that the case was being filed "pursuant to 42 U.S.C. §1983" (section 1983) (Parent Ex. CC at pp. 1-2).

[5] The parent again alleged violations of section 504, the ADA, and section 1983 (Parent Ex. A at p. 1).

[6] In an interim decision dated November 17, 2017, the IHO declined to consolidate the proceeding pertaining to the 2017-18 school year with the proceeding for the 2014-15, 2015-16 and 2016-17 school years (see July 17, 2018 Interim IHO Decision at pp. 2-3 & Ex. III). However, based upon a subsequent narrowing of the relief sought in the proceeding pertaining to the 2017-18 school year and the agreement of the parties, in an amended interim decision dated July 17, 2018, the IHO consolidated the proceedings (see Tr. pp. 42-43; July 17, 2018 Interim IHO Decision at p. 3). The IHO appended exhibits I to IV to the July 2018 interim decision, with exhibit III constituting the November 2017 interim decision. There is reference during the impartial hearing to hearing dates that occurred (that likely addressed procedural matters), a subpoena, and an interim decision or ruling regarding IEEs in the proceedings pertaining to the 2017-18 school year before that matter was consolidated with the proceeding for the 2014-15, 2015-16, and 2016-17 school years (see Tr. pp. 14-15, 29-30, 52, 73-74, 146); however, the hearing record filed with the Office of State Review does not include transcripts of such hearing dates or the interim decision ordering IEEs. The hearing record does include a copy of the subpoena issued in the proceedings pertaining to the 2017-18 school year (Parent Ex. D). Given the limited nature of the parent's appeal, it does not appear that either party is prejudiced by the district's omission of these documents with its filing of the hearing record in this limited instance; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in an adverse determination (see 8 NYCRR 279.9[a], [b]).

requested reimbursement for out-of-pocket expenses, transportation to and from all services and transportation costs (Parent Exs. A at p. 10; CC at p. 14).[7]

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 8, 2018, and concluded on February 24, 2020, after sixteen days of proceedings (Tr. pp. 1-614).[8] During the impartial hearing, the district asserted that the parent's claims relating to the 2014-15 school year were beyond the IDEA's two-year statute of limitations, conceded that the student had been denied a FAPE for the 2015-16 school year, and stated that it was considering its position on the 2016-17 school year but would not present witnesses (Tr. p. 30). On a subsequent hearing date, the district agreed during questioning from the IHO that it was not defending that the education the district provided to the student was appropriate (Tr. pp. 74-75).

The IHO issued a final decision dated March 24, 2021 (see generally IHO Decision). First, the IHO addressed the district's statute of limitations defense and found that the "parent knew or should have known about her due process rights no more than 2 years from the claims alleged in the November 15, 2017 Due Process Complaint or by November 15, 2015" (id. at p. 14).[9] On that basis, the IHO determined that the parent's claims were viable for part of the 2015-16 school year and for all of the 2016-17, 2017-18, and 2018-19 school years (id.). The IHO further found that the exceptions to the two-year statute of limitations did not apply to the parent's claims and that an allegation of failure to evaluate was not a basis for tolling the statute of limitations except in rare occasions (id. at pp. 14-15).

Based on the district's failure to meet its burden to show that it offered the student a FAPE, the IHO turned to crafting an appropriate award of compensatory education (see IHO Decision at pp. 15-16). The IHO acknowledged that, despite the district's failure to meet its burden, the parent was not entitled to a default judgement consisting of an award of all the compensatory education services requested (id.). The IHO noted that, despite the parent's belief that the award should be consistent with the recommendations of the parent's evaluators, none of the parent's evaluators possessed knowledge of the legal FAPE standard and there was "considerable evidence" that the

[7] The parent also requested an interim order for independent educational evaluations (IEEs); however, in the March 2018 second amended due process complaint notice, she acknowledged that, at that point, the IHO had ordered IEEs in the pending impartial hearing concerning the 2017-18 school year (Parent Exs. A at p. 9; CC at pp. 13, 14).

[8] No testimony was received during the first seven hearing dates (Tr. pp. 1-137). The parties discussed procedural matters and interim relief, set forth their positions regarding the parent's claims, and identified and received exhibits into evidence (see id.).

[9] During the course of the impartial hearing, the IHO issued several interim decisions addressing consolidation, the district's compliance with a subpoena, and interim relief (see July 18, 2018 Interim IHO Decision; November 3, 2018 Interim IHO Decision; Mar. 26, 2019 Interim IHO Decision; May 1, 2019 Interim IHO Decision; July 10, 2019 Interim IHO Decision; Oct. 3, 2019 Interim IHO Decision; Nov. 12, 2019 Interim IHO Decision; Dec. 19, 2019 Interim IHO Decision; Mar. 4, 2020 Interim IHO Decision; Mar. 2, 2021 Interim IHO Decision). In the March 2, 2021 interim decision, the IHO declined to consolidate the pending matter with another proceeding initiated by the parent involving the 2018-19, 2019-20, and 2020-21 school years (Mar. 2, 2021 Interim IHO Decision at pp. 2-3).

student benefitted from the special education services received from the district during the school years in question (id. at p. 16). Based on the evidence in the hearing record, the IHO found he was "constrained to find" that the 6:1+1 special class recommended on the student's IEP(s) did not sufficiently address his needs especially in light of the district's failure to provide evidence in support of its recommendation (id. at p. 17). However, the IHO found that the private psychologist's recommendation for a 1:1 ABA program was not warranted by any observation or report of the student's functioning in the classroom at the time of the CSEs' recommendations for the 6:1+1 special class, noting that there was significant evidence that the student was functioning appropriately and making progress in his special class program according to his teacher (id. at pp. 17-18). As relief, in the form of 1:1 ABA, the IHO awarded two hours per day to supplement the student's instruction for each of the years at issue: 270 hours for a portion of the 2015-16 school year, and 420 hours each for the 2016-17, 2017-18, and 2018-19 school years, totaling 1,530 hours, less the 1,100 hours the IHO had previously ordered as interim relief, amounting to an award of 430 hours (id. at p. 18).

Regarding the parent's request for extended school day services, the IHO determined that an award was "not supported as a matter of law" as the student did "not have very substantial social/emotional and behavior issues at home or school, notwithstanding [his need for] considerable attention to stay on task" (IHO Decision at p. 18).

Turning to related services, the IHO found that the student should have received group speech-language therapy; however, he disagreed with the number of sessions recommended by the parent's evaluator and awarded (27) 30-minute sessions for a portion of the 2015-16 school year and (42) 30-minute sessions for each of the 2016-17, 2017-18, and 2018-19 school years, totaling 153 30-minute sessions (IHO Decision at p. 19). With regard to compensatory OT services, the IHO found that the student did not require substantially more OT than that provided by the district during the school years in question (id.). The IHO further found that the recommendation from the private evaluator was excessive and for the purpose of maximization (id. at p. 20). As such, the IHO determined that, relative to what the student's IEPs had recommended, one additional session per week was sufficient and awarded (27) 30-minute sessions for the portion of the 2015-16 school year and (42) 30-minute sessions each for the 2016-17, 2017-18, and 2018-19 school years, totaling 153 30-minute sessions (id.). The IHO ordered that the ABA services be provided by a licensed special education ABA provider or teacher with experience using ABA at a reasonable market rate not to exceed $200 (id. at p. 23).

For services the student was mandated to receive pursuant to his IEPs, the IHO awarded compensatory educational services for related services that were not delivered due to cancellation on the part of the district and for provider absences in the amounts of (36) 30-minute sessions of speech-language therapy, (31) 30-minute sessions of OT, and (16) 30-minute sessions of PT (id. at pp. 19-20).

As for other relief, the IHO found that assistive technology was appropriate for the student and ordered the district to implement the recommendations made in the assistive technology IEE and provide 20 hours of assistive technology training up to a maximum of 40 hours upon request and to include the parent as appropriate (IHO Decision at p. 20). The IHO also ordered 15 hours of compensatory parent counseling and training for the portion of the 2015-16 school year and 24 hours each for the 2016-17, 2017-18, and 2018-19 school years, totaling 87 hours (id. at p. 21).

Next the IHO directed the district to "make available to [the student] music services available to other N.Y.C. students commensurate with [the student]'s skills, which services shall not interfere with [the student]'s special education program and FAPE" (id.). In conclusion, the IHO stated that he had considered all other requests and claims of the parties and found them to be without merit or insufficiently asserted (id. at p. 22).

IV. Appeal for State-Level Review

The parent appeals and first asserts that the IHO should not have made any findings relative to the 2018-19 school year after denying the parent's request for consolidation but that, to the extent he did, the relief he awarded was insufficient. In addition, the parent alleges that the IHO failed to hold the district to its evidentiary burdens and failed to develop the hearing record relative to the student's attendance at related services sessions and progress.

Concerning the IDEA's two-year statute of limitations, the parent alleges that the district only raised a statute of limitations defense for the 2014-15 school year and the IHO erred by making a sua sponte determination regarding the 2015-16 school year. The parent further contends that the IHO erred in his determination of the dates by which the parent's claims accrued. The parent argues that the district did not prove that she knew or should have known about deficiencies in the 2014 and 2015 IEPs and provided no evidence that the district tried to assist the parent with understanding the IEP process or that the parent knew or should have known that the district had misconstrued the student's cognitive abilities and recommended insufficient related services. The parent alleges that the IHO did not analyze when the parent knew of these claims and the district failed to make a record of the dates by which the parent's claims would have accrued. Next, the parent asserts that the IHO erred by dismissing her IEP implementation claims because the district failed to prove the parent knew or should have known of its failures to implement the student's IEPs, noting that the district did not advise the parent of its failure to implement the student's IEPs and the parent believed the services to be in place. The parent also claims that the IHO failed to conduct a proper analysis by focusing on when the parent knew of her due process rights, rather than on violations and implementation issues. The parent also argues that the IHO should have found claims related to the 2014-15 and entire 2015-16 school years were timely as the district did not establish it provided the parent with prior written notices or procedural safeguards notices. The parent also asserts that the IHO should not have dismissed the parent's claims for 1:1 ABA and extended school day services for the 2015-16 school year because those claims were tolled by the parent joining a pending district court case, as a named plaintiff as of May 1, 2020.

The parent asserts that, due to his finding related to the statute of limitations, the IHO erred in not awarding compensatory education. As relief for the 2014-15 school year, the parent seeks 1,600 hours of 1:1 ABA, 80 hours of parent counseling and training, and 40 hours each of speech-language therapy, OT, and PT as compensatory educational services.

Next, the parent claims that the IHO failed to award a sufficient amount of compensatory educational services as a remedy for the district's denial of a FAPE to the student for the 2015-16, 2016-17, and 2017-18 school years. The parent argues that the IHO improperly rejected unopposed evidence about the student's need for a full-day 1:1 ABA program and extended school day services and erred in concluding that the student was functioning appropriately and making progress in the district program during the relevant school years. The parent asserts that, for the

entirety of the 2015-16 school year through the 2017-18 school year, the student should be "awarded a minimum of 5520 hours (40 x 138 weeks) (or at least 4830 hours (35 hours x 138) less 1100 hours" of 1:1 ABA services. The parent also alleges that in awarding the equivalent of two sessions per month of compensatory parent counseling and training, the IHO ignored unrebutted evidence that the parent should have received two hours per week. The parent requests an additional 281 hours of compensatory parent counseling and training for each school year at issue. As for related services, the parent asserts that the IHO arbitrarily reduced the compensatory speech-language therapy and OT relative to the recommendations in the IEEs. The parent requests 184 additional sessions each of speech-language therapy and OT. The parent also claims that the IHO failed to award all of the missed related services sessions mandated by the student's IEPs as compensatory education and requests these make-up services in addition to the foregoing.

As for other relief, the parent asserts that the IHO should have awarded the parent reimbursement of out-of-pocket expenses for insurance co-payments and should have ordered the CSE to convene to amend the student's IEP and recommend a full-day ABA program, increased related services, and extended school day services.

Regarding pendency, the parent alleges that the IHO failed to issue a pendency order or award any relief for pendency violations. The parent asserts that the student should have received individual OT, speech-language therapy, and PT two times per week each for 30-minute sessions. The parent argues that the district provided a partial record of missed pendency services and the IHO failed to rule on pendency after stating he would do so after briefing. As relief for the failure to provide pendency services, the parent seeks all special education and related services from November 15, 2017 through the date of this decision.[10]

Lastly, the parent asserts that the IHO erred in failing to rule on the parent's section 504 claims.[11] The parent has annexed three exhibits to her request for review that she has requested be considered as additional evidence.

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[10] The parent's November 15, 2017 due process complaint notice, November 15, 2017 amended due process complaint notice, and March 26, 2018 amended due process complaint notice each assert a claim for compensatory pendency services (Parent Exs. A at p. 10; C at p. 12; CC at p. 14). According to the hearing record, the parent did not request an order on pendency. The parent's attorney raised the issue of compensatory pendency services within the context of the district's disclosure to the parent of missed related services during discussions on the record (Tr. pp. 584-86, 593-95). It is unclear what the parent is seeking. If the disclosed missed services represent compensatory pendency services, the IHO made an award based on the only information available in the hearing record, which is discussed below.

[11] An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504, section 1983 or the ADA, systemic or otherwise, and such claims will not be further addressed.

In an answer with cross-appeal, the district responds to the parent's allegations with admissions and denials. The district asserts that the impartial hearing concerned the 2014-15, 2015-16, 2016-17, and 2017-18 school years and cross-appeals the IHO's award of compensatory educational services related to the 2018-19 school year. In addition, the district argues that additional evidence submitted with the parent's request for review should not be considered as it is either already in the hearing record or is unnecessary to render a decision. The district requests reversal of the compensatory award of 420 hours of ABA, 21 hours of speech-language therapy, 21 hours of OT, and 24 hours of parent counseling and training, which relate to the 2018-19 school year.

In an answer to the district's cross-appeal the parent reasserts her claims and alleges that the district has not cross-appealed the relief awarded to the parent and simply appeals the inclusion of the 2018-19 school year.

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]).[12]

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).

[12] 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).

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing

The parties agree that the IHO erred by including the 2018-19 school year in his award of compensatory educational services. The parent alleges that the IHO erred but requests that the sufficiency of the hours awarded for the 2018-19 school year be reviewed and increased. The district cross-appeals the award and requests that the hours awarded for the 2018-19 school year be deducted from the parent's total award of compensatory education.

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]).

Here, the IHO declined to consolidate the present matter with another proceeding initiated by the parent concerning the 2018-19, 2019-20, and 2020-21 school years (Mar. 2, 2021 Interim IHO Decision at pp. 2-3). Accordingly, as the parties both agree, the IHO erred in ordering relief relating to the 2018-19 school year. I decline the parent's invitation to review the sufficiency of the award despite this error, since any such award could be duplicative or conflict with the pending proceedings. Therefore, as the district requests, that portion of the IHO's award relating to the 2018-19 school year shall be deducted from the total compensatory education award.

2. Additional Evidence

Before turning to the merits of the parties' arguments on appeal, I will address whether the additional evidence offered by the parent with her requests for review should be considered. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Among the documents submitted by the parent are the due process complaint notices and amended due process complaint notices (SRO Ex. A), an email with an "ENCOUNTER" attendance summary of the student's related services sessions with a search range between July 1, 2014 and July 3, 2019 attached (SRO Ex. B), and an "Excel" spreadsheet purported to offer detailed information about the student's performance and progress during related services sessions not captured by the attendance summary document (SRO Ex. C), which was later refiled in a portable document format (pdf) exceeding 600 pages (SRO Ex. C1) accompanied by a modified and condensed document of 264 pages (SRO Ex. C2). At the outset, I note that proposed SRO exhibit

A does not constitute additional evidence as each of the due process complaint notices and amended due process complaint notices were already admitted into evidence during the impartial hearing as separate exhibits (see Parent Exs. A; C; AA; CC).

Proposed SRO exhibit B includes related service session attendance information with a date range of July 1, 2014 through July 3, 2019, some of which information is already included in the hearing record in that parent exhibit SS includes related service attendance information with a date range of September 1, 2014 through October 25, 2018 (see Parent Ex. SS).[13] To the extent SRO exhibit B offers updated information (i.e., attendance information for the time period after the October 25, 2018 date on the exhibit in evidence), I do not find the more recent information on the proposed document necessary to make a decision on the issues presented on appeal.

With regard to proposed SRO exhibit C, the parties and the IHO discussed the document during the impartial hearing. Specifically, the size and illegibility of the document was discussed during the impartial hearing and the IHO agreed to the parent's attorney's proposal that she would attempt to reach an agreement with the district's representative regarding condensing and formatting the document so it would be more manageable, but it does not appear that this was accomplished (Tr. pp. 340-41). The proposed exhibit as submitted is burdensome and unmanageable. At a minimum, the parent's attorney should have directed the undersigned to the specific portions of the document that she believed to be paramount to her case (see 8 NYCRR 279.8[c][3] [a request for review must include "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number"]). As the request for review fails to include such citations, I am not inclined to sort through the voluminous document to ascertain how it fits within the parent's arguments on appeal (see R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 811 [5th Cir. 2012] [it is not the reviewing authority's "duty to sift through the record in search of evidence"]). Additionally, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [noting that appellate review does not include researching and constructing the parties' arguments]). As the information contained in proposed SRO exhibit C was available during the impartial hearing, and there are no specific citations to any relevant portion of the over 600 page document, the document will not be considered on appeal and is not necessary to render a decision in this matter.

B. Statute of Limitations

The parent alleges that the IHO erred by finding that her claims for the 2014-15 school year and for a portion of the 2015-16 school year were barred by the IDEA's two-year statute of limitations.

[13] The hearing record reflects that the first available information regarding the student's attendance at related services sessions begins with the 2015-16 school year (Tr. pp. 93-95, 156-57, 568-71, 573-76, 594-95, 599-601, 606-08, 610). Altering the search range dates on the attendance summary document will not generate results that are not maintained in the district's database (see SRO Ex. B).

1. Accrual of Claims

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

In this case, the parent's initial due process complaint notice was dated October 19, 2017 (Parent Ex. AA). The student's IEP for the 2014-15 school year was not included in the hearing record; however, it is undisputed that a CPSE convened and developed an IEP on July 3, 2014 (see Parent Ex. AA at p. 3). The parent's claim specific to the July 2014 CPSE and IEP was that the CPSE failed to consider or recommend ABA for the student (id.).

With regard to the 2015-16 school year, the parent, in her October 2017 due process complaint notice, took issue with the March and October 2015 IEPs, and, in her second amended due process complaint notice dated March 26, 2018, added claims addressing the April 2015 IEP (Parent Exs. AA at pp. 3-7; CC at pp. 6-7).[14]

The hearing record reflects that a CPSE convened on March 19, 2015 and developed an IEP which included a recommendation for 12-month services for the 2015-16 school year (Parent Ex. F at pp. 1, 13).[15] According to the hearing record, the parent attended the March 19, 2015 CSE meeting in person and signed the attendance page (id. at p. 2). In the October 2017 due process complaint notice, the parent alleged violations relating to the conduct of the March 2015

[14] To the extent that the parent asserts that the district only raised the statute of limitations defense with respect to the 2014-15 school year, there was some confusion during the hearing with the district representative asserting both a two year statute of limitations and specifically referencing the 2014-15 school year (Tr. pp. 19, 30-31); however, the hearing record does not offer a sufficient basis to depart from the IHO's interpretation of the district's request to apply the two-year statute of limitations (see IHO Decision at p. 13). In addition, to the extent that the parent argues the district should have been required to file a "formal motion," the IHO made his intent clear during the hearing that he intended to consider the district's request to apply the statute of limitations (Tr. pp. 31-32, 76-77, 94-95, 157-59). Additionally, the parent had the opportunity to file a post-hearing brief after the conclusion of the hearing and decided not to address any arguments related to the statute of limitations defense in the post-hearing brief (IHO Ex. II).

[15] The March 2015 IEP indicates an implementation date of March 19, 2015 and includes a recommendation for 12-month services through summer 2015 (Parent Ex. F at pp. 1, 13).

CPSE meeting (i.e., composition of the CPSE, parent participation, predetermination, and sufficiency of evaluative data) and asserted that the March 2015 IEP did not set forth a sufficient description of the student's needs or adequate annual goals, and the CPSE failed to recommend 1:1 instruction, ABA services (including supervision), extended school day services, supports for the student's various areas of needs, research-based methodologies, recommendations relating to functional grouping, adequate related services, parent counseling and training, or assistive technology (id. at pp. 3-5).

The parent also set forth allegations that no "turning five" meeting had occurred prior to September 2015 but, later, in her March 2018 amended due process complaint notice removed this claim and asserted new claims related to the April 2015 IEP (compare Parent Ex. CC at pp. 6-7; with Parent Ex. AA at p. 5). The hearing record shows that a CSE convened on April 14, 2015 and developed an IEP with an implementation date of September 9, 2015 (Parent Ex. YY at pp. 1, 7-8, 11). According to the hearing record, the parent attended the April 14, 2015 CSE meeting in person and signed the attendance page (id. at p. 14). The parent's claims relating to the April 2015 CSE meeting and resultant IEP as set forth in her March 2018 second amended due process complaint notice, included procedural violations (i.e., CSE composition, parent participation, predetermination, and sufficiency of evaluative data) and allegations that the IEP failed to sufficiently describe the student's needs, include appropriate annual goals, or set forth a program and placement that represented the student's least restrictive environment (LRE), and that the CSE failed to recommend 1:1 instruction, ABA services (including supervision), extended school day services, research based methodologies, recommendations relating to functional grouping, or sufficient related services, parent counseling and training, or assistive technology (Parent Ex. CC at pp. 6-7).

Several of the parent's claims regarding the July 2014, March 2015, and April 2015 IEPs are such that they each likely accrued at the time of the respective CPSE or CSE meetings or when the parent received a copy of each resultant IEP; in other words, "almost immediately" after each action underlying the complaint occurred, notwithstanding that the parent may have subsequently "acquired additional information" about her claims (Roges v Boston Pub. Schools, 2015 WL 1841349, at *3 [D. Mass. Apr. 17, 2015]). Additionally, while the IHO seemed to conflate the questions of claim accrual and examination of one of the exceptions to the statute of limitations in his analysis (i.e., focusing on when the parent knew of her due process rights), ultimately, the IHO found that a January 11, 2015 bilingual psychological evaluation and a May 27, 2015 psychological evaluation recommended additional services for the student that the district did not recommend in a subsequent IEP (IHO Decision at p. 14; see Parent Exs. J; N at p. 5).[16] The IHO correctly identified that, based on the evaluation(s), the parent knew or should have known that the July 2014, March 2015, and April 2015 IEPs recommended an inadequate level of services no

[16] In his analysis, the IHO noted that the March 19, 2015 reconvene of the CPSE following the January 2015 evaluation "did not result in an increase of special education services" for the student (IHO Decision at p. 14). However, the January 11, 2015 bilingual psychological evaluation did not include any recommended services (Parent Ex. J at p. 7). The May 27, 2015 psychological evaluation recommended that the student receive intensive home/community based behavioral intervention such as ABA (Parent Ex. N at p. 5). The October 20, 2015 IEP referenced in the parent's October 19, 2017 due process complaint notice was not included in the hearing record (Parent Ex. AA at pp. 6-7).

later than May 27, 2015 and, therefore, the parent should have requested an impartial hearing regarding her claims for the 2014-15 school year by May 27, 2017, at the latest.

The student's October 2015 IEP was not included in the hearing record; however, it is undisputed that a CSE convened and developed an IEP on October 20, 2015 (see Parent Ex. AA at p. 5). The October 17, 2017 due process complaint notice was filed within two years of the October 2017 CSE meeting and, therefore, the parent's claims relating to the October 2015 CSE meeting and the October 2017 IEP were timely raised. In determining that certain of the parent's claims were untimely, it appears that the IHO relied upon the date of the parent's first amended due process complaint notice (November 15, 2017) (see Parent Ex. C). This was error and, therefore, the relief is adjusted to encompass that period of time from October 19, 2015 through November 17, 2015, as set forth above.

In light of the above, the parent knew or should have known about any action forming the basis of her claims pertaining to the July 2014, March 2015, and April 2015 IEPs more than two years prior to the filing of her October 2017 due process complaint notice or March 2018 second amended due process complaint notice, respectively. However, the parent's claims relating to the October 2015 IEP were timely raised in the October 2017 due process complaint notice and, in this respect, the IHO erred.

2. Withholding of Information

Having determined that the parent's claims relating to the July 2014, March 2015, and April 2015 IEPs were not raised within the applicable limitations period, I turn to the question of whether the IHO erred in his application of—or failure to apply—the statutory exceptions to the IDEA's statute of limitations. Exceptions to the timeline to request an impartial hearing apply if a parent was prevented from filing a due process complaint notice due to: 1) a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice, or 2) the district withholding information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at *6).

On appeal, in a footnote in her memorandum of law, the parent indicates that the specific misrepresentation and withholding of information exceptions to the statute of limitations under the IDEA are "not relevant here" (Parent Mem. of Law at p. 9 n.5). On the other hand, on appeal, the parent alleges that the district failed to introduce evidence of prior written notices and procedural safeguards notices and that, therefore the IHO erred in finding the parent's claims time-barred (see Req. for Rev. ¶¶ 2, 20). These allegations are relevant to the withholding of information exception to the statute of limitations and, therefore, this exception will be addressed.[17]

[17] The parent also asserts that the IHO should not have dismissed the parent's claims for 1:1 ABA and extended school day services for the 2015-16 school year, because those claims were tolled by the parent joining a pending class action, as a named plaintiff as of May 1, 2020. While the parent's assertion may be true—in that her membership in a class action lawsuit may toll the applicable statute of limitations for another action regarding the same subject matter (see American Pipe and Constr. Co. v. Utah, 414 U.S. 538, 553 [1974]), the parent has not presented sufficient information to determine if her claims in this proceeding would be subject to tolling. Pertinently, the class action raises allegations of systemic violations, specifying an improper use of "Alleged

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist. v. C.M., 744 Fed Appx 7, 11 [2d Cir. Aug. 1, 2018]; R.B., 2011 WL 4375694, at *4, *6; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 986 [E.D. Tex. 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Here, while there are no prior written notices included in the hearing record, according to the March 26, 2018 amended due process complaint notice, the parent received a prior written notice on May 31, 2015 (see Parent Ex. CC at p. 7). Further, the parent asserts that the district did not establish that it provided the parent with procedural safeguards notices for the first time on appeal (Request for Review ¶¶ 2, 20). During the impartial hearing, there was no mention of procedural safeguards notices (see Tr. pp. 1-614).[18] After the district raised the defense of statute of limitations, it was incumbent upon the parent to assert exceptions to the statute of limitations (see, e.g., Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 10 n.1).

Autism Services Policies and Practices" (M.G. v. New York City Dep't of Educ., 162 F. Supp. 3d 216, 230 [S.D.N.Y. 2016]). However, it is unclear to what extent systemic violations can be raised in an administrative proceeding (see J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 465 [S.D.N.Y. 2018], citing S.W. v. Warren, 528 F.Supp.2d 282, 294 [S.D.N.Y. 2007] ["systemic violations are often the result of implemented policies and procedures, [ ] administrative hearing officers do not have the ability to alter already existing policies"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Accordingly, it does not follow that tolling pursuant to American Pipe is available to an individual petitioner seeking relief regarding allegations of systemic violations in an administrative proceeding.

[18] None of the due process complaint notices or amended due process complaint notices include an allegation that the parent was not provided with procedural safeguards notices (Parent Exs. A at p. 3; C at pp. 3, 5; AA at pp. 3, 5; CC at 3, 5).

Moreover, notwithstanding that the hearing record does not include copies of prior written notices or procedural safeguards notices, the IHO accorded weight to the information included in the January 11, 2015 psychological evaluation and social history in determining when the parent knew of her due process rights (see IHO Decision at p. 14; see also Parent Exs. J; K). In accord with the IHO's ultimate determination, the totality of the evidence in the hearing record shows that, even if the parent did not receive every required procedural safeguards notice, she was made sufficiently aware of her rights (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). I see no reason to depart from the IHO's determination on this point. Accordingly, the evidence in the hearing record does not demonstrate that the parent was prevented from filing a due process complaint notice due to the withholding of information which the district was required to provide.

C. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, the district conceded or at least failed to meet its burden to prove that it offered the student a FAPE for the 2015-16 school year after October 2015 and for the 2016-17 and 2017-18 school years. The parent now requests all of the relief sought at the impartial hearing. To be sure, the district was required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing, the district failed to put in contrary evidence regarding an appropriate compensatory education award, failed to offer any documentary evidence and called one witness to explain the related services summary form (Tr. p. 314).

However, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]).[19] Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (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."]).

Here, the parent's request for relief represents an hour-for-hour compensatory education remedy for the school years at issue without consideration of the program and services the student received. A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" or partially mitigated as the case may be (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

[19] Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

mandatory in cases where a denial of a FAPE is established]). With this framework in mind, I turn to the parent's specific requests.

1. 1:1 ABA and Parent Counseling and Training

The parent requests compensatory education representing 40 hours per week of ABA services for the school years at issue, totaling either 4,920 hours based on a 40-hour week or 4,305 hours based on a 35-hour week less the 1,100 hours provided via interim order. The IHO awarded 10 hours per week of 1:1 ABA for the 111-week period (from November 15, 2015 through June 30, 2018) for which he determined the student was entitled to compensatory education services (IHO Decision at p. 18). The parent's experts indicated that the student should have receive full-time 1:1 ABA instruction and, therefore, should receive hour-for-hour compensatory education that equaled a full-time ABA program (Parent Exs. JJ; VV; WW).

In crafting the number of hours awarded, the IHO found that the parent's experts did not possess knowledge of the legal FAPE standard and did not consider the services the student was receiving during the relevant time period when making their recommendations for compensatory education (IHO Decision at p. 16). The IHO found that there was considerable evidence that the student "benefitted from the special education services [the student] received during the period in question" (id.). The parent argues that "[a]lthough [the student] may have made some progress during the [school year]s, he did not achieve grade-level curriculum standards, as required by his IEPs" (Parent Mem. of Law at p. 17). The parent's argument tends to support the IHO's conclusions. The parent concedes that the student made some progress in the district program during the school years at issue, yet the parent's request of 40 hours per week of ABA services would be appropriate only in the most extreme of circumstances, such as if "the child sat in the closet," as the IHO phrased it (Tr. pp. 37-38). The "some progress" is what the IHO weighed in calculating an award of compensatory education amounting to 10 hours per week, rather than the 40 hours per week sought by the parent.

With that said, there is some support in the hearing record for an upward modification of the IHO's award of compensatory education from 10 hours per week to 15 hours per week. Pursuant to the IHO's interim orders for ABA, a Board Certified Behavior Analyst (BCBA) began providing 1:1 ABA services to the student in his classroom for 15 hours per week (Tr. pp. 173, 198, 512). The BCBA testified that she began providing services in January 2019 when the student was in the third grade and attending a 6:1+1 special class (Tr. pp. 174, 512). At the time of the first day of her testimony, the BCBA had been providing 1:1 ABA for approximately four months and reported that she was working on decreasing the student's vocal stereotypy, scripting, echolalia, implementing a token economy for on-task behavior, and working on his greeting and social skills (Tr. p. 174). The BCBA also testified that she was working on the student's use of pronouns, recalling information, differentiating yes and no, following two-step directions, manding/requesting for help or missing items, "taxing or labeling his emotions in a self-regulation program," and teaching him to wait (Tr. pp. 174-75). The BCBA further testified that the student's verbal behaviors interrupted his learning because the student frequently engaged in scripting during structured academic settings (Tr. p. 175). The BCBA implemented a token economy with the student using visual cues and the opportunity to earn tokens for on-task behavior free of interfering behaviors in order to receive access to a preferred activity such as using an iPad (Tr.

pp. 175-76). The BCBA also described using gesture prompts to assist the student with following two-step directions to promote classroom independence (Tr. p. 179).

Over the approximately four months of services provided by the BCBA, she testified that the student had shown progress and was responding to some of the strategies and programs the BCBA had put in place (Tr. p. 186). Specifically, the BCBA testified that the student's self-injurious behaviors had decreased, the student's manding had increased in that he had spontaneously and independently stated that he was hungry and requested food (Tr. pp. 186-87). The BCBA reported that the student required a sequence of prompts to engage in reciprocal communication and had shown "really nice progress" in the area of receptive language (Tr. pp. 187-88). The BCBA testified that the student was able to select the correct answer among a choice of four after reading a sentence and also reported that the student had mastered following one-step directions and was currently working on two-step directions with a gesture prompt (Tr. pp. 188-89). The student was reportedly a strong decoder and had made some progress in reading comprehension (Tr. pp. 189-90). In math, the BCBA described the student's progress as moving from tallies to manipulatives (Tr. p. 191). The BCBA also noted improvement in the student's writing, which she described as one of the student's least preferred activities (Tr. p. 194). According to the BCBA, the student would often engage in self-injurious behaviors during writing activities when she began working with him in January 2019 (id.). The BCBA also reported that the classroom teacher had shared writing samples from the student from October 2018 and described the student's improvement with tracing letters and writing "under the model without any dotted lines" (id.). Overall, the BCBA testified that the student's writing had "come a really long way" and that the student's self-injurious behaviors had abated in both classroom writing activities and during OT (id.).

The BCBA testified for a third time after providing services to the student for approximately 11 months.[20] The BCBA testified that for the 2019-20 school year, the student had successfully transitioned to a fourth grade 8:1+1 special class (Tr. pp. 512, 513). The BCBA reported that she had seen an increase in interfering behaviors which she attributed to the academic rigor of the class, noise from verbal peers, higher expectations in the classroom and the student's rigidity (Tr. p. 513). Overall, she stated that the student was "doing well" and he had greater opportunities to practice social skills with higher functioning, verbal peers than during the previous school year (Tr. p. 514). The BCBA testified that the student was now working on initiating greetings and conversations with less prompting required in contrast to the prior school year when the focus was reciprocal greetings requiring a sequence of prompting (id.). The BCBA further testified that the student's academic program was more challenging than the prior school year and the student was able to remain on-task for longer periods of time than during the prior school year (Tr. pp. 514-15). The BCBA further noted improvements in writing, reading, interfering behaviors, and a significant decrease in self-injurious behaviors (Tr. pp. 515-20).

On the first day of her testimony, the BCBA recommended a full day of 1:1 ABA as well as 10-15 hours of home-based ABA "to carry over skills" and to promote "consistency" (Tr. pp. 218-19). On the third day of her testimony, approximately seven months later, the BCBA testified that the student "needs support throughout the school day, which is 30 hours . . . a week" as well

[20] The BCBA briefly testified for a second time on an earlier date but the hearing was adjourned due to construction noise (Tr. pp. 426-28).

as "home support" (Tr. p. 555). The BCBA testified as to the purpose of home support, indicating that it was necessary for the student to learn to tolerate denied access, to address food rigidities, adaptive living skills, and navigating community safety, and so that the student's vocal stereotypy could be addressed in the same way at home as it was being addressed at school (Tr. pp. 555-56). On cross-examination, the BCBA agreed that the student was making progress while receiving 15 hours per week of 1:1 ABA services (Tr. pp. 557-58, 561).

Based on the foregoing., the hearing record supports that the BCBA provided the student with 15 hours per week of ABA services and the progress that she reported and the IHO described was based on 15 hours of ABA services per week. As such, I will increase the IHO's award to three hours per day or 15 hours per week of ABA services for the 2015-16 (465 hours), 2016-17 (630 hours) and 2017-18 (630 hours) school years.[21] Deducting the hours awarded by the IHO for the 2018-19 school year and deducting the 1,100 hours awarded via interim orders, the net award is 625 hours of 1:1 ABA services. The hearing record demonstrates the student's availability for learning in all areas with the support of 15 hours per week of 1:1 ABA. Accordingly, the IHO correctly determined that the student did not require a full day of 1:1 ABA services nor did he require a home-based program to benefit from classroom instruction.[22]

With regard to parent counseling and training, the parent argues that the IHO ignored evidence that the parent should have received two hours per week of the service (see Parent Exs. HH at p. 33; JJ at p. 7). The IHO found that two hours per month was appropriate (IHO Decision at p. 21). The IHO noted that the student's behaviors were not interfering with the student's classroom performance or with other students (id.). The IHO also acknowledged that the parent was trained in ABA therapy and she knowledgeably described the student's functioning at home (id.). There is insufficient basis in the hearing record to modify the IHO's award, except to add two additional hours for the October to November 2015 time period and to subtract from the award those sessions that the IHO awarded for the 2018-19 school year. Thus, the student is entitled to 65 hours of compensatory parent counseling and training.

2. Speech-Language Therapy

The parent alleges that the IHO awarded an insufficient amount of compensatory speech-language therapy sessions. The student was mandated to receive two 30-minute sessions per week of individual speech-language therapy pursuant to his IEPs for the school years at issue. The IHO determined that the student should have also received one session per week of group speech-language therapy (IHO Decision at p. 19). The parent argues that the IHO erred and should have awarded compensatory education representing two sessions of speech-language therapy per week in accordance with the recommendation for four sessions per week by the parent's independent evaluator in the May 15, 2018 speech-language evaluation (see Parent Ex. II). The May 15, 2018

[21] Compared to the IHO's original award, four weeks of services have been added to the award for the 2015-16 school year to account for the IHO's error in identifying the accrual date for the parent's claims related to the October 20, 2015 IEP.

[22] As I agree with the IHO's determination that the student did not require a home-based program in order to receive educational benefit (IHO Decision at pp. 18-19), the parent is likewise not entitled to reimbursement for out-of-pocket expenses related to privately obtained home-based ABA services.

speech-language evaluation reflects that the parent was concerned about the student's comprehension level and communication (id. at p. 1). The parent reported that the student was unable to communicate his needs or his dislikes and presented with constant echolalia, scripting, and repetitive self-talk (id.). The evaluator recommended individual speech-language therapy two times per week for 30-minute sessions and group speech-language therapy two times per week for 30-minute sessions (id. at p. 3). However, the independent speech-language evaluation was completed prior to the student receiving 1:1 ABA services, which, as discussed above, worked on improving the student's receptive language skills and on communication in social settings, such as reciprocal greetings, and the parent's description of the student's functioning as of May 2018 was different from the BCBA's description of his then-current functioning. In finding that the student required one group speech-language therapy session per week instead of two, the IHO weighed evidence that the student had "some significant communication skills and [wa]s able to communicate with adults" (IHO Decision at p. 19, citing Parent Exs. TT; UU; VV). Overall, there is insufficient basis in the hearing record to modify the IHO's discretionary equitable award of one additional session of group speech-language therapy per week for 111 weeks, except for the modifications relating to the accrual date of the statute of limitations and the 2018-19 school year being outside the scope of the hearing. Thus, the parent is entitled to 57.5 hours of compensatory speech-language therapy.

3. Occupational Therapy

The parent alleges that the IHO awarded an insufficient amount of compensatory OT sessions. Pursuant to his IEPs during the school years at issue, the student was mandated to receive two 30-minute sessions per week of individual OT. The IHO determined that the student should have received a total of three sessions per week and ordered one additional session per week of OT (see IHO Decision at p. 19). The parent argues that the IHO erred and that the student is entitled to an additional hour of compensatory OT per week in accordance with the recommendation made by the parent's independent evaluator in the May 25, 2018 OT evaluation report (see Parent Ex. FF at p. 4). The May 2018 OT evaluation was conducted to assess the student's sensorimotor function and his need for services (id.at p. 1). At the time of the evaluation, the parent reported her main concerns for the student as being academic performance and the student's ability to communicate his needs (id.). The parent reported that the student's main form of speech was through scripting and echolalic responses (id.). The parent also described the student as very specific with food, reluctant to try new things, and as having difficulty with certain forms of touch, such as getting a haircut or brushing his teeth (id.). The parent also stated that the student enjoyed playing piano and listening to music (id.). The independent evaluator recommended that the student receive individual OT three times per week for 45-minute sessions (Parent Exs. FF at p. 4; KK at p. 3). For compensatory educational services, the evaluator recommended that the student receive two sessions per week for 30 minutes each (id.).

In finding that the student was entitled to compensatory OT services representing one 30-minute session per week, the IHO relied in part on evidence of the student's progress during the school years at issue and opined that the private evaluator's recommendations were made with the goal of maximization, which was not required by the IDEA (IHO Decision at pp. 19-20). There is insufficient basis in the hearing record to modify the IHO's calculation of an appropriate compensatory OT award, except to apply the modifications for the accrual of the parent's claims

for the 2015-16 school year and the 2018-19 school year being outside the scope of the hearing. Thus, the student is entitled to 57.5 hours of compensatory OT.

4. Missed Services

In his decision, the IHO determined that the student was entitled to compensatory education for services missed due to cancellation or provider absence (IHO Decision at pp. 19-20). The parent seeks compensatory education for all missed services regardless of the reason. The district argues that the IHO reasonably declined to award all of the parent's requested compensatory education. At the outset I note that a review of the hearing record indicates that despite his intention to award only those services missed due to cancellation or provider absence, the IHO failed to deduct services that the student was able to make up from his final award and the IHO improperly included services missed during the 2018-19 school year (IHO Decision at pp. 19-20; see Parent Ex. SS). However, the district has not cross-appealed the IHO's failure to deduct services that were made up by the student. The district has only cross-appealed the award of missed sessions for the 2018-19 school year. As such, I will not modify the IHO's award to reflect the actual number of services the student missed due to cancellation or provider absence for the relevant school years. Although the IHO found that a portion of the 2015-16 school year was time-barred, the hearing record does not indicate individual dates of service in the summary. It appears that the IHO reasonably awarded all of the missed services for the 2015-16 school year and the district has not cross-appealed that award and no modification is necessary to account for the accrual date of the parent's claims.

The IHO awarded the student (36) 30-minute sessions of compensatory speech-language therapy based on the district's summary of related services for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. SS; see Tr. p. 268). Deducting the services missed during the 2018-19 school year, the IHO should have awarded (33) 30-minute sessions of compensatory speech-language therapy (Parent Ex. SS).[23] The IHO awarded the student (16) 30-minute sessions of compensatory PT based on the district's summary of related services for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. SS; see Tr. p. 268). Deducting the services missed during the 2018-19 school year, the IHO should have awarded (14) 30-minute sessions of compensatory PT (Parent Ex. SS). The IHO awarded the student (31) 30-minute sessions of compensatory OT based on the district's summary of related services for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. SS; see Tr. p. 268). Deducting the services missed during the 2018-19 school year, the IHO should have awarded (28) 30-minute sessions of compensatory OT (Parent Ex. SS). The IHO's award is modified accordingly.

VII. Conclusion

Based on the foregoing, the IHO erred regarding the statute of limitations to the extent that the October 17, 2017 due process complaint notice was filed within two years from accrual of the parent's claims related to the October 2017 CSE meeting and the IHO erred by including the 2018-19 school year in his award. Therefore, the compensatory education award is adjusted accordingly. The evidence in the hearing record also supports an upward modification of the IHO's award of

[23] The hearing record reflects that the student was able to make-up three of the eight missed sessions during the 2016-17 school year (Parent Ex. SS).

compensatory 1:1 ABA services from 10 hours per week to 15 hours per week. The IHO's decision is affirmed in all other respects.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 24, 2021 is modified to reflect that the parent's claims related to the October 2015 CSE meeting and October 2015 IEP were timely and that any relief awarded regarding the 2018-19 school year was outside the scope of the hearing; and

IT IS FURTHER ORDERED that the parent is awarded 625 hours of ABA instruction rather than the 430 hours awarded by the IHO; and

IT IS FURTHER ORDERED that the parent is awarded 65 hours of parent counseling and training rather than the 87 hours awarded by the IHO; and

IT IS FURTHER ORDERED that the parent is awarded 148 30-minute sessions of speech-language therapy rather than the 189 sessions awarded by the IHO; and

IT IS FURTHER ORDERED that the parent is awarded 143 30-minute sessions of OT rather than the 184 sessions awarded by the IHO; and

IT IS FURTHER ORDERED that the parent is awarded 14 30-minute sessions of PT rather than the 16 sessions awarded by the IHO.

Dated: **Albany, New York**
June 3, 2021

STEVEN KROLAK
STATE REVIEW OFFICER