The University of the State of New York

The State Education Department
State Review Officer
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No. 21-169

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Law Office of Courtney L. Haas LLC, attorneys for respondents, by Courtney L. Haas, 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 that portion of a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered compensatory educational services for the 2018-19 and 2019-20 school years. The 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). 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

Prior to entering kindergarten, the student received early intervention and preschool special education services (Parent Ex. G at pp. 1, 3; Dist. Exs. 2 at p. 1; 3 at p. 1). Upon transition to kindergarten, she was evaluated by the CSE and found eligible for special education as a student with a speech or language impairment (Parent Ex. G at p. 3). For the 2017-18 school year, the student attended an integrated coteaching kindergarten classroom in a district school (Tr. p. 99; Parent Ex. G at p. 3).

A CSE convened on February 1, 2019 for an annual review and continued to find the student eligible for special education as a student with a speech or language impairment (see generally Dist. Ex. 1). At the time of the February 2019 CSE meeting the student was attending a

kindergarten integrated co-teaching (ICT) classroom for a second year where she received related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling (Dist. Ex. 1 at pp. 1-2).[1] According to the resultant February 2019 IEP, the student's instructional/functional levels in reading and math were at the kindergarten level (id. at p. 21). A psychoeducational summary, included in the present levels of performance, indicated that the student demonstrated "significant cognitive, academic, motor coordination and speech[-]language disabilit[ies]" (id. at p. 1). The psychoeducational summary also revealed that the student had difficulty with "attention, learning, maturity, social withdrawal, functional communication and some habits of externalizing behavior" (id.). Based upon this and other information regarding the student's then- present levels of performance, the February 2019 CSE recommended that the student receive five periods per week of ICT services in math; 12 periods per week of ICT services in English Language Arts (ELA); two periods per week of ICT services in social studies: and two periods per week of ICT services in science (id. at pp. 16-17). The February 2019 CSE additionally recommended that the student receive the following related services: one 30-minute session per week of group counseling services, two 30-minute sessions per week of group occupational therapy (OT) (separate location), one 30-minute session per week of group OT (classroom), one 30-minute session per week of group physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy (id. at p. 17). Finally, the February 2019 CSE recommended 12-month services in the form of two 30-minute sessions per week of individual speech-language therapy (id. at p. 18). The student attended the district placement for the remainder of the 2018-19 school year and the beginning of the 2019-20 school year (see generally Tr. pp. 100-05; Parent Ex. G at pp. 1, 3).

In summer 2019 the parents wrote to the school psychologist to express their concern regarding the student's lack of progress and suggested that further information was needed (Tr. p. 107-08). The district approved an independent neuropsychological evaluation of the student (see Tr. p. 108). The evaluation took place over three days in October 2019 (Parent Ex. G at p. 1).

Next, on December 19, 2019, a CSE convened to conduct an annual review and review the results of the October 2019 neuropsychological evaluation (Dist. Ex. 2). The CSE recommended that the student's disability classification be changed from speech or language impairment to intellectual disability (Dist. Ex. 2 at pp. 1, 23).[2] [3] The December 2019 IEP indicated that the student was in a first grade ICT classroom with related services but her "cognitive and academic functioning" was "characterized as that of a child in pre-kindergarten" (id. at pp. 1-2).[4] The IEP

[1] The IEP noted that the student was repeating kindergarten as a result of "academic and cognitive delays" (Dist. Ex. 1 at p. 2).

[2] The projected implementation date of the December 2019 IEP was January 10, 2020 and the projected annual review was December 19, 2020 (Dist. Ex. 2 at p. 1).

[3] A comprehensive neuropsychological evaluation was completed in October 2019 and the neuropsychologist recommended that the student's classification be changed to intellectual disability based upon the student's "diagnostic presentation and learning needs" (Parent Ex. G at pp. 1, 15).

[4] The December 2019 IEP noted that the student's instructional/functional levels in reading and math were at the kindergarten level (Dist. Ex. 2 at p. 23).

indicated that the student required "multi-sensory visual and verbal cues and prompts throughout all aspects of her school day"; "[r]edirection, repetition, and refocusing prompts"; preferential setting; additional time for tasks;" exemption, modified criteria, or alternative assessment for standardized tests; breaks as needed; a daily visual schedule; a choice of academic tasks"; "hands-on, experiential learning"; extra direction at the outset of tasks; and a modified curriculum to address her management needs (id. at p. 7). The December 2019 CSE recommended that the student attend an 8:1+1 special class for math, ELA, social studies and science in a New York State Education Department (NYSED) approved non-public day school (id. at pp. 18-19, 23). Additionally, the December 2019 CSE recommended one 30-minute session per week of group counseling services, one 30-minute session per week of individual counseling services, two 30-minute sessions per week of group OT (separate location), one 30-minute session per week of group OT (classroom), two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group speech-language therapy (id. at p. 19). The December 2019 CSE recommended that the student receive the same program and services for summer 2020 (id. at p. 20). The CSE also recommended that the student receive special transportation (id. at p. 24).

The parents disagreed with the recommendations contained in the December 2019 IEP, and, as a result, by letter dated August 27, 2020 notified the district of their intent to unilaterally place the student at the Cooke School and Institute (Cooke) for the 2020-21 school year (see generally Parent Ex. A).[5] The student began attending Cooke in September 2020 (Tr. pp. 78, 81).

On December 21, 2020, a CSE convened to conduct an annual review of the student's program (see generally Dist. Ex. 3).[6] The December 2020 IEP noted that the student's instructional/functional levels continued at the kindergarten level for both reading and math (Dist. Ex. 3 at pp. 1, 24). The December 2020 CSE recommended that the student attend an 8:1+1 special class for ELA, math, social studies, science and all electives in one of the district's specialized schools with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual OT, two 30-minute sessions per week of group OT, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy (Dist. Ex. 3 at pp. 19-20, 24). The December 2020 CSE recommended the same program and related services for summer 2021 and continued to recommend special transportation accommodations for the student (id. at pp. 21, 23).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 27, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19,

[5] The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] The implementation date for the December 2020 IEP was January 18, 2021 with a projected annual review on December 21, 2021 (Dist. Ex. 3 at p. 1).

2019-20, and 2020-21 school years (see Parent Ex. A). The parents assert that "[a]ll claims apply with equal force to IEPs in place during the school years at issue" (Parent Ex. A at p. 3).

The parents alleged that each of the IEPs failed to: recommend an appropriate placement for the student's complex needs; recommend 1:1 or small group instruction; include sufficient support for the student's management needs; contain special transportation accommodations; consider the placement size for the student as she was highly distractible and dysregulated in crowds; and the instruction provided during pandemic for 2019-20 school year was "scant," all of which denied the student a FAPE for the years in question (Parent Ex. A at pp. 3-4). Further, with respect to the 2020-21 school year, the parents alleged that the district failed to provide information pertaining to the remote learning during the COVID-19 pandemic (id. at p. 4). The parents alleged that the district's failure to recommend an appropriate placement for the 2020-21 school year left the parents with no choice but to enroll the student at Cooke (id.).

As relief, the parents requested a finding by the IHO that, among other things, the student was denied a FAPE for 2018-19, 2019-20, and 2020-21 school years and that such denials "impeded" the parents' "procedural and substantive rights" under the IDEA (Parent Ex. A at pp. 4-5). The parents also sought payment of tuition to Cooke for 2020-21 school year, together with appropriate transportation to and from Cooke (id. at p. 5). The parents included a blanket statement seeking "[a]ny and all other relief that may be warranted based upon the evidence at hearing and deemed appropriate by the [IHO]" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 9, 2021 and concluded on May 20, 2021 after two days of proceedings (Tr. pp. 1-144). During the impartial hearing, the district presented three IEPs as documentary evidence and indicated that it would not argue that it had offered the student a FAPE for the school years in question (Tr. pp. 20, 28). In a decision dated June 30, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years, that the parents were entitled to compensatory education services for the 2018-19 and 2019-20 school years, that Cooke was an appropriate unilateral placement for the 2020-21 school year, and equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 10, 12-14, 17-19).[7] As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Cooke for the 2020-21 school year and awarded 432 hours of compensatory education services for the denial of FAPE during the 2018-19 and 2019-20 school years (IHO Decision at pp. 14, 18-19).

In connection with the IHO's finding a denial of FAPE for the 2018-19 school year, the IHO held that the district admitted three IEPs into evidence without presenting any witnesses to describe how the IEPs offered the student a FAPE (IHO Decision at p. 10). The IHO found that the February 2019 IEP was developed for the 2018-19 school year; however, he found that it was created "over 5 months after the school year began" had an implementation date of February 10, 2019 (id.). The IHO noted that at the time the February 2019 was developed the student was "repeating kindergarten in an [ICT] classroom without a current IEP" (id.). Accordingly, the IHO

[7] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-20).

held that the district "clearly failed to demonstrate that it had provided [a] FAPE" for the 2018-19 school year (id.).

For the first half of the 2019-20 school year, the IHO held that the CSE's recommendation for an ICT in first grade was a denial of FAPE (IHO Decision at p. 12). The IHO held that for the second half of the 2019-20 school year, the district failed to demonstrate that an 8:1:1 special class was appropriate or how the IEP would be implemented during COVID (id.).

Next, the IHO determined that compensatory education services were an appropriate remedy for the district's denial of FAPE for 2018-19 and 2019-20 school years (IHO Decision at pp. 12-13). In connection with compensatory educational services, the IHO held that parents adequately stated their claims and relief for the 2018-19 and 2019-20 school years (IHO Decision at pp. 9, 13). Accordingly, the IHO awarded 432 hours of compensatory education tutoring in multi-sensory instruction at rate of $125.00 per hour for the denial of FAPE during both the 2018-19 and 2019-20 school years ("6 hours/week x 36 weeks of school at 216 hours per year for 2 years") (IHO Decision at pp. 14, 19).

In connection with the 2020-21 school year, the district offered no evidence that it offered an appropriate program to the student for the 2020-21 school year and the district conceded a FAPE (IHO Decision at p. 14). The IHO held that the testimony of the student's teacher at Cooke together with the testimony by one of the student's parents demonstrated the appropriateness of Cooke (id. at p. 17). The IHO further held that the parents provided timely notice of the unilateral placement, cooperated with the CSE process, and therefore, equitable considerations favored the parents (id. at pp. 17-18). Accordingly, the IHO ordered the district to pay full tuition in amount of $75,025.00 - $2,000 of the tuition reimbursed to the parents and $73,025.00 paid directly to Cooke (id. at pp. 18-19).

IV. Appeal for State-Level Review

The district appeals that part of the IHO decision that awarded the parents 432 hours of multi-sensory tutoring as compensatory education services for the district's denial of FAPE for the 2018-19 and 2019-20 school years.[8] It is of note that the district does not appeal the IHO's findings that the district denied the student a FAPE for the 2018-19 and 2019-20 school years, but challenges only the relief awarded for those two school years.[9]

The district argues that although the parents sought a finding that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, the parents failed to specify any relief to be awarded if a denial of FAPE was found. The district argues that the IHO erred in finding that the parents' due process complaint notice requested relief for the 2018-19 and 2019-

[8] The district does not appeal the IHO's finding that Cooke was an appropriate unilateral placement or the district's obligation to pay Cooke tuition for the 2020-21 school year.

[9] As such, the IHO's determinations on the district's denial of FAPE for the 2018-19 and 2019-20 school years has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; 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]).

20 school years. The district contends that the IHO incorrectly adopted the parents' argument that it was "appropriate for an IHO to award additional compensatory services that the parent did not specify or use 'the exact terminology' for in a due process complaint."

Further, the district argues that the parents' reliance on Application of the New York City Dept. of Educ., Appeal No. 14-014 is "misguided" and distinguishable from the present case. Generally, the district argues that in Application of the New York City Dept. of Educ., Appeal No. 14-014, the parent requested "additional" tutoring which was a form of pleading compensatory relief. Here, the district argues the parents did not propose any relief for the denials of FAPE during the 2018-19 and 2019-20 school years in their due process complaint notice.

The district contends that the parents first raised the issue of compensatory services at the hearing and then later in their closing brief. Additionally, the district argues that the parents could have amended their due process complaint notice, and further that the district did not agree to expand the scope of the hearing. Finally, the district argues that the lack of notice of the parents' compensatory claim and the IHO's erroneous conclusion that compensatory education was properly pled resulted in the district not being given a fair opportunity to defend the claim. Ultimately, the district seeks a reversal of the IHO's award of 432 hours of compensatory education.

In an answer, the parents deny the material allegations contained in the district's request for review. The parents argue that they "clearly" described the procedural and substantive claims in their due process complaint notice relating to the district's denial of FAPE for the 2018-19 and 2019-20 school years. They argue that their due process complaint notice discusses the CSE's placement of the student in an ICT classroom despite the student's failure to make progress. The parents further referenced a 2019 neuropsychological evaluation which found that the ICT class was not appropriate. Further, the parents argue that the due process complaint notice alleges that each of the IEPs at issue "fail to recommend[] an appropriate specialized program for [the student] in light of her complex needs," "fail[] to recommend sufficient 1:1 or small group instruction in the program recommendations," and "fail to include sufficient support for [the student] in light of her myriad of deficits." The parents also contend that the CSEs refused to consider the size of the recommended placement and how it impacts the student's distractibility and dysregulation. Based upon these enumerated allegations contained in the due process complaint notice, the parents allege that the district "had notice" of how it failed to offer the student a FAPE since the 2018-19 school year. Furthermore, the parents argue that the due process complaint notice need not use "the exact terminology" of compensatory services when seeking any relief that the IHO deems appropriate for the deprivation of FAPE. They argue that the district was informed of the parents FAPE claims for the 2018-19 and 2019-20 school years and the parents "intent to pursue a related remedy."

Additionally, the parents assert that the testimony of the director of EBL Coaching supported their request for compensatory educational services. The director of EBL Coaching testified that based upon her assessments of the student she recommended "600 hours of 1:1 instruction using the Orton Gillingham method and similar research-based, multisensory techniques to build [the student's] writing, math and reading skills."

Lastly, the parents argue that IHOs have "broad remedial authority" in awarding relief and seek to uphold the award of compensatory educational services.

V. Applicable Standards

In terms of the relief disputed by the parties in this case, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125 [2d Cir. 2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also 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 & n.12 [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"]).

VI. Discussion

A. Preliminary Matter

1. Scope of Impartial Hearing

The main issue presented in this appeal is whether the IHO erred in determining that the student was entitled to compensatory education services for the denial of FAPE for the 2018-19 and 2019-20 school years (IHO Decision at pp. 12-14, 19). The district contends that a request for compensatory education services was not contained in the parents' due process complaint notice, and therefore, it was improper for the IHO to make such ruling (see 8 NYCRR 200.5[j][1][ii]).

The district contends that the IHO erred in adopting the parents' argument that they need not specifically request compensatory education services in their due process complaint notice "when the parent foresees the possibility of the need for additional services" by requesting as the parents did here "[a]ny and all other relief that may be warranted based upon the evidence at hearing and deemed appropriate by the" IHO. In addition, the district argues that the IHO ignored the parents' "concession" that the due process complaint notice failed to include a claim for a compensatory award. Finally, the district argues that the State and federal regulations require the parents to set forth a "proposed resolution" to the problem in their due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue

which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, it is undisputed that the parents' August 2020 due process complaint notice does not explicitly seek relief in the form of compensatory education services (Tr. p. 26; see generally Parent Ex. A). However, the district's arguments that compensatory education relief must always be predicated on raising it in a due process complaint notice in some form is an overly simplistic view of the requirements. The district argues that Application of the Dep't of Educ., Appeal No. 14-014 was erroneously relied upon by the IHO, but that decision only explains unremarkable points that district's arguments that the parent in that case failed to raise compensatory education relief in the due process complaint notice were wrong because the requested relief was present in the document, and that all was not lost regarding the parents request for compensatory education merely because such magic words were not uttered in the document. The district's argument is without merit.

Instead, the parents were correct to point out that with respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). [emphasis added]. In this case, compensatory educational services were first explicitly raised when the parents sought to introduce Parents' Exhibit I into evidence (Tr. pp. 24-25). Parents' Exhibit I was a letter dated May 13, 2020 from the director of EBL Coaching who assessed the student and made a recommendation for tutoring to develop the student's reading, spelling, writing, math and reading comprehension skills (Parent Ex. I). The district objected to Parents' Exhibit I stating it was irrelevant, not addressed in the due process complaint notice, and conducted only days before the May 20, 2021 hearing (Tr. p. 25). In response, the parents' argued before the IHO that "[a]lthough the complaint does not request compensatory services in the relief, the [district] was put on notice that the [p]arent[s] [were] indeed seeking compensatory services" and the district received notice of the compensatory claim at the time of the mandatory disclosures by the parties prior to the impartial hearing (Tr. p. 26; Parents Post Hr'g Brief at p. 13).[10] The parents also argued that the assessment and

[10] State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]).

recommendation from EBL Coaching that was offered during the May 2021 impartial hearing was not available at the time of their August 2020 due process complaint notice because of the COVID-19 and they were unable to have the assessment conducted earlier (Tr. p. 26). The parents argument is convincing in these circumstances, especially when they raised the additional form of relief at the outset of the impartial hearing.[11]

Next, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]).

In the district's opening statement, district's counsel states that although it is not presenting any witnesses it reserves the right to challenge the appropriateness of the EBL Coaching recommendation and further argues it may challenge the recommendation in its closing brief (Tr. p. 28; see Dist. Post Hr'g Brief). Next, the district's counsel moved to dismiss the parents' claims for the 2018-19 and 2019-20 school years because the parents "failed to meet the minimum requirements" in pleading relief and offering a "proposed resolution" to the problems alleged in the due process complaint notice (see 8 NYCRR 200.5[i][1][v]; Tr. pp. 28-29).

The IHO references the district's motion to dismiss in her decision pointing out that the due process complaint notice was filed on August 27, 2020, and at no point prior to the May 20, 2021 impartial hearing, did the district seek to make a motion to dismiss the claims pertaining to the 2018-19 or 2019-20 school years (IHO Decision at p. 9).[12] The IHO held that "[e]ven if the motion at the hearing were considered timely, the [p]arents had adequately stated the claims and relief sought for the 2018[-19] and 2019[-20] school years" (id.). In addition, the IHO referenced the parents' closing brief wherein the parents argued that the due process complaint notice stated "[a]ll claims apply with equal force to IEPs in place during the school years at issue" (id. at p. 10).[13]

[11] The parents also point to the statement in their due process complaint notice that states "[a]ny and all other relief that may be warranted based upon the evidence at hearing and deemed appropriate by the [IHO]," but such catch all language that amounts to any relief that can be dreamed up at an unknown point in the future, is too vague to be of use. It is the proper hearing practices by the parents' attorney—raising the specific information early on by including it in their evidentially disclosures and then bringing it up again at the outset of the hearing—that are far more compelling than the boilerplate language in the due process complaint.

[12] This serves to underscore the importance of the pre-hearing conference to simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

[13] There was a second argument in this case proffered by the parent and adopted by the IHO, regarding the district's failure to challenge any of the parents' allegations, which at this juncture is a dead issue. Nevertheless, I was dismayed to see it. The IHO further relied on the parents' closing brief which stated that the "SRO has found that allegations that are left unchallenged are deemed as true 'unless found to be inconsistent with the evidence in the record,'" citing Application of a Student with a Disability, Appeal No. 01-044. The parents' and the IHO's application of that ruling at any point in this matter was fundamentally flawed. First, the SRO's statement was in reference not to mere allegations made before an impartial hearing was conducted, but to pleadings filed in a

On cross-examination of the director of EBL Coaching, the district's counsel questioned her about the recommended compensatory tutoring hours and the rate charged for the hours (Tr. pp. 45, 49-50, 52; Parent Ex. I). The district chose not to call any witnesses to rebut this testimony (Tr. pp. 8, 28). Finally, in the district's closing brief it argues that the parents were not entitled to compensatory education services (Dist. Br. at pp. 5, 10-14). Based upon the foregoing, the district "opened the door" and attempted to defend the claim for compensatory education services.

Thus, the district went forward and attempted to attack the appropriateness of the parents' requested compensatory education relief during the impartial hearing, and it can hardly be said that the district was precluded from defending itself in this matter. Further, the parents adequately developed the hearing record pertaining to their claim for compensatory education services. A comprehensive neuropsychological evaluation was conducted in October 2019 due to concerns pertaining to the student's "slow developmental progress and functioning" (Parent Ex. G at p. 1). The 2019 neuropsychological evaluation detailed the student's "history of poor prenatal care, traumatic birth, and global developmental delays including low muscle tone, poor coordination, fine/gross motor delays, speech-language delays, attentional problems, hyperactivity/impulsivity, sensory processing issues, and delays in play skills, self-care skills, social skills, and cognitive development" together with a remarkable medical history "for a head injury (without concussion), visual problems, and sleep difficulties" (id. at p. 14). Based upon the neuropsychologist's testing results, the student demonstrated "cognitive strengths in retrieval of categorical information (i.e., types of animals), basic vocabulary, and simple quantitative reasoning involving matching" (id.). However, her "intellectual and academic functioning was substantially below age and grade level expectations" (id.). The neuropsychologist noted an impairment in adaptive functioning including difficulty demonstrating independent behaviors across all environments (id.). Based upon the student's cognitive and adaptive deficits, the neuropsychologist diagnosed the student with a mild to moderate intellectual disability (id.).

Additionally, the neuropsychologist's testing results revealed that the student's "language, visual-motor skills, and executive functioning were all below age expectations" which she noted was consistent with diagnoses of a language disorder and developmental coordination disorder (Parent Ex. G at p. 15). The neuropsychologist also found that the student demonstrated "executive functioning weaknesses" and "symptoms of inattention and hyperactivity/impulsivity" possibly consistent with attention deficit hyperactivity disorder (ADHD) (id.). The neuropsychologist opined that the student's then-current educational setting was not appropriate (id.). Further, the neuropsychologist stated that although the student's presentation was not consistent with an autism spectrum disorder, the parents may want to seek further assessment of the student (id.). Lastly, the neuropsychologist concluded that the student's "cognitive and academic functioning" was that of a pre-kindergarten student (id.). Based upon the neuropsychological testing results, she recommended the student be placed in "a small, specialized, structured, calm, and nurturing

review proceeding under Part 279 after an evidentiary record had been fully developed and a final IHO decision had been rendered. Second the very regulatory language regarding allegations being "deemed as true" that were discussed by the SRO in that proceeding were stricken from State regulations long ago. Both the parties and IHO should focus on ensuring that allegations on material issues are proven or disproven during an impartial hearing through the development of an adequate evidentiary record rather than reliance upon outdated "gotcha" tactics. The error was harmless in this matter however, because it fortunately had little bearing on the outcome of this case.

academic environment" with peers who did not demonstrate unsafe behaviors so that she could access the curriculum and make meaningful progress (id.)., The neuropsychologist also recommended that the student receive speech-language therapy, social skills training, counseling, occupational therapy, and numerous modifications and accommodations throughout her school day (id. at pp. 16-17).

Further, the director of EBL Coaching testified at the hearing that she evaluated the student on May 13, 2021, in the areas of reading, spelling, writing, and math (Tr. pp. 36, 38, 59; see Parent Ex. I). She testified that the student lacked basic foundational skills: testing "at a mid-kindergarten level for decoding, spelling, and mathematics" and at a "kindergarten level for both writing and reading comprehension, all well below the expected levels for her grade" (Tr. pp. 38-39, 42, 44; Parent Ex. I). Based upon her assessment, she opined that the student was in "critical" need of "multi-sensory instruction in reading and spelling" to "build her writing, mathematics, and reading comprehension skills" (Parent Ex. I). Accordingly, the director of EBL Coaching recommended that the student receive 600 hours of 1:1 multi-sensory tutoring (Tr. p. 39; Parent Ex. I).

The strongest argument in the district's favor is its reliance on A.K. v. Westhampton Beach Sch. Dist (2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019]), in which the parent raised the issue of compensatory education for the first time in his closing brief to the IHO. I agree with the notion that a parent should not raise the specter of a compensatory education claim after the evidentiary hearing has concluded, as it promotes tactics of unfair sandbagging and poor record development. But as described above, those circumstances are not present in this case. As the issue of compensatory education services was a proper issue for the IHO to make a ruling, I shall next address whether the relief awarded by the IHO was appropriate under the circumstances.

B. Relief - Compensatory Education Services

At the outset, it should be noted that the IHO made clear that the award for compensatory relief was only for the 2018-19 and 2019-20 school years (IHO Decision at pp. 12-14). Moreover, the IHO also established that the sole relief for the denial of FAPE for the 2020-21 school year was tuition reimbursement (id. at pp. 14-18).[14]

[14] Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but

As discussed above, the parents submitted both documentary and testimonial evidence of the student's need for compensatory services (Tr. pp. 31-60; Parent Ex. I). The district failed to offer any proof of a compensatory remedy, or challenge the evidence presented by the parents as to the student's need for compensatory services (see IHO Decision at p. 14). The only argument proffered by the district was that it "did not present evidence at the impartial hearing regarding an appropriate compensatory education remedy since the parents did not request such relief in their due process complaint notice[]" (Req. for Rev. at ¶ 12). As discussed above, the district had adequate notice and an opportunity to defend the claim for compensatory education during the impartial hearing.

[T]he 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 no witnesses (Tr. pp. 8, 28).

In awarding compensatory services, the IHO held the student was denied a FAPE for two school years, presented with significant delays, and the parents presented an expert witness on the issue (IHO Decision at p. 14). However, the IHO held that the recommendation from EBL Coaching "ranged from 6-8 hours a week for two school years (36 weeks of school x 6 for 2 years is 432 hours and 36 weeks of school x 8 for 2 years is 576 hours)" (id.). The IHO also found that the rate of $125.00 per hour for the tutoring was an "enhanced" rate and the recommendation provided "a wide range" and appropriate remedy in her discretion was to award 432 hours of the rate of $125.00 per hour for the FAPE denial during the 2018-19 and 2019-20 school years (id.). Since the parents did not cross-appeal to modify the award of compensatory services, and the district having failure to meet its burden, I find no reason to disturb the IHO's award of 432 hours of compensatory tutoring services.

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the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs, but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

VII. Conclusion

Based upon the foregoing, the parents' claim for compensatory educational services was properly before the IHO, and the IHO's award of 432 hours of compensatory tutoring at the rate of $125.00 per hour shall be upheld.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 30, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER