The University of the State of New York

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

No. 21-176

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Daniel Levin, Esq.

Law Office of Philippe Gerschel, attorneys for respondent, by Philippe Gerschel, 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 a decision of an impartial hearing officer (IHO) which awarded respondent's (the parent's) son special education teacher support services (SETSS) as compensatory relief for a denial of a free appropriate public education (FAPE) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

In or around February 2017 the student was referred for an evaluation due to concerns regarding his social/emotional development, fine motor skills, and language skills (Dist. Exs. 11

at p. 1; 12 at p. 7). At the time, the student was four years eleven months old and attending a private religious school (see Parent Ex. A at p. 1; Dist. Ex. 11 at p. 1). Subsequently, the student participated in a bilingual psychological evaluation, a bilingual educational evaluation, a bilingual speech-language evaluation, and an occupational therapy (OT) evaluation (Parent Ex. C at pp. 2-3; Dist. Exs. 11, 12).

The bilingual psychological evaluation, conducted in February 2017, consisted of administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), parent responses to the Vineland Adaptive Behavior Scales (Vineland), a teacher interview, clinical observation, informal testing, and parent interview (Dist. Ex. 11 at p. 2). Results of the WPPSI-IV revealed that the student's full-scale IQ placed his overall cognitive skills in the average range of intellectual functioning (id. at p. 2).[1] The evaluating psychologist reported that the student scored in the below average range on tasks measuring his visual motor perception and motor planning (id. at p. 3). Specifically, the psychologist noted that the student had difficulty stacking 10 blocks without the column falling over, and also had difficulty manipulating and piecing together puzzle pieces, which she opined suggested the student's ability to analyze and synthesize visual information and to understand part-whole relationships were within the low average range of development (id. at pp. 2-3).

Parent responses to the Vineland revealed that the student's adaptive levels were adequate for the communication, daily living skills, socialization, and motor skills domains, however, within the motor skills domain the student's adaptive level for fine motor skills was judged to be moderately low (Dist. Ex. 11 at p. 5). The psychologist reported that the student presented with a weak grasp on writing implements, had difficulty writing his name and numerical digits, difficulty completing simple puzzles and art projects, and could not cut out a simple design (id.). The psychologist noted that, according to the student's teacher, the student could not write his name with the same ease as his classmates and withdrew from activities that included cutting and coloring as he perceived them to be difficult (id. at pp. 5-6). Although the psychologist indicated that the student's skills in all domains were adequate, she also reported that the student's adaptive behavior composite level was in the moderately low range (id. at p. 5).

The psychologist recommended that the student be evaluated in the areas of speech and OT to address his fine motor weaknesses and difficulty focusing (id. at p. 6).

In addition to the psychological evaluation, the student participated in a February 2017 bilingual educational evaluation that consisted of administration of the Developmental Assessment of Young Children-Second Edition (DAYC-2), a parent interview, classroom observation, teacher interview, and informal assessment (Dist. Ex. 12 at p. 1). Based on the student's performance on the DAYC-2 the evaluating teacher reported that the student's scores in the cognitive, receptive language, and adaptive behavior domains were all in the average range (id. at pp. 8-10). In addition, the teacher reported that the student's scores in the expressive language and social/emotional domains were above average (id.). With respect to the student's gross and fine

[1] The psychologist noted that per the Chancellor's regulations current evaluation tests were not standardized and therefore not validated for the district's bilingual/bicultural population (Dist. Ex. 11 at p. 2). As such, the results were to be considered approximate and reflective of learning patterns, strengths, and weaknesses, rather than definitive skill levels (id.).

motor skills however, the teacher found the student's scores fell in the below average and very poor ranges, respectively (id.).

A February 2017 OT evaluation included administration of the Peabody Developmental Motor Scales-Second Edition (PDMS-2) on which the student performed 1.60 standard deviations below the mean on measures of fine motor and visual motor skills (Parent Ex. C at p. 3). Delays were noted in the student's eye-hand coordination and intra palmar manipulation (id.). The student was unable to trace a line, color between lines, or connect dots (id.). A March 2017 speech-language evaluation included administration of the Preschool Language Scale – Fifth Edition (PLS-5) and the Goldman Fristoe Test of Articulation 2 (GFTA-2) (id. at pp. 2-3). Although the student presented with age-appropriate receptive language skills, he was found to have reduced expressive language skills, as well as reduced oral motor/feeding skills (id.).

In an April 25, 2017 prior written notice, the district provided the parent with notice that the Committee on Preschool Special Education (CPSE), which met on the same day, recommended that the student be classified as a preschool student with a disability, and that he receive twice weekly, 30-minute sessions of both speech-language therapy and OT in a 10-month program (Dist. Ex. 10).[2]

In July 2018 the parent obtained a supplemental psychological evaluation of the student (Dist. Ex..8; see Parent Ex. C at p. 1). The supplemental evaluation was conducted by a psychologist and included completion of the Conners 3rd Edition (Conners 3) by the parent and examiner and observation of the student using the Autism Diagnostic Observation Schedule – Second Edition (ADOS-2) (Dist. Ex. 8 at p. 3). Additional assessment measures included a parent interview, teacher interview, and review of the student's records (id.). Based on the parent's responses on the Conners 3, the examiner reported that compared to other children his age the student presented with very elevated concerns for inattention and hyperactivity/impulsivity (id. at pp. 3-4, 6). The examiner indicated that the student met the Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition (DSM-5) criteria for attention deficit hyperactivity disorder (ADHD), combined type (id. at p. 3). Completion of the Conners 3 also yielded elevated scores for defiance/aggression and peer relation problem behaviors (id. at pp. 3-4, 6). With respect to the ADOS-2, the examiner reported that compared to same age peers the student presented with a low level of autism-related spectrum symptoms (id. at p. 1). She explained that the student's score on the ADOS-2 meant that, although he did not meet the clinical criteria for an autism spectrum disorder, the student presented with some problem behaviors characteristic of autism (id.). The examiner expressed concern regarding the poor quality of the student's social responses and noted that in social interactions his responses were often negative or "not 'in tune'" with the examiner and the student continued with his own train of thought (id. at p. 4). The examiner also identified behaviors of concern that she observed during the ADOS-2 administration including frequent eye rolling, that based on degree and frequency could be classified as an unusual complex mannerism; constant motion, described as the student moving about repeatedly and without purpose; active refusal of adult directives; and frequent temper tantrums triggered by a very low tolerance for frustration (id. at pp. 4-5). The examiner indicated that the student's enjoyment in social interactions was limited to situations he controlled and noted that the student presented with very

[2] There is no individualized education program (IEP) resulting from the April 25, 2017 CSE meeting in the hearing record.

restricted pretend play and a poor understanding of reciprocity in interactions (id. at pp. 4, 6). The examiner recommended that the student receive school-based speech-language therapy and OT, as well as SETSS and counseling (id. at p. 6).

On August 10, 2018, a CSE convened to develop an IESP for the upcoming 2018-19 school year (first grade), during which the student was scheduled to attend the same private religious school as he had attended in previous school years (Dist. Ex. 3 at p. 1; see Dist. Exs. 11 at p. 1; 12 at p. 1). The August 2018 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive related services of two 30-minutes sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, one 30-minute session of individual counseling per week, and one 30-minute session of group counseling per week (Parent Ex. C at p. 9).[3] The IESP noted that the student had not been receiving the OT and speech-language services "since he was recommended" to receive them (Parent Ex C at p. 3; Dist. Ex. 8 at pp. 1-2). The IESP also included information from the parent that the student had started receiving reading services in May 2018 from two separate reading specialists for a total of six times per week (Parent Ex. C at p. 3).

According to the parent, a CSE did not convene to develop an IEP or an IESP for the student for the 2019-20 school year (see Parent Ex. E at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated March 7, 2021, the parent requested an impartial hearing, asserting that the district had failed to properly implement the student's August 2018 IESP during the 2018-19 and 2019-20 school years (Parent Ex. A at p. 2).[4] Specifically, the parent asserted that the district did not implement the related services contained in the IESP and the parent was not able to obtain providers on her own (id.). To remedy the asserted failure by the district, the parent requested a bank of compensatory education services to make up for those services the student was not provided during the 2018-19 and 2019-20 school years (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 12, 2021 and concluded on June 10, 2021 after four days of proceedings (Tr. pp. 1-183).[5] In an April 13, 2021 motion, the district requested that the IHO dismiss the parent's claims concerning the 2018-19 school year as barred by the statute of

[3] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[4] On March 24, 2021, the IHO was assigned to hear this matter as well as another due process hearing involving the same student, with the second assigned matter involving the 2020-21 school year (Consolidation Order at p. 2). There is no indication in the record which party, if any, requested that the two due process hearings be consolidated. Regardless, by order dated March 25, 2021, the IHO declined to consolidate this instant matter with an impartial hearing matter involving the student's 2020-21 school year (id. at p. 3).

[5] On the first two hearing dates—April 12 and April 21, 2021—the parties convened on the record for pre-hearing and status conferences and to discuss procedural matters, including timelines to address the district's motion to dismiss (see Tr. pp. 6-28).

limitations, with response and counter response papers filed by both parties (Dist. Exs. 1; 13; Parent Ex. G). The IHO issued a final decision dated July 13, 2021 decision (see IHO Decision).[6]

With respect to the statute of limitations defense raised by the district concerning the 2018-19 school year, the IHO noted that it was "not uncommon" for the district not to provide SETSS services at the beginning of the school year, and it was unreasonable to expect the lack of services at the beginning of the school year to trigger the filing of a due process complaint notice (IHO Decision at p. 6). The IHO ultimately found that the district did not demonstrate that a procedural safeguards notice was provided to the parent in an understandable manner and that the parent had no knowledge of her procedural due process rights (id. at p. 8). Due to the district's failure to demonstrate that the parent received and understood those rights, the IHO denied the district's motion to dismiss those claims for the 2018-19 school year based on the statute of limitations (id.).

As to the merits, the IHO found that the district denied the student a FAPE for both the 2018-19 and 2019-20 school years (IHO Decision at pp. 12, 14). With respect to the 2018-19 school year, the IHO clarified that the scope of the impartial hearing was limited to the parent's implementation claim, as the due process complaint notice did not raise an issue relating to the recommendations set forth in the IEP (id. at p. 9). Thus, the IHO determined that the parent was not entitled to the requested relief of compensatory SETSS, as the allegations in the due process complaint notice (relating to the district's alleged failure to implement OT, speech-language therapy, and counseling) were very specific and had no bearing to the requested SETSS relief (id. at pp. 9-10).[7]

Turning to the 2019-20 school year, the IHO found that, based on the district's failure to convene a CSE or develop an IEP, the district committed "the ultimate denial of FAPE" (IHO Decision at p. 12).[8] The IHO found that, in crafting appropriate relief, he was not bound by the "four corners of the due process complaint" (id. at p. 13). In so finding, the IHO contrasted his finding regarding the 2018-19 school year, emphasizing that it was the IEP claims that were outside the scope of the impartial hearing for that school year, as opposed to the relief (id.). The IHO found that, while the student was not entitled to compensatory SETSS specifically for the 2018-19 school year, because he was "so behind in reading and math," he was entitled to more than a year of compensatory services "to make him whole" (id.). The IHO therefore awarded a bank of 400 hours of compensatory SETSS instruction for the student to be used over a two-year period (id. at p. 14).

[6] 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. 1-17).

[7] "In order to have a complete record," the IHO addressed the appropriateness of the IEP for the 2018-19 school year and found that the district's witness had been unable to explain how the CSE arrived at its recommendations for the student and that the district had not accorded the parents' concerns about the student's reading needs sufficient weight (IHO Decision at pp. 10-12).

[8] Although the IHO's decision referenced the 2020-21 school year in the body of his decision, it appears that he meant the 2019-20 school year, as reflected in the underlined heading just above this paragraph (see IHO Decision at p.12).

Finally, the IHO denied the parent's request for reimbursement for private special education instruction, noting the parent provided no documentation or testimony as to the nature of the service provided, the provider's credentials, the rate which the provider charged for services, or any progress the student may have made during the time the student received those services (IHO Decision at p. 14).

IV. Appeal for State-Level Review

The district appeals asserting that the IHO erred in awarding the parent 400 hours of compensatory SETSS for the 2019-20 school year. The district asserts that the IHO improperly expanded the scope of the impartial hearing by allowing the parent to introduce a new claim for compensatory SETSS over the district's objections. The district further asserts that the proper scope of relief that was available to the IHO centered around those related services requested as compensatory services as found in the due process complaint notice, namely, counseling, speech-language therapy, and OT. The district also asserts that the IHO impermissibly relied upon the student's 2020-21 IESP in fashioning the relief because the district had objected to the IESP's introduction into evidence and the document was excluded as a result. Finally, the district asserts that, while one of the psychological evaluations recommended SETSS services, it did not specify frequency or duration for the SETSS, either as an IESP service or for compensatory purposes. The district notes that the parent's affidavit included a request for 320 hours of SETSS, calculated based on eight hours per week over 40 weeks for the school year, and argues that if an award of compensatory SETSS was deemed warranted, the hearing record did not support an award greater than the 320 hours requested in the affidavit.

In an answer, the parent responds to the district's allegations and argues that the IHO's decision be upheld in its entirety.[9]

V. Applicable Standards

A board of education must offer a free appropriate public education (FAPE) to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing

[9] In a reply, the district asserts that the parent's answer was not verified in accordance with the practice regulations and should be rejected. Subsequent to the district's filing of its reply, the parent filed an affidavit of verification signed by the parent. Given the subsequent filing by the parent of the verification, no further discussion is necessary on this point.

a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[10] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[11] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Scope of Review

First, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's

[10] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[11] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public-school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, the district does not appeal the IHO's determinations that the statute of limitations did not bar the parent's claims pertaining to the 2018-19 school year and/or that an exception to the statute of limitations applied. The district also does not appeal the IHO's finding that it denied the student a FAPE for both the 2018-19 and 2019-20 school years. Specific to the 2019-20 school year, the district has not appealed the IHO's decision that it denied the student a FAPE by failing to convene a CSE or develop an IEP for the student, opting instead to focus its appeal on the relief that the IHO awarded to remedy such FAPE denial. Finally, the parent does not appeal the IHO's determinations denying compensatory SETSS as relief to remedy the district's denial of FAPE for the 2018-19 school year and denying reimbursement for unilaterally obtained services. Therefore, the IHO's determinations regarding the statute of limitations and the district's offer of a FAPE for the 2018-19 and 2019-20 school years, as well as his denial of some of the relief sought by the parent, have become final and binding and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As the district has not appealed the IHO's determinations that the district denied the student a FAPE for the 2018-9 and 2019-20 school years, the scope of this appeal is limited to reviewing the IHO's award of compensatory SETSS as relief.

B. Scope of the Impartial Hearing

The district appeals the IHO's award, arguing that the IHO erred in expanding the scope of the impartial hearing to include SETSS as a form of relief for the 2019-20 school year denial of FAPE.

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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415 [f][3][B]; 34 CFR 300.507 [d][3][i], 300.511[d]; 8 NYCRR 200.5 [j][1][ii]), or the original due process complaint notice 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]).

Here, it is undisputed that the parent's March 2021 due process complaint notice requests compensatory education services as relief but does not explicitly seek compensatory SETSS (see generally Parent Ex. A). However, the district's arguments that specific compensatory education relief must always be predicated on raising it in a due process complaint notice is an overly simplistic view of the requirements. Instead, with respect to relief (as opposed to 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] [emphasis added]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). While an award of relief not explicitly requested in a due process complaint notice may be appropriate in some circumstances, parties should not wait until after the hearing is complete to articulate the relief sought (see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [declining to address the parent's request for compensatory education that was raised for the first time in a post-hearing brief]).

Here, at the outset of the impartial hearing, the parent's attorney did confirm that the compensatory education sought was related to missed sessions (Tr. pp. 19, 21). However, at the May 11, 2021 hearing date, prior to the beginning of witness testimony on June 10, 2021, the parent's attorney indicated that the relief which the parent sought had "changed" (Tr. p. 39). The parent's attorney suggested he could amend the complaint if necessary but the IHO indicated that such a request was too late and, in addition, the district objected to any expansion of the scope of the impartial hearing (Tr. pp. 39-40). However, the parent's attorney stated his position that relief in the form of compensatory SETSS or reimbursement for unilaterally obtained SETSS could be available in that, if the IHO found a denial of a FAPE, the IHO would have discretion to craft a remedy to place the student in the position he would have been in but for the deprivation of FAPE, which could be calculated by means other than employing an hour-for-hour calculation of missed services and could include an award of SETSS (Tr. pp. 54-55, 74-75). The parent's attorney noted that the due process complaint notice alleged an implementation failure but indicated that, absent an operative IESP for the 2019-20 school year, the precise services which the district failed to implement remained an open question and could be viewed broadly (see Tr. pp. 40, 55). The parent's attorney pointed to a subsequent IESP developed on January 27, 2021, that recommended SETSS and which was referenced in the March 2021 due process complaint notice, arguing that such post-dated IESP could be relied upon for the purposes of crafting relief (Tr. pp. 37, 42-44, 55-56; Parent Ex. A at p. 2). Overall, the due process complaint notice requested compensatory education relief (albeit specifying related services) and the parent's attorney articulated the parent's intent to specifically seek compensatory SETSS early enough in the hearing process that the hearing record does not support the district's argument that compensatory SETSS was an impermissible remedy based on the scope of the impartial hearing.

The district argues that the IHO's decision is internally inconsistent in that he properly found that compensatory SETSS was outside the scope of the impartial hearing for the 2018-19 school year but then found that compensatory SETSS was an available remedy for the 2019-20 school year. However, the district misunderstands the distinction that the IHO drew between the requirements for stating a claim in the due process complaint notice and for requesting relief. As to the 2018-19 school year, the IHO found no claim stated that was directed at the IEP and, therefore, there was no claim that an award of compensatory SETSS would remedy (see IHO Decision at p. 9). However, for the 2019-20 school year, the IHO found that the district's failure to convene a CSE or develop an IEP was a claim that was properly before him, and he based his determination that the district denied the student a FAPE on this claim (see id. at p. 12). The IHO did not read a request for compensatory SETSS into the due process complaint notice but

acknowledged that he was exercising his discretion to devise an appropriate remedy (id. at p. 13).[12] As noted above, the district does not appeal the IHO's determination that the district denied the student a FAPE or the grounds underlying the parent's FAPE claim. Nor does the district argue that an award of compensatory SETSS was an inappropriate remedy for the denial of FAPE. Having found a denial of a FAPE, it was within the IHO's discretion to craft an appropriate compensatory award to remedy a denial of FAPE even if the particular form of compensatory education sought at the impartial hearing was not identified in the due process complaint notice. Therefore, I decline to disturb the IHO's award of relief on the grounds stated by the district.

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 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; 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]). 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"]).

[12] To justify his award of compensatory SETSS, the IHO relied, in part, on language in the due process complaint notice requesting "any further relief that the hearing officer may deem just and proper to ensure that the student receives a free appropriate public education" (IHO Decision at p. 13; Parent Ex. A at p. 3). However, 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 employed by the parent's attorney—i.e., notifying the IHO and the district of the relief sought during the impartial hearing, prior to the beginning of witness testimony—that are far more compelling than the boilerplate language in the due process complaint notice.

Having found that the IHO did not exceed the scope of the impartial hearing by awarding SETSS as a compensatory remedy, the district's only remaining argument regarding the IHO's award is that the parent "did not present any evidence or testimony that the student needed SETSS for the 2019-2020 school year" (Req. for Rev. ¶ 24).

However, the student was recommended to receive SETSS by at least one evaluator prior to the 2018 CSE meeting to address cognitive deficits (see Dist. Ex. 8 at p. 6). Further, the hearing record shows that the student's last known age and chronological grade were incongruent with his known levels of performance (see, e.g., Dist. Exs. 7; 8). The parent provided unrefuted testimony that the student was, at the time of the impartial hearing, reading at the "beginner first grade level" and was at the kindergarten level in math (Tr. pp. 130-21). The parent also testified that the student could not read, and "can't do any textual learning," and was diagnosed with dyslexia (Tr. p. 131). The parent further specified that the student has trouble with letter recognition and writing (forming) letters, as they come out backwards or upside down (Tr. pp. 131-32).

The district argues that the July 2018 supplemental psychological evaluation recommended SETSS for the student for the 2018-19 school year, not the 2019-20 school year; however, the district points to no evidence in the hearing record that the student's needs had changed in a notable way after the July 2018 evaluation and, as the party carrying the burden of proof, it was incumbent upon the district to offer its view of the special education needs into the hearing record (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]). The district's failure to enter any evaluative information into the hearing record or create an IEP or IESP leading up to or during the 2019-20 school year effectively precludes it from arguing a credible alternate view of the student's needs or successfully rebutting the evidence proffered at the hearing by the parents (and relied upon by the IHO) in support of an award of compensatory SETSS.

The district also makes much of the IHO's purported reliance on the January 2021 IEP and the parent's testimony regarding the student's needs as of June 2021 to conclude that the student required SETSS during the 2019-20 school year,[13] arguing that the evidence post-dated the relevant school year and, therefore, could not be relied upon. While it may be improper to rely on retrospective evidence about the student to evaluative the appropriateness of an IEP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]), the scope of evidence which may be relevant to crafting a compensatory remedy is broader. For example, a student's progress or lack thereof may be examined at a point in time after the school year at issue to assess the amount of deprivation suffered by the student as a result of the district's denial of a FAPE (see Smith v. Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018] [noting that "a

[13] Contrary to the district's argument, the IHO explicitly declined to rely on the January 2021 IEP to calculate the number of hours of compensatory SETSS appropriate to remedy the district's denial of a FAPE to the student for the 2019-20 school year (see IHO Decision at pp. 13-14).

child must have 'lost progress' or a need for education 'restor[ation],' or else the child may be deemed 'whole' and no educational services may be necessary] [internal citation omitted] [alterations in the original], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]). The IHO appropriately weighed the evidence in the hearing record through this lens.

Finally, the district argues that the IHO should not have awarded compensatory SETSS in an amount that was in excess of eight hours per week for one year (based on 40 weeks), totaling 320 hours, as requested in the parent's affidavit (see Parent Ex. E at ¶ 18). However, the IHO concluded that based on the evidence in the hearing record, the student required more than one year's worth of compensatory services to "make him whole" (IHO Decision at p. 13), and the district does not identify a sufficient basis for disturbing the IHO's discretionary award of 400 hours of compensatory SETSS (see Mary McLeod Bethune Day Academy Pub. Charter Sch. V. Bland, 555 F. Supp. 2d 130, 135 [D.D.C. 2008] [noting that compensatory awards should be tailored to the students' needs and may exceed "hour-for-hour replacement of time spent without FAPE"], quoting Reid, 401 F.3d at 524).[14]

VII. Conclusion

Based on the above, I find that the hearing record does not support reversing the IHO's determinations or the award of a bank of 400 hours of compensatory SETSS to be utilized in a two-year time frame.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 22, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER

[14] There is also insufficient grounds for subtracting the number of hours of SETSS that the student received from a private provider given the IHO's finding that the evidence in the hearing record was insufficient regarding those services (IHO Decision at p.14).