The University of the State of New York

The State Education Department
State Review Officer
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No. 22-031

**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:**
Liz Vladeck, General Counsel, attorneys for petitioner, by Daniel H. Levin, Esq.

Brain Injury Rights Group, attorneys for respondent, by Peter G. Albert, 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 ordered the district to provide compensatory education to the student. Respondent (the parent) cross-appeals from the IHO's decision to the extent it determined that the district program and services provided by the district from March 2020 through the 2020-21 school year were appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

The student in this matter has received diagnoses of developmental delays, autism, hypertonia, and apraxia (Tr. p. 416; Parent Exs. B at pp. 1, 2, 5; E at pp. 1-2; F at pp. 1, 5).[1] The

[1] Exhibits submitted to the Office of State Review did not correspond with the table of contents provided by the district. The IHO recognized the misnumbering of the district's exhibits during the hearing (Tr. pp. 180, 198, 201-02). Additionally, during the hearing it was acknowledged that there were errors with regard to the pagination of certain exhibits (Tr. p. 203). Although the exhibit list attached to the IHO decision identifies the district's exhibits more accurately than the district exhibit list, there are inconsistencies between the IHO exhibit list, the labeling on the exhibits, and the descriptions of the documents as they were entered into the hearing record (see Tr. pp. 85-87, 201-12; Dist. Exs. 1-9). For ease of reference, the district's exhibits are cited as they are identified in the IHO decision exhibit list.

student is non-verbal and utilizes a dynamic display communication device and gestures to communicate (Parent Ex. B at p. 3; Dist. 3 at p. 2).[2] The student also has difficulty walking, navigating steps, and sitting without proper support; therefore, she requires adult supervision and orthotics (Tr. pp. 397-401; Parent Ex. B at p. 5; Dist. Ex. 6 at p. 1).[3]

On January 31, 2019, a pyscho-educational evaluation was conducted, but the student's cognitive functioning could not be assessed due to the student exhibiting self-directed behaviors, having a lack of expressive language, and an inability to attend to the task (Parent Ex. D at pp. 1, 5). At that time, it was determined that the student's academic skills were below grade level, the student had difficulty generalizing her skills and working independently (id. at pp. 4, 6). The student's social and emotional functioning were delayed, the student exhibited tantrum behaviors when frustrated, didn't express her wants and needs appropriately, and needed assistance throughout the day with academic and ADL skills (id. at pp. 4-5, 6).

The student attended specialized public schools during the 2019-20 school year and received related services that were provided on an individual basis which included: occupational therapy (OT), physical therapy (PT), and speech-language therapy (Tr. pp. 417-19).

On April 6, 2020, a CSE convened for the student's annual review and developed an IEP with an implementation date of April 7, 2020 (Parent Ex. B at pp. 1, 17).[4] [5] The April 2020 CSE found the student eligible for special education and related services as a student with autism and recommended a 12-month program in a special class in a specialized school (id. at pp. 1-2, 6, 13-14, 17-19). The CSE determined that the student required a highly structured program, adult supervision, and "a low student ratio" (id. at p. 6). Specifically, the CSE recommended that the student attend an 8:1+1 special class from April 7, 2020 to August 14, 2020 (id. at p. 6). The CSE further recommended that beginning on April 7, 2020, the student's related services would consist of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual speech-language therapy, and three

[2] Identification of the speech progress report partially relied on for this information, dated March 31, 2020, varies in the record. The district's exhibit list identifies the document as district exhibit 4 and it appeared to be admitted during the hearing as district exhibit 4; however, the document is labeled as district exhibit 3 and the IHO decision exhibit list identifies the document as district exhibit 3.

[3] The physical therapy progress report partially relied on for this information, dated April 3, 2020, is marked inconsistently throughout the hearing record. The document is identified as district exhibit 6 in the IHO decision exhibit list and the district's exhibit list, but the exhibit itself is marked as district exhibit 5.

[4] The district states that a CSE convened on August 6, 2020, when the remainder of the hearing record and IEP reflect a date of April 6, 2020, therefore the August date appears to be a typographical error (Req. for Rev ¶ 3; Parent Ex. B at p. 17).

[5] There are duplicate exhibits in the hearing record (compare Parent Ex. B, with Dist. Ex. 2; compare Parent Ex. C with Dist. Ex. 3; compare Parent Ex. D with Dist. Ex. 8). The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). Although the IHO acknowledged his responsibilities with regard to the admission of evidence, the IHO is reminded of his obligation to exclude from the hearing record any evidence he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (Tr. pp. 85-88; 8 NYCRR 200.5[j][3][xii][c]). Where exhibits are duplicated, the corresponding parent exhibits will be cited.

50-minute sessions per year of group parent counseling and training (id. at p. 13). The CSE also recommended that the student participate in adapted physical education two times per week, beginning in April 2020 (id. at pp. 12-13). For the 2020-21 10-month school year, the CSE recommended that the student attend a 12:1+1 special class for ELA, math, social studies and science, beginning in September 2020 (id. at p. 12). The CSE also recommended that the student's IEP include the services of a 1:1 health paraprofessional due to the student's hypotonia and need for safety while walking and sitting (id. at pp. 6, 13-14). The student's related services recommendations remained the same (id. at p. 13). The CSE did not recommended adapted physical education for the student for the 2020-21 school year (see Parent Ex. B at pp. 12-14). It was recommended that the student receive special transportation for a limited time not exceeding 60 minutes (id. at p. 17). Lastly, the CSE recommended a dynamic display speech generating device to be used in school and at home (id. at pp. 7, 14).

During summer 2020, the student remained eligible to receive special education services, however the district provided the services remotely (Tr. pp. 428-30). Nevertheless, the student only attended remote speech therapy on July 6, 2020 and July 8, 2020 and did not attend further sessions during summer 2020 (Tr. pp. 241-44, 273-74).

On July 28, 2020, the parent provided the district with notice of her intention to unilaterally self-cure the district's failure to provide the student a FAPE, if the district did not immediately begin implementing the educational program set forth in the student's IEP (Parent Ex. C at p. 1). The letter indicated that the parent's contentions related to the student's educational program being inappropriately changed from a classroom to the student's home, the student's services not being provided in person by a special education teacher or related service provider, and the student not being provided with direct services as the IEP did not provide for remote delivery (id. at p. 1). The parent asserted that such alterations constituted an improper change in the student's educational program (id. at pp. 1-2). The parent requested that an extensive independent evaluation be conducted of the student, a determination made regarding compensatory services, changes made to the student's educational program due to the district's failure to provide the student with a FAPE since mid-March 2020, and for the CSE to reconvene to review the updated evaluation and make appropriate changes to the student's IEP (id. at p. 2).

**A. Due Process Complaint Notice**

The parent filed a due process complaint notice, dated August 14, 2020 and subsequently attempted to amend the due process complaint notice on August 17, 2020 (see Parent Ex. A at p. 1; see Amended Due Process Comp. at p. 1).[6] Both notices are similar; however, the amended due

[6] 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]). Here, the parent's amended due process complaint notice, dated August 17, 2020, was filed prior to the pre-hearing conference, which occurred on July 30, 2021 (Tr. p. 1; see Amended Due Process Comp.). However, there is nothing in the transcript to reflect that during the hearing the district consented to the parent amending the due process complaint notice. In fact, the transcript makes multiple references to the initial August 14, 2020 due process complaint notice being operative (Tr. pp. 2, 27, 33, 47, 140, 194). Although the district acknowledges the parent's amended due process complaint notice in its answer to the parent's cross-appeal, the

process complaint notice alleged that the district failed to offer the student a FAPE pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794 by "unilaterally modifying the [s]tudent's IEP" (compare Parent Ex. A with Amended Due Process Comp.).[7]

The parent alleged in the August 14, 2020 due process complaint notice, that the district failed to offer the student a FAPE by "failing to implement the [s]tudent's educational program as established in the [s]tudent's last agreed upon [IEP]" (Parent Ex. A at p. 1). Additionally, the parent argued that as of mid-March 2020 the district "unilaterally, substantially, and materially altered the [s]tudent's 'status quo' educational program as it relate[d] to the [s]tudent's pendency rights" when the district: "substantially and materially altered the location of where the [s]tudent was to receive services from a school classroom to the most restrictive setting: at the [s]tudent's home," "substantially and materially altered the delivery of these services by precluding the [s]tudent from receiving in-person services by a special education teacher or related service providers," and provided the student's services remotely as opposed to as a direct service as required by her IEP, and did not provide proper notice to the parent (id. at pp. 1-2). The parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id. at p. 2).

After noting that the district's federal and State obligations to continue to provide students with a FAPE during the COVID-19 pandemic—while allowing for flexibility during this transition of services—had not been waived or absolved, the parent alleged that the district violated the student's pendency rights and, as a result, sought "immediate relief" (id. at p. 2). Additionally, the parent requested an "extensive independent evaluation" of the student to "determine the need for compensatory services as well as any appropriate changes" to the student's "educational program and placement" to remedy the district's failure to offer the student a FAPE "since mid-March 2020"

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parent herself failed to acknowledge the amended due process complaint notice in her opposition papers to the district's motion to dismiss and her post hearing memorandum of law (Answer to Cross Appeal ¶ 5; Parent Opp'n to Motion at p. 2; Parent Mem. of Law at p. 1). The IHO also made no ruling as to whether the amended due process complaint notice was accepted, did not address it in his decision, or include it in the decision's exhibit list (IHO Decision at pp. 2, 34). Therefore, for purposes of this appeal, the August 14, 2020 due process complaint notice will be relied upon.

[7] Although the parent's opposition papers to the district's motion to dismiss references section 504 claims being made in the August 14, 2020 due process complaint notice, such statement is incorrect as the parent's section 504 claims were only made in the amended due process complaint notice (compare Parent Ex. A with Amended Due Process Comp.; Parent Opp'n to Motion at pp. 2-3). Regardless of whether the IHO addressed the parent's section 504 claims, an SRO lacks jurisdiction to consider an IHO's failure or refusal to rule on a section 504 claim as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). [20-123] In fact, courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review the parent's claims related to section 504.

(id.). The parent also requested that the district convene a CSE upon the completion of the evaluation to review it and "make any appropriate changes" to the student's IEP (id. at pp. 2-3).

As relief, the parent requested that the IHO: issue an "interim order" directing the district to implement the student's last-agreed upon IEP by "reopening the [s]tudent's school," or, alternatively, allowing the parent to "self-cure the unilateral change in the student's status quo educational program"; issue an "interim order" directing the district to "conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need[ed] to be made to the [s]tudent's IEP"; and issue an "interim order" finding that the district failed to offer the student a FAPE and determining an appropriate compensatory award, and further requested that the district pay the parent's attorney's fees and expenses associated with representation in this matter, along with any other remedy deemed appropriate (id.).

**B. Events Post-Dating the Due Process Complaint Notice**

Beginning in September 2020, the student received special education and related services by way of a blended learning model, which included both in-person and remote learning on an alternating weekly schedule (Tr. pp. 266, 277-78, 285, 432). According to the student's special education teacher for the 2020-21 school year, the student's one-to-one paraprofessional did not appear at the student's home during remote sessions, but rather assisted the teacher by way of a computer (Tr. p. 280).

On July 28, 2021, a psychological evaluation of the student was conducted which included assessment of the student's intellectual functioning (Parent Ex. F). Administration of the nonverbal subtests of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded a nonverbal IQ of 42 (standard score), which the evaluators reported was in the moderately delayed range of intellectual functioning (id. at pp. 1, 3, 5). In contrast, administration of a second assessment, the cognitive subtests of the Leiter International Performance Scale, Third Edition (Leiter-3), yielded a full-scale IQ of 62 (standard score) which the evaluators reported was in the mildly delayed range of intellectual functioning (id. at pp. 2, 3, 5). The evaluators indicated that the student performed significantly lower on the SB-5 due to her poor response to verbal prompts and directions (id. at p. 3). As part of their assessment the evaluators also administered the Autism Diagnostic Observation Schedule, Second Edition, Module 1 to assist in determining a clinical diagnosis (id. at p. 3). They reported that a comparison of the student's score on the ADOS-2, with other children of her age suggested a "High level of autism spectrum related symptoms" (Parent Ex. F at pp. 1-2, 5). Additionally, completion of the Vineland Adaptive Behavior Scales, Third Edition (Vineland III) by the student's mother which included assessment of the student's communication, daily living and socialization skills, yielded an adaptive behavior composite score of 42 (standard score), which corresponded to a percentile rank of less than one percent (id. at pp.1 2, 5-6).

**C. Impartial Hearing Officer Decision and Related Events**

The impartial hearing commenced on July 30, 2021 by way of a pre-hearing conference regarding the parent's request for an independent educational evaluation (IEE) (July 30, 2021 Tr. pp. 1-25). An appearance to determine the student's pendency placement continued on the same

date and was followed by three hearings held in August 2021 (Tr. pp. 27-78; July 30, 2021 Tr. pp. 26-56).[8]

On August 6, 2021, a social history evaluation suggested that services provided by the Office for People with Developmental Disabilities (OPWDD) would allow the student to become more independent and acquire the life skills that she needed (Parent Ex. E at pp. 1-2).

On August 13, 2021, the parent made a written application requesting that the IHO issue an interim order for a comprehensive IEE at public expense, including an independent neuropsychological evaluation and evaluations in the areas of OT, PT, and speech-language therapy by a provider of her choice (Parent Req. for Independent Evaluations at pp. 1, 3, 5). The parent asserted that the student was entitled to an IEE because the district failed to conduct updated evaluations to determine the ways in which the student regressed due to the unilateral change that occurred when the student began to receive services remotely in her home (id. at pp. 2-3). Further, the parent asserted that the request for a district funded IEE had been made to the district in the August 2020 due process complaint notice and the district had not responded (id. at p. 4).

In an interim order dated August 31, 2021, the IHO ordered an IEE at public expense (IHO Ex. III). More specifically, the IHO directed the district to fund: a neuropsychological evaluation, educational evaluation, speech-language evaluation, OT evaluation, and a PT evaluation (id. at pp. 9-10). The IHO explained that although the parent did not disagree with a specific district evaluation, it was unclear when the student was last evaluated and the parent was not provided with an opportunity to disagree with any re-evaluation of the student (id. at p. 9). Additionally, the IHO determined that it was necessary to order an IEE "in order to have an appropriate and complete record on which to base [her] decision and any potential award of compensatory education" (id. at pp. 9-10).

In an interim decision regarding the student's placement during the pendency of this proceeding, dated September 30, 2021, the IHO determined that the parties agreed the student's April 2020 IEP was the student's last agreed upon IEP (IHO Ex. V at p. 5). The IHO noted the parent's argument that the district violated pendency "when it closed the District's schools during the pandemic and unilaterally modified the Student's IEP, by changing her program and services from in-person to remote"; however, the IHO rejected the parent's request for an interim order stating that the district denied the student a FAPE and providing compensatory services (id. at pp. 5, 8). The IHO ordered the district to provide the student with the program and services set forth in the April 2020 IEP and further ordered the district to reimburse the parent for services set forth in the April 2020 IEP that had to be secured by the parent between the filing of the due process complaint notice and the district's implementation of the pendency order (id. at pp. 8-9). The parent's request for an interim order stating that the district denied the student a FAPE and providing specific compensatory services was denied (id. at p. 8).

On October 8, 2021, the district filed a motion to dismiss the parent's due process complaint notice and to vacate the August 2021 interim order which directed the district to fund an IEE (see

[8] Other than the July 30, 2021 pendency hearing, the transcripts of the proceedings are consecutively numbered (see Tr. pp. 1-454; July 30, 2021 Tr. pp. 26-56). Accordingly, citations to the transcript will simply indicate the page number, except that citations to the July 30, 2021 pendency hearing will indicate the hearing date as well as the page number.

IHO Ex. I). The district asserted that the parent's due process complaint notice was "substantially similar" to other due process complaint notices filed by the parent's attorneys in other matters (id. at p. 2). Further, the district argued that each of the parent's "vague allegations fail[ed] to state a cause of action, the IHO lack[ed] authority and jurisdiction to award parent's relief, and/or parent's requested relief [wa]s moot" (id.). In support of its position, the district cited to Application of the Dep't of Educ., Appeal No. 21-187, alleging that the due process complaint notice in that matter was nearly identical to the one at issue in this proceeding and argued that in that matter a State Review Officer found that the due process complaint notice contained no cognizable denial of FAPE related to the change to remote instruction and dismissed the due process complaint notice with prejudice (id. at p. 3). More specifically, the district argued that the IHO lacked authority or jurisdiction to order the student's school to re-open after closing due to the COVID-19 pandemic, that the parent's request to re-open the school was moot because it had already occurred, that the parent's due process complaint notice failed to state a claim upon which relief could be granted as it did not allege any deficiency in the student's IEP or placement or assert a denial of FAPE other than the switch to remote instruction, and that the request for interim independent evaluations should not have been granted as a matter of law as the parent did not disagree with a district evaluation and the ordered evaluation "serves as nothing more than a fishing expedition for future hypothetical proceedings" (id. at pp. 3-13).

On November 3, 2021, the parent's attorney notified the IHO that the parent would be withdrawing her due process complaint notice without prejudice, but the district opposed the withdrawal, asserting that the withdrawal should be with prejudice considering the motion to dismiss filed by the district remained pending (Dist. Ex. 1 at pp. 3-4). On November 11, 2021, the IHO allowed the parent to respond to the district's motion to dismiss (id. at pp. 2-3). Thereafter, the parent's attorney indicated that the parent was no longer withdrawing her due process complaint notice, but rather requested that the IHO make a ruling on the district's motion to dismiss (id. at pp. 1-2). However, the district argued that "[t]he parent should not have the right to change their position" and that the IHO should determine if the withdrawal was with or without prejudice (id. at p. 1).

After the hearing resumed on November 18, 2021 and December 20, 2021 to discuss the possible withdrawal and the district's motion (Tr. pp. 80-189), the IHO issued an interim decision granting the district's motion to dismiss the parent's request to reopen the district's schools that were closed due to the pandemic, and denying the district's motion in all other respects (IHO Ex. IV). The IHO found that she lacked jurisdiction to order implementation of the student's last agreed upon IEP by re-opening the student's school or allowing the parent to self-cure (id. at p. 6). She further determined that the parent's claims regarding the student's school closing were moot and were therefore dismissed (id. at pp. 7-9). However, the IHO found that the parent's due process complaint notice included an allegation that the district denied the student a FAPE because it "fail[ed] to implement the student's educational program as established in the [s]tudent's last agreed upon [IEP]," an allegation which the IHO found to be "plausible" (id. at p. 12). The IHO then rejected the district's motion to vacate the IHO's interim order regarding an IEE (id. at pp. 13-14).

The hearing resumed with the presentation of evidence and witness testimony on January 6, 2022 (Tr. pp. 191-454). According to testimony of a private occupational therapist, speech-language pathologist, and physical therapist, evaluations of the student were conducted on January 3, 2022, in the areas of OT, speech-language, and PT, which included informal assessments due

to there being limited time to conduct the evaluations (Tr. pp. 322, 325-27, 342, 355-56, 363-65, 377-78, 385-86, 392-94, 404-06).[9]

In a final decision dated February 24, 2022, the IHO held that the district provided the student with a FAPE from March 2020 through the 2020-21 school year (IHO Decision at p. 31). The IHO also found that both parties agreed that the student's April 2020 IEP was appropriate (id. at p. 18). Additionally, the IHO determined that there was no merit to the argument that the district failed to implement the IEP by providing the student with her special education program and services remotely or pursuant to a blended model (id. at pp. 18-21). The IHO found that the district's change to remote instruction was not a failure to implement the student's IEP or a failure to provide a FAPE, stating that compliance with the IDEA did not preclude the district from offering education through distance learning (id. at p. 19). The IHO determined that the district offered no evidence or testimony as to how the student's IEP was implemented from March 2020 to June 2020 and only provided details regarding the period from September 2020 to June 30, 2020 (id. at pp. 19). However, the IHO indicated that the due process complaint notice did not allege that the student failed to receive instruction or services (id. at p. 19).

With regard to the parent's request for compensatory education, the IHO found that the testimony presented in the hearing record conflicted regarding whether the student regressed from March 2020 through the 2020-21 school year (id. at pp. 24-25). Furthermore, the IHO found that the hearing record did not establish that if regression had occurred, it was caused by the change to remote learning (id. at p. 24). However, despite the above conclusions, the IHO indicated that during Summer 2020 the student missed classes and services, which caused the student to fail to receive more than a de minimus educational benefit and constituted the denial of a FAPE (id. at pp. 26-27). Accordingly, the IHO determined that the student was entitled to receive compensatory education and services (id. at pp. 27, 31). Specifically, the IHO directed that the student be provided with compensatory education and services commencing within 30 days of the date of the decision, including the following: 18 individual OT sessions, 18 individual PT sessions, 22 individual speech language therapy sessions, 12 adapted physical education classes, as well as 30 English language arts classes, 60 mathematics classes, 30 social studies classes, and 18 science classes, with the classes being provided in a special 12:1+1 classroom (id. at p. 31). The IHO further determined that based on testimony from the student's teacher that the student missed some of her special education programming during the 2020-21 school year, the district was required to conduct an audit within 30 days of the date of the decision to ascertain the number of hours that the student missed in instruction and related services and to provide the missed services as compensatory education (id. at pp. 27, 31). The IHO ordered the district to provide the awarded compensatory education, and additional amount determined, with the support of a one-to-one paraprofessional and a speech generating device (id. at p. 31).

[9] According to counsel for the parent, due to the timing of the evaluation and the hearing, there were no reports of the evaluations to disclose (Tr. pp. 325-26). However, testimony of the evaluators was allowed during the hearing (see generally Tr. pp. 314-411).

## IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in awarding compensatory services while also finding that the district provided the student with a FAPE. The district also asserts that the IHO wrongly denied its motion to dismiss.

The district argues that the closure of a public school building due to the COVID-19 pandemic and the student being provided with remote or hybrid learning did not change the student's placement. The district stated that the parent's due process complaint notice did not include any allegations that the program offered was inappropriate, that the student did not receive instruction or services remotely during the school closure, that the student regressed during the provision of remote instruction, or that the student was adversely impacted by receiving instruction remotely. According to the district, any claims regarding the actual delivery of services after March 2020 were not included in the due process complaint notice and were therefore outside the scope of the impartial hearing and should not have been considered by the IHO. With regard to the student's special education programming and services during summer 2020, the district asserts that remote instruction was offered, but the parent had rejected the provision of instruction remotely.

Further, the district argued that any change in the delivery of the student's instruction was a systemic issue that was not reviewable by the IHO as it was outside of the IHO's jurisdiction. Relatedly, the district asserts that executive orders issued by the Governor of the State of New York did not trigger the student's right to a pendency placement and that issues pertaining to claims regarding the provision of remote instruction were beyond the jurisdiction of the IHO. The district further alleges that the parent's request to reopen the district public schools was moot as the schools had since re-opened. The district also argues that to the extent the parent was alleging a violation of the student's pendency rights due to the closing of the public schools, such an allegation was premature as the student was not entitled to a pendency placement prior to the parent filing the due process complaint notice in August 2020. Therefore, the district requests that the IHO's denial of its motion to dismiss be reversed.

The district also argues that the IHO's award of compensatory services must be reversed, as the due process complaint notice, and hearing record did not allege or establish that the student regressed during the period of remote instruction. With regard to the testimony provided by the evaluators, the district asserts that the testimony should not have been permitted due to the delay that occurred in observing the student. Furthermore, the district argues that the IHO lacked the authority to order the district to conduct an audit of any instruction or classes missed by the student during the 2020-21 school year. Specifically, it was stated that it was improper to order conditional relief predicated upon the results of an audit that was to be conducted after the hearing record closed.

Lastly, the district asserts that the IHO improperly held a hearing rather than issuing a termination order after the parent withdrew her claims. The district acknowledged that a dispute existed between the parties regarding whether the parent's withdrawal would be with or without prejudice. Regardless, the district asserts that the IHO should not have allowed the parent to rescind her request to withdraw her due process complaint notice.

The parent answers and cross-appeals from the IHO's determination that the district offered the student an appropriate educational program from March 2020 through the 2020-21 school year. Initially, the parent asserts that the IHO decision should be upheld to the extent that it awarded the student compensatory services and ordered the district to conduct an audit to determine services not received by the student. Additionally, the parent argues that the IHO properly denied the district's motion to dismiss. With respect to the cross-appeal, the parent alleges the district violated "the procedural requirements of the IDEA when it switched to a remote learning plan following school closures." The parent further argues that a denial of FAPE was the result of instruction and services being denied, specifically the student being unable to participate in virtual classes, failing to have meaningful interactions with her teacher for months, and the district failing to provide the academic and related services that were mandated in the student's IEP, including the support of a 1:1 paraprofessional.

In an answer to the parent's cross-appeal, the district reiterates many of the arguments contained within the request for review and also argues that it was not required to provide notice, obtain consent, or follow other procedural requirements prior to switching the delivery of the student's educational programming to remote instruction.

In a reply, the parent contends that she is not making arguments concerning the systemic change to remote learning associated with the COVID-19 pandemic. Rather, the parent asserts that the district ignored the procedural requirements of the IDEA when it unilaterally switched to remote learning following school closures in March 2020, without notice or consent, which violated her due process rights and prevented her from having any meaningful participation in the formation of the student's educational program. The parent further asserts that her claims were related to the district's failure to implement the student's IEP by providing no "in-person instruction or services between mid-March and August 2020, and no instruction or services at all during July and August 2020."

**V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

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. District's Request for an Order of Termination

The district contends on appeal that the email sent by the parent's attorney on November 3, 2021, seeking to withdraw the matter, was valid and could not be rescinded (Tr. p. 148; Req. for Rev. ¶¶ 27-28; Dist. Ex. 1 at pp. 3-4). The district asserts that the due process complaint notice should have never been addressed by the IHO, rather the IHO should have merely decided whether the parent's withdrawal was with or without prejudice. Specifically, the district asserts that because the hearing had already commenced and four appearances were held, the parent's withdrawal should have been with prejudice (Req. for Rev. ¶ 28).[11]

Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]).[12] In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).

The parent desired to withdraw her due process complaint notice without prejudice, but the district objected to the withdrawal on the grounds that it should occur "with prejudice given the district's [m]otion to [d]ismiss" (Dist. Ex. 1 at pp. 3-4). The IHO decided that "[i]n light of the [d]istrict's motion to dismiss and vacate this IHO's interim order, I will allow [parent's counsel] to address such motion, before deciding upon the [p]arent's request to withdraw without prejudice

[10] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[11] Although appearances did occur on July 30, 2021, August 9, 2021, August 13, 2021, August 26, 2021 they were pre-hearing conferences that addressed issues associated with independent educational evaluations and pendency (July 30, 2021 Tr. p. 2, 28; Tr. 28, 43, 64).

[12] State regulation provides that "the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference" (8 NYCRR 200.5[j][6][i]).

and the [d]istrict's request that such withdrawal be with prejudice" (id. at p. 3). However, the parent then rescinded her request to withdraw (id. at p. 2). The parties outlined their positions on the record as to whether the parent's withdrawal of the due process complaint notice should be considered rescinded (Tr. pp. 88-97, 164-69; Dist. Ex. 1 at p. 2). The record reflects that the IHO evaluated and considered both parties' arguments when deciding that the parent's withdrawal had been rescinded and that she would not terminate the proceedings (Tr. pp. 88-97, 164-169). The IHO analyzed the dispute between the parties, citing to the applicable State regulation, and found that the withdrawal never went into effect (Tr. pp. 89-94, 166-69). The IHO provided a rational basis for the decision not to terminate the parent's due process complaint notice, addressing the parent's reasoning for rescinding the withdrawal. Upon review, the IHO's decision accepting the parent's rescission of the request for a withdrawal was reasonable. Further, to the extent the district requests that this matter be terminated at this stage of the proceedings, after the hearing has taken place and the parties have presented detailed arguments, it appears that such a determination would be unfair to the litigants and contrary to the interests of judicial economy. Accordingly, because the district has not presented a compelling reason on appeal to disturb the IHO's determination, it will not be disturbed.

**B. District's Motion to Dismiss**

The main issue presented on appeal is whether the IHO erred in denying the district's motion to dismiss the parent's due process complaint notice when she found that the due process complaint notice included an allegation that the district denied the student a FAPE because it failed to implement the April 2020 IEP. The district appeals from the IHO's determination, contending that the parent's due process complaint should have been dismissed as the IHO lacked jurisdiction to re-open the student's school after it was closed due to emergency orders issued as part of the COVID-19 pandemic, that the issue of the school closure was moot because the school had since re-opened, that claims related to the student's pendency placement were premature, that the change to remote instruction could not be found to constitute a denial of FAPE because it was systemic in nature, and that there were no allegations in the parent's due process complaint notice that the student suffered regression or was adversely impacted by the remote instruction (Req. for Rev. ¶¶ 11-24).

As the district notes, the parent's allegations in the due process complaint notice were very similar to those alleged in matters involving different students, which were discussed in Application of a Student with a Disability, Appeal No. 21-241, Application of a Student with a Disability, Appeal No. 21-210, Application of the Department of Education, Appeal No. 21-188, and Application of the Department of Education, Appeal No. 21-187. In each of these matters, the parents' allegations—brought by the same law firm as is representing the parent in this matter—surrounded the school closures that took place as a result of the COVID-19 pandemic. Relevant to such circumstances is the decision of the District Court of the Southern District of New York in J.T. v. de Blasio, which also involved plaintiffs represented by the same law firm as the parent in the present matter (500 F. Supp. 2d at 145). The Court in J.T. described in detail the March 13, 2020 closure of schools in New York City, as well as the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery consistent with federal and State guidance (id. at 181-84).

During the pendency hearings, the parent's attorney indicated on the record that it was his understanding that in July 2020, the student received a "blended, hybrid" model that consisted of

a combination of in-person and remote related services, which continued in September 2020 (July 30, 2021 Tr. p. 48; Tr. p. 66). After the IHO directed the district to present evidence as to whether the district was prepared to implement the April 2020 IEP as of September 2020 (July 30, 2021 Tr. p. 49), the district representative indicated that the student's school was open in September 2020 and could have implemented the student's IEP; however, the district was not able to present either a witness or documentary evidence (Tr. pp. 30-32, 45-47). According to counsel for the parent, beginning "[i]n July -- July 1, 2020, the student did receive some in-person, some remote services, some of the related services, and essentially that continued when the regular school year began in September of 2020. It was a combination of in-person and remote, sometimes referred to as hybrid" (Tr. p. 66).

The student's special education teacher testified that the student did not attend school during summer 2020 and she only attended two days of remote instruction with speech-language therapy in July 2020 (Tr. pp. 244, 274). The special education teacher stated that related services were offered to students who attended summer school, but only in a remote format; she also indicated that she believed the student did not attend for the summer because the parent wanted in person instruction and only a remote option was offered (Tr. p. 244, 274). However, the student's special education teacher testified that in September 2020, the school was using a blended schedule in which the student attended in-person on an alternating weekly schedule (Tr. pp. 265-66, 277-79, 304). Specifically, the student received one-to-one instruction and related services both in-person and remotely (Tr. pp. 245-47, 278-79). The student's teacher stated that during the 2020-21 school year related services were offered to the student when she attended school remotely, but there were times when the student did not attend (Tr. pp. 284-86). Additionally, the teacher indicated that the school moved to providing in-person instruction full-time in February 2021 (Tr. p. 302). The student's teacher acknowledged that the parent expressed concerns regarding remote learning and the student's participation during the 2020-21 school year (Tr. pp. 285, 300-02).

The parent testified that during the 2019-20 school year the student was receiving academic and related services in-person until March 13, 2020 (Tr. p. 426). The parent also testified that the following Monday all schools went remote and for the remainder of that week no services were provided, until the following week when the school attempted to start delivering services remotely (id.). The parent indicated that from mid-March 2020 through June 2020, the district attempted to provide services to the student virtually, but it was not a satisfactory method of service delivery because the student was unable to participate (Tr. p. 427). She explained that the student was non-verbal, could not sit still in front of the computer without significant support and needed a one-to-one paraprofessional to help her utilize her speech generating device (Tr. pp. 427-28). The parent testified that at some point in July 2020, a couple of weeks after the start of the summer program, the district offered related services in-person; however, because the district did not provide the student's transportation as recommended on the IEP, the parent was required to provide the student with transportation and she could only do so sporadically (Tr. pp. 430-31).[13] The parent then testified that as of September 2020, the hybrid learning schedule allowed the student to attend school for five days and then be home for remote learning for five days (Tr. p. 432). Additionally, there were many instances in which the school closed, or quarantines forced the student to remain in the home, causing in-person attendance to occur as little as one or two days in a month (id.).

[13] The April 2020 IEP recommended the provision of specialized transportation for the student (Parent Ex. B at pp. 17, 19).

The parent acknowledged that the school was closed by emergency executive order during the COVID-19 pandemic (Tr. p. 442). However, to the extent that the parent took issue with the executive decision to close schools or the district's actions to deliver instruction and services to students with disabilities remotely during the closure, those allegations are systemic in nature, and no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO nor I have plenary authority to pass judgment on the Governor's or district policies affecting all students. Even if I possessed such authority, courts have held that certain summary administrative actions that have the effect of limiting the availability of protections otherwise afforded by law under ordinary circumstances may be justified as part of the government's response to emergency situations (see, e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 979 [D.N.M. 2020]), so it is far from clear that the parent would prevail with that argument in the appropriate forum anyway.

In addition, in describing her allegations, the parent referenced concepts such as "status quo" and pendency rights (Parent Ex. A at pp. 1-3). To the extent the due process complaint notice alleged a violation of the student's pendency placement, such an allegation was premature insofar as the student was not entitled to a pendency placement prior to the parent's filing of the due process complaint notice in August 2020 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the Governor's March 2020 executive order closing schools in the State is not the event that would trigger the student's right to a pendency placement under the IDEA, and it was only the parent's filing of a due process complaint notice that gave rise to the student's rights under stay-put. The parent also requested that an IHO issue an order requiring the district to implement the student's last-agreed upon IEP by reopening the student's school or allowing the parent to "self-cure the unilateral change in the [s]tudent's status quo" (Parent Ex. A at p. 3). However, an IHO would not have sufficient authority to countermand Governor Cuomo's executive orders addressing the COVID-19 pandemic response or to direct the district to open an entire school and, in any event, district schools have since re-opened and such request is now moot (see J.T., 500 F. Supp. 3d at 190).[14] The parent's attorney even acknowledged on the record that "the issue of the reopening of schools has kind of come and gone" (Tr. pp. 196-97).

With regard to claims that the district failed to implement the student's IEP and that this caused the student to regress, the district asserts that such claims were not set forth in the parent's due process complaint notice. In fact, the district argued that there were no particulars mentioned in the due process complaint notice regarding the student or her IEP (Tr. pp. 113, 145). Rather the district asserted that the due process complaint notice only concerned the change from in-person

[14] Further, the Court in J.T. held that the switch to remote learning in light of the pandemic in and of itself did not constitute a change of placement that would trigger a student's right to pendency (500 F. Sup. 3d at 187-90). The Court left open the possibility that an individual parent could assert "that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in [a student's] pendency" (id. at 194); however, the parent has not presented an argument that something other than the closure of the student's school and the provision of instruction remotely resulted in a change in placement.

instruction to remote instruction, without alleging any denial of instruction or services (Tr. pp. 102-03, 107-110, 124). Therefore, the district repeatedly objected during the hearing to testimony about whether the student regressed during remote instruction or whether the IEP was implemented, asserting such claims were not raised in the due process complaint notice (Tr. pp. 102-03, 107, 173, 230, 319-20, 340, 441).

During the impartial hearing the parent presented arguments related to the implementation of the student's IEP and alleged that the student regressed during the period she was offered instruction remotely.[15] With regard to regression, the parent testified that during the period of late March 2020 through June 2021, she watched her "child wither away," "withdraw from everything," "start horrible stemming [sic] behaviors" and that the student did not want to "participate socially with her siblings" (Tr. pp. 434-35). The parent argued that remote learning was inappropriate for the student as it caused "tantrums and behavior" and disruptions in her daily life (Tr. p. 439). The parent submitted reports from a July 2021 psychological evaluation and an August 2021 social history evaluation into the hearing record and elicited testimony from a private occupational therapist, speech-language pathologist, and physical therapist who conducted evaluations of the student in January 2022 (see generally Tr. pp. 314-411; Parent Ex. E, F).

Additionally, in the parent's post-hearing Memorandum of Law, she focused her argument on the implementation of the April 2020 IEP after the move to remote instruction, asserting that the student could not participate in virtual instruction because she was nonverbal and required more support than the parent could provide at home (IHO Ex. X at pp. 8-9). According to the parent, the student regressed during the provision of remote instruction as shown by the testimony of the private evaluators (id. at pp. 9-13). Moreover, the parent asserted that the student was denied educational benefits, including a lack of progress towards her IEP goals, an inability to participate, and failure to make progress in the general education curriculum (id. at p. 15). The parent further referenced State guidance indicating that "For students with needs so complex that they were not able to participate in or benefit from special education programs and services in learning modalities other than full in-person instruction, the Committee must determine the type and extent of compensatory services that may be necessary to address a loss of skills" ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While

[15] Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf; see IHO Ex. X at p. 15). The parent then re-asserted these same allegations in her answer and cross-appeal (Answer to Cross Appeal ¶ 8).

It is uncontested on the record that the student needed the services of a 1:1 health paraprofessional due to safety concerns and a high risk of injury (Parent Ex. B at pp. 6, 13-14; Tr. pp. 248-249). However, it is also undisputed that during periods of remote learning, a one-to-one paraprofessional never appeared at the student's home (Tr. pp. 280, 427-28). Rather, the student's paraprofessional provided support when the student attended in-person and virtually during remote sessions (Tr. pp. 280-81). The parent testified that this was problematic for virtual classes, as the student needed significant support, but both parents were employed and had responsibilities associated with their other children, making them unable to serve as the student's 1:1 paraprofessional (Tr. pp. 427-28). The parent asserted that the student needed to operate two devices to participate in remote academics, an iPad to receive services and an iPad to speak, but the district failed to provide an in-home 1:1 paraprofessional to help the student utilize the devices (Tr. p. 428).

Here, the district was correct that the August 2020 due process complaint notice did not allege that the student did not receive instruction and/or services remotely during the school closure, instead taking issue with the remote delivery itself (see Parent Ex. A). Nor did the parent allege in the due process complaint notice that a CSE considered or was asked to consider whether the student may need additional services to make up for lost skills due to the closure of schools and the change in the delivery of services as a result of the pandemic, which as discussed further below, is the process contemplated by the United States Department of Education (USDOE) and the State Education Department's (SED's) Office of Special Education. 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]).

The IHO generally found that the district did provide a FAPE to the student from March 2020 through the 2020-21 school year, but also stated in the body of the decision that the failure to provide the student with transportation during the summer of 2020 resulted in the student missing services which resulted in a denial of FAPE and that the student also missed some of her program and services during the 10-month 2020-21 school year (IHO Decision at pp. 25-27, 31). The IHO awarded the student compensatory education for the services that she found were missed

during these periods (id. at p. 31). However, as discussed above, the hearing record supports finding that the services that were missed from March 2020 through the 2020-21 school year were missed due to the switch in the provision of instruction from in-person to remote in response to the Covid-19 pandemic.

Both the USDOE and SED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(*l*), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

Here, there is no indication that a CSE has conducted such a review, nor is there any indication that the parent requested that the CSE conduct such a review. The parent expressed during the hearing that, in her opinion, the student regressed during remote learning and that remote delivery was inappropriate for the student (Tr. p. 439-41). The parent stated that she informed the school of the student's difficulties with remote learning, her dissatisfaction with the same, and her desire to obtain related services in the home beginning in April 2020 (Tr. pp. 435-36, 438-40). However, the parent did not testify that she requested a reconvene of the CSE, but only indicated that the CSE did not convene to consider the impact of remote instruction on the student (Tr. pp. 432-33).

Additionally, although OT, PT, and speech-language evaluations were completed during the hearing, in January 2022, reports of those evaluations were not submitted into the hearing record and it does not appear from the hearing record that reports of the evaluations were delivered to the CSE so that the CSE could consider whether the evaluative information supported the parent's position or if compensatory education would be appropriate to make-up for any loss of skill linked to the provision of remote instruction to the student. In any event, the evaluations that were conducted during the pendency of this proceeding post-date the due process complaint notice and did not occur until January 3, 2022 (Tr. pp. 322, 356, 385-86). Indeed, the due process complaint notice does not include any allegations relating to a CSE's consideration of compensatory education or lack thereof because of responsive measures by the government to mitigate the public health threat from COVID-19.

At this point, the CSE should have reconvened to develop an IEP for the student for the 2021-22 school year (see Parent Ex, B at p. 1 [showing a projected date of annual review of April 6, 2021]), and the parent was required to raise these concerns concerning the student's regression and compensatory education with the CSE in the first instance. As discussed above, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. Accordingly, the IHO erred in ordering compensatory education at this juncture. However, the parties, if they have not already done so, should conduct a review of the student's present levels of academic achievement and functional performance as envisioned by federal and state education authorities and convene a CSE to engage

in educational planning for the student, which should include a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely. Once a CSE conducts such a review, if the parent disagrees with the recommendations thereof, she may pursue dispute resolution through one of the mechanisms described above.

Therefore, because the IHO's order alters the procedure that must be followed with regard to compensatory education services arising out a change in the delivery of instruction during the COVID-19 pandemic, it cannot be upheld.

**VII. Conclusion**

In summary, given the allegations in the parent's due process complaint notice, the IHO erred in denying the district's motion to dismiss. The IHO should not have decided whether the district offered the student a FAPE from March 2020 through the 2020-21 school year, notwithstanding the shift to remote instruction due to school building closures resulting from the COVID-19 pandemic. Even if the district's delivery of remote instruction could support a finding that the district failed to provide the student a FAPE, the student would not be entitled to relief in the form of compensatory services at this juncture as it does not appear that a CSE review occurred.

In light of these determinations, I need not address the parties' remaining arguments.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated February 24, 2022 is modified by reversing that portion which ordered the district to commence the provision of compensatory education and services to the student; and

**IT IS FURTHER ORDERED** that the IHO's decision dated February 24, 2022 is modified by reversing the portion that required the district to conduct an "audit" to ascertain the hours of instruction and related services missed by the student during the 2020-21 school year and to add that amount to the total hours allotted as an award of compensatory services; and

**IT IS FURTHER ORDERED** that, to the extent it has not already done so, the district shall convene a CSE to review the student's educational program and consider whether compensatory services are warranted to make up for a loss of skill resulting from the school closures or remote delivery of instruction and/or services, if any, attendant to the COVD-19 pandemic.

**Dated:** **Albany, New York**
**June 6, 2022**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**