The University of the State of New York

The State Education Department
State Review Officer
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No. 22-045

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Sarah Khan, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for a prospective placement and prospective funding of the costs of the student's tuition at the International Institute for the Brain (iBrain) as compensatory educational services.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). If disputes occur between parents and school districts,

[1] The Commissioner of Education has not approved iBrain as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student is this case has been the subject of a prior State-level administrative appeal, which remanded the matter to the IHO for further proceedings (see Application of a Student with a Disability, Appeal No. 21-209). The current appeal arises from the IHO's decision issued after remand; accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will not be repeated in detail.

Briefly, the student attended ADAPT—a State-approved, nonpublic school—for preschool during the 2019-20 and 2020-21 school years until the parent unilaterally placed the student at iBrain in April 2021; the student remained at iBrain through the conclusion of the 2020-21 school year (i.e., April 2021 through June 2021) and for the entire 2021-22 school year (12-month school year program) (see Parent Exs. K at p. 1; R at pp. 1-2; see generally Parent Exs. M; P).

By due process complaint notice dated June 22, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A at p. 1). Relevant to the instant appeal, the parent requested, as relief, findings that the district failed to offer the student a FAPE for "her entire educational career" beginning with the 2019-20 school year (12-month program), and to order the district to "fund" the student's educational placement at iBrain for the 2020-21 and 2021-22 school years, and to provide "compensatory services" for the district's "failure to address [the s]tudent's needs in prior school years" (id. at pp. 13-14).[2]

A. Impartial Hearing Officer and State Review Officer Decisions

As noted previously, in a decision dated September 5, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year, but failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see Application of a Student with a Disability, Appeal No. 21-209). With respect to the parent's unilateral placement of the student at iBrain, the IHO found that the parent sustained her burden to establish that it was appropriate for both the 2020-21 and 2021-22 school years (id.). However, despite finding that iBrain was appropriate and met the student's unique needs, the IHO—based on equitable considerations—declined to award either direct funding or tuition reimbursement for both the portion of the 2020-21 school year the student attended iBrain and for the entirety of the 2021-22 school year, and declined to award transportation funding as well on the ground that the parent had failed establish her lack of lack of financial resources to pay the tuition and related costs of iBrain (id.). In addition, the IHO denied the parent's request for compensatory educational services, noting that while sought as relief for "'prior school years,'" the parent did not "specify or describe the form this relief should take" (id.).

Ultimately, the IHO awarded the following as relief for the district's failure to offer the student a FAPE for the 2020-21 and 2021-22 school years: the district must provide the parent with "all attendance records and progress reports (that have not already been provided) pertaining

[2] In the prior State-level administrative appeal, the parent argued that because the district "opened the door" to the 2018-19 school year by submitting the IEPs from the March 2019 and August 2019 CPSE meetings into evidence and "eliciting testimony about them at the hearing," the IHO should have found the district failed to offer the student a FAPE for the 2018-19 school year and granted compensatory educational services as relief (see Application of a Student with a Disability, Appeal No. 21-209). This argument was rejected because the parent's argument mischaracterized the facts in the hearing record, which demonstrated that the student's IEP for the 2019-20 school year was initially developed at the March 2019 CPSE meeting and was subsequently modified at the CPSE meetings held in August and September 2019—and that none of these IEPs were to be implemented at any point during the 2018-19 school year (see Dist. Exs. 1 at pp. 1, 3; 3 at pp. 1, 3; Parent Ex. B at pp. 1, 3). In addition, the parent's argument ignored the fact that her own attorney, in his opening statement, noted that "[t]here [were] a number of IEPs that the [district] ha[d] prepared from 2019, . . . actually from March 26, 2019," which the district's attorney responded to in his opening statement (Tr. pp. 22-23, 28-29). As such, the parent's argument was found to be without merit and was not addressed in the decision.

to any and all related services administered by the [district] or via a [district] placement"; the district must conduct "new evaluations" of the student—which "must address cognition, psychology, speech[-]language, [occupational therapy (OT)], [physical therapy (PT)], behavior, and [assistive technology] services"—within 20 calendar days of the date of the decision; the district must convene a CSE meeting within 30 calendar days of the date of this decision to consider the findings of the evaluations ordered therein, as well as the IHO's decision; and finally, the district, upon convening a CSE meeting, must "offer placement in a special class of no more than 6 students, with related services at the same levels as reflected in the April 2021 IEP" (Application of a Student with a Disability, Appeal No. 21-209).

The parent appealed, and as most relevant here, argued that the IHO erred by finding that the district offered the student a FAPE for the 2019-20 school year. In addition, the parent contended that the IHO erred by failing to award compensatory educational services, as she had requested compensatory educational services in the due process complaint notice to remedy the district's failure to offer the student a FAPE "for [the student's] entire educational career."[3] In addition, the parent argued that the IHO erred by denying her request to be reimbursed for the costs of the student's tuition and transportation at iBrain for a portion of the 2020-21 school year and the entirety of the 2021-22 school year.

With respect to the IHO's allegedly erroneous finding that the district offered the student a FAPE for the 2019-20 school year, the parent pointed, in part, to evidence that the student had no placement at the start of the 2019-20 school year because the district had failed to recommend nursing services for the student until the development of the September 2019 IEP, which occurred at the CSE meeting held on September 26, 2019, and which precluded the student from attending ADAPT until either October or November 2019 (see Application of a Student with a Disability, Appeal No. 21-209). With respect to the IHO's decision denying the parent's request for compensatory educational services, the parent argued that the IHO mischaracterized the due process complaint notice, which included a request for compensatory education as well as extended-age eligibility, to compensate for the district's failure to offer the student a FAPE for the student's entire educational career (including the 2018-19 school year).

In a decision dated November 17, 2021, the undersigned SRO concluded that—with respect to the 2019-20 school year—"although the IHO noted the lack of nursing services at the start of the school year, it d[id] not appear that the IHO considered whether the student missed school entirely for approximately one month at the start of the 2019-20 school year due to the lack of nursing services" (Application of a Student with a Disability, Appeal No. 21-209). Noting that another issue in the appeal required a remand to the IHO, the SRO remanded this specific issue to the IHO to "determine whether the missed program and services at the start of the 2019-20 school year denied the student a FAPE, and what, if any, compensatory educational services would be an appropriate remedy" (id.). The SRO specifically instructed the IHO that, when "deciding what

[3] The district also cross-appealed from portions of the IHO's decision; ultimately, the undersigned sustained the district's cross-appeal, finding that the IHO erred in directing the district to develop a public school IEP with specific a student-to-staff ratio and other characteristics because the district had already been required to fund the student's placement at iBrain for the 2021-22 school year and it was otherwise premature to dictate the student's services for the 2022-23 school year, which was not the subject of these proceedings (see Application of a Student with a Disability, Appeal No. 21-209).

would be an appropriate remedy, the IHO may reconsider his determination that, for the 2019-20 school year, 'despite significant challenges, [the student] made progress and received an educational benefit'" (id.).

Turning to the parent's appeal of the IHO's decision denying her request for compensatory education, the undersigned SRO found that, in addition to potentially being entitled to compensatory educational services for a portion of the 2019-20 school year, the parent could also be entitled to compensatory educational services for the district's failure to offer the student a FAPE for that portion of the 2020-21 school year prior to the student's unilateral placement at iBrain in April 2021—or, more specifically, from September 2020 through April 2021. However, at that juncture, the undersigned found that neither party had informed either the IHO, or the SRO on appeal, as to its respective positions about how to best remediate the situation by indicating, for example, the "total amount of compensatory educational services by type with frequency, duration, and location recommendations" (Application of a Student with a Disability, Appeal No. 21-209).[4] In addition, the undersigned found that neither party made any "meaningful effort at all to develop the hearing record" concerning an award of compensatory educational services, and therefore, this issue was also remanded to the IHO to fashion an appropriate remedy for the district's failure to offer the student a FAPE from September 2020 through April 2021 (id.).

Apart from the issues remanded to the IHO, the undersigned SRO also reversed that portion of the IHO decision which had denied the parent tuition reimbursement and transportation at iBrain for a portion of the 2020-21 school year and the entirety of the 2021-22 school year on the basis that the parent had established her financial obligation to pay for the unilateral placement even if she had not established her lack of financial resources to pay and, therefore, the IHO's order should be modified to direct the district to reimburse the parent for the costs of the students tuition and transportation costs for the relevant time period of his attendance at iBrain upon proof of payment by the parent (Application of a Student with a Disability, Appeal No. 21-209).

B. Impartial Hearing Officer Decision on Remand

Upon remand, the IHO conducted a prehearing conference with the parties on December 29, 2021 (see Tr. pp. 240-49). At the prehearing conference, the IHO asked each party whether they intended to submit additional evidence on remand (see Tr. pp. 243-44). At that time, the parent's attorney advised the IHO of their intention to submit "evidence of what [they] believe[d] would be an appropriate compensatory award for the time period," which evidence would most likely be in the "form of additional witness testimony and the additional documents regarding status reports and such, or progress reports from the student's unilateral placement" (id.). The district's attorney advised of possibly calling "one additional witness in regard to the portion of the one school year at issue in which the student did not receive . . . one-to-one services—and whether or not that was a deprivation of FAPE" (Tr. p. 244). In response, the IHO noted that, while

[4] The undersigned also noted that, in light of the decision to remand the matter, it was unnecessary at that time "to fully consider the parent's request for extended-age eligibility as relief," and moreover, given that the student was then-currently in kindergarten, "it strain[ed] credulity that any plausible argument c[ould] be made that compensatory education relief should be prolonged into the remote future," meaning, "approximately 16 years from now after the student age[d] out of IDEA services" (Application of a Student with a Disability, Appeal No. 21-20).

"additional evidence [wa]s not something [he] typically consider[ed] after [the parties] started the hearing and after so much evidence was already put in and after the parties have had a full opportunity," it was something he "would consider" and asked the parties to submit motions so he could "know what's coming" (Tr. pp. 244-45).

Consistent with the IHO's directive at the impartial hearing, both parties submitted motions concerning the submission of additional evidence (see Admin. Hr'g Exs. 1-2).[5] In reviewing the motions, both parties argued for the IHO to admit additional evidence (see generally Admin. Hr'g Exs. 1-2).

When the impartial hearing resumed on January 25, 2022, the IHO initially addressed the parties' motions and asked for each party to express any objections or arguments in response to the opposing party's motion (see Tr. pp. 250-51). The district's attorney had no objections to the parent's motion seeking to submit additional evidence, but then clarified that, contrary to the position asserted in its own motion, the district would "not be calling the witness . . . previously mentioned in [its] motion" (Tr. pp. 251-52). The parent's attorney had no objection to the district's position stated on the record (see Tr. p. 252). The parent's attorney asked, however, whether the next scheduled impartial hearing date could be rescheduled to "remain within the five-day compliance period" so the parent could submit an "additional document" (id.).

Before responding to the request to reschedule the impartial hearing, the IHO asked the parent's attorney to describe the evidence they intended to submit (see Tr. p. 252). The parent's attorney explained that one document related to the "factual issue" concerning when the parent "submitted the application or the documents to apply for a one-to-one nurse in school," and the other document was an "email chain showing that these documents were submitted, and that they were either lost or misplaced, so that resulted in a month or perhaps longer," at the start of the 2019-20 school year "where the student was without the services of a nurse and therefore could not attend" school (Tr. pp. 252-53). In addition, the parent's attorney noted that another witness would not be necessary, but if the IHO found additional witness testimony was needed, the parent could "confirm and authenticate that correspondence" (Tr. p. 253).

At that point, the IHO turned to the SRO's decision remanding the matter and read into the hearing record the language within the decision he found to be descriptive of the issue to be addressed concerning the 2019-20 school year (see Tr. pp. 253-54). Based on his interpretation of that language, the IHO stated that, "even to the SRO, it appear[ed] that the factual issues [wer]e already resolved, except for the remedy" (Tr. p. 254). The IHO further noted that, for both of the issues presented on remand, the "only that that's missing to [him] and—which [wa]s why the way [he] decided the way [he] did—[wa]s there was no—there [had been] no arguments regarding compensatory education" (id.). According to the IHO, it would be "helpful" if the parties, "at the very least," made an "argument, or some type of a plan" to fashion an award of compensatory educational services, and the IHO believed that the hearing record contained "enough" evidence

[5] For reasons not explained in the hearing record, the IHO failed to add the parties' motions concerning additional evidence to the administrative hearing record (see generally Tr. pp. 240-63; Parent Exs. A-T; Dist. Exs. 1-17). The district nevertheless provided the parties' motions to the Office of State Review as part of the administrative hearing record on appeal, and for the sake of clarity, the parent's motion will be referred to in citations as "Admin. Hr'g Ex. 1" and the district's motion will be referred to in citations as "Admin. Hr'g Ex. 2."

for the parties to do so (Tr. pp. 254-55). The IHO further noted that a "significant amount of evidence [had been] presented," and the parties "should be able to look through that [hearing] record and fashion a proposed compensatory relief" (Tr. p. 255). The IHO added that he did not think there was a "need to open up the hearing for more facts in the way [the parent's attorney] was proposing" (id.).

The parent's attorney confirmed his understanding of the IHO's stated position, and further confirmed that, based on the undersigned SRO's decision, the IHO was required to make a determination regarding whether the failure to provide the student with nursing services in the 2019-20 school year resulted in a failure to offer the student a FAPE" (Tr. p. 256). The IHO agreed, and noted that the "time period and the missed services for the time period [wa]s no longer a factual issue"—therefore, the only outstanding issue to be resolved was whether it constituted a denial of a FAPE—which the IHO characterized as a "legal argument" (id.). Both parties agreed to brief this issue for the IHO (see Tr. p. 257).

In addition, the IHO indicated that the parties could brief the issue regarding how to fashion an award of compensatory educational services in this case, using the evidence already in the hearing record (see Tr. p. 257). The parent's attorney agreed with the IHO, and indicated that, if "deemed either helpful or necessary to present additional testimony"—given that the student's program at iBrain had already been found to be appropriate—the "only thing [the parent] would have done would be to submit additional documentary and/or testimonial evidence to show the amount of progress a student had made in the short time she was [t]here, to support the program that she [wa]s receiving as a compensatory award" (Tr. pp. 257-58). Alternatively, the parent's attorney stated they would be "happy" to brief the same issue on papers (Tr. p. 258).

According to the IHO, because the SRO did not find "there was an ambiguity of facts, or there was an absence of facts"—other than "[t]here just wasn't anything on this prong of the relief requested, compensatory education"—he wanted the parties to brief "these two issues with the facts at hand" (Tr. p. 258). After briefing those issues, the IHO noted that, if he "deem[ed] that something else [wa]s needed for [him] to make a decision, [he] w[ould] schedule another conference" or a "hearing" (id.). The parent's attorney had no objection to the IHO's plan, and the IHO discussed a briefing schedule with the parties (see Tr. pp. 258-59).

Consistent with the IHO's schedule, both parties submitted briefs (see generally Admin. Hr'g Exs. 3-4).[6] In its brief, the parent requested that, for the district's failure to offer the student a FAPE for two months during the 2019-20 school year and for the 2020-21 school year from July 2020 through March 2021, the IHO order the district to fund, at a minimum, one additional school year of tuition and related services, including transportation, at iBrain, as compensatory educational services (see Admin. Hr'g Ex. 3 at pp. 1-2, 9-10, 13).

[6] For reasons not explained in the hearing record, the IHO failed to include the parties' closing briefs addressing the question of FAPE at the start of the 2019-20 school year and the compensatory educational services award in the administrative record (see generally Tr. pp. 240-63; Parent Exs. A-T; Dist. Exs. 1-17). The district nevertheless provided the parties' closing briefs to the Office of State Review as part of the administrative hearing record on appeal, and for the sake of clarity, the parent's brief will be referred to in citations as "Admin. Hr'g Ex. 3" and the district's brief will be referred to in citations as "Admin. Hr'g Ex. 4."

The district argued in its brief that the student was provided with a FAPE for the entire 2019-20 school year—as the absence of nursing services until September 2019 "had no impact on the student" because the student made progress—and no compensatory educational services were warranted for the 2020-21 school year because the student made a "substantial amount of progress at iBrain," which contradicted the assertion that the student was "not in a position she would have been in had the district complied with its obligations under the IDEA" (Admin. Hr'g Ex. 4 at pp. 1, 3, 8, 10-11).[7] The district also argued that "no specific compensatory education or services" had been requested, therefore, "there could be no fact-specific inquiry as to how any requested compensatory education or services" would place the student in the "position she would have been in" but for the district's failure to offer a FAPE (id. at pp. 10-11).

In a decision dated March 14, 2022, the IHO initially noted that, in addition to the initial issue of whether the district offered the student a FAPE for the beginning of the 2019-20 school year, the second issue on remand was to determine "'what, if any, compensatory education [wa]s necessary to make up for the denial of FAPE for the 2020-21 school year prior to the [s]tudent's placement at [iBrain]" (IHO Decision at p. 1). In deciding the first issue, the IHO found that, for the 2019-20 school year, the evidence reflected that the district failed to offer the student a FAPE for approximately one month (id. at pp. 5-7). The IHO indicated that the parent testified that the student did not attend school "until at least October" 2019, and the district witness—a CPSE administrator—testified that he "did not know the [s]tudent's first date of school attendance in 2019" (id. at pp. 5-6). In addition, the IHO noted that the district failed to submit attendance records for the 2019-20 school year, and further failed to present any other witnesses to directly contradict the parent's claims that the student "started at least one month late" (id. at p. 6). Given the evidence in the hearing record, the IHO concluded that the district failed to offer the student a FAPE "during a period starting in September of 2019 through at least October of 2019" (id.). The IHO added that "even though the [district's] September IEP offered a FAPE, . . . , and even though the program benefitted the [s]tudent, . . . , this d[id] not excuse any failure to timely implement the program" (id. [internal citations omitted]).

Turning to the overall issue of relief, the IHO found that, while the student was "deprived [of] a FAPE during the above-stated time period and during all of the subsequent school years at issue, [he] nonetheless f[ound] that compensatory education in the form requested by the [parent wa]s not warranted" (IHO Decision at p. 6). According to the IHO, the parent was awarded tuition reimbursement for a "full year" at iBrain, which offered the student "'an individualized and appropriate program' inclusive of specialized transportation, nursing services, assistive technology, [OT], [PT], speech-language therapy, music therapy, vision education services, and hearing services" (id.). In addition, the IHO noted that the student made a "wide range of progress in the program" (id.). Consequently, the IHO concluded that the tuition reimbursement previously awarded to the parent—"in addition to the previously-ordered evaluations"—constituted a

[7] The district argued that the student began attending ADAPT "on or around October 2, 2019" (Admin. Hr'g Ex. 4 at p. 4, citing to Dist. Ex. 5 [representing the student's September 2019 IEP with an implementation date of October 2, 2019] and Tr. pp. 216-17 [reflecting the parent's testimony that the student began attending ADAPT "late" during the 2019-20 school year, in either "October" or "November"]). In addition, the district asserted that, although the district did not recommend nursing services until the development of the September 2019 IEP, the student "was in a 6:1:2 program with ample supervision and support" (Admin. Hr'g Ex. 4 at p. 7, citing to Dist. Ex. 3 [representing the IEP developed in August 2019]).

"sufficient and fair redress for the injury suffered" by the student and the denials of FAPE (id.). As a final point, the IHO noted that "[a]dding compensatory education to this in the form of tuition for an additional year at [iBrain] would go far beyond what [wa]s needed to make the [s]tudent whole under the circumstances of this case" (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by failing to award one year of prospective funding for the student to attend iBrain as compensatory educational services.[8]

In its answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.[9,10]

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

[8] In support of this argument, the parent argues, in part, that the IHO "did not allow any additional evidence to be submitted into the record, which would have allowed [her] to present evidence and testimony about how [the student was performing academically before her enrollment at iBrain, how she ha[d] progressed currently, and whether the latter 'made up' for the past deficiencies" (Req. for Rev. ¶ 42, citing to Tr. pp. 252-58). However, upon further inspection, the transcript pages cited in support of the parent's contention, are inapposite. First, transcript pages 252 through 257 reflect discussions concerning the need for additional evidence to determine how long the district failed to provide the student with nursing services at the start of the 2019-20 school year; and on this point, the IHO ultimately found that the undersigned had already resolved this factual issue and therefore, no additional evidence was needed on that factual issue (see Tr. pp. 252-57). Thereafter, pages 257 through 258 reflect discussions concerning the need for additional evidence with respect to fashioning an appropriate compensatory educational services remedy (see Tr. pp. 257-58). Here, as already noted, the IHO suggested that the parent's attorney could brief this issue using the evidence already in the hearing record, and the parent's attorney agreed with the IHO's suggestion (see Tr. p. 257). The parent's attorney offered to produce additional testimony, but only if the IHO found it would be "helpful or necessary," noting further that because the student's program at iBrain had already been found to be appropriate, the parent would have only submitted additional documentary or testimonial evidence to demonstrate the student's progress at iBrain "to support the program that she [wa]s receiving as a compensatory award" (Tr. pp. 257-58). Otherwise, the parent's attorney stated that they "would be happy" to present the compensatory award arguments on paper if the IHO believed it could be done that way (Tr. p. 258). In light of the agreement to present her compensatory education award through her attorney on paper, the parent's argument now on appeal that the IHO did not allow the submission of additional evidence is without merit.

[9] The district does not appeal the IHO's finding that the district failed to offer the student a FAPE at the start of the 2019-20 school year; as such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[10] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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).

When a school district fails to offer a FAPE, compensatory educational services may be awarded as 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]). 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]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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, 456-57 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that

likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; 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"]).

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). With respect to a request for compensatory educational services as a remedy, under the due process procedures set forth in New York State law, the district is required to address its burdens in the due process hearing context by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (E. Lyme Bd. of Educ., 790 F.3d at 457, quoting Reid, 401 F.3d at 524 [noting that the "'ultimate award [of compensatory education] 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'"]). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district—unlike states which align the burden of production and persuasion consistent with Schaffer v. Weast, 546 U.S. 49, 58-62 (2005)—it is not an IHO's or an SRO's responsibility to craft the district's position regarding the primary issue in the case: the appropriate compensatory education remedy. Additionally, while allocating an evidentiary burden to the district, a parent nevertheless has a responsibility to identify the compensatory education remedy sought in the same fact-specific manner, and it is insufficient to assert general statements that a student is entitled to an unspecified amount of unidentified compensatory educational services.

VI. Discussion—Relief

In this instance, when the matter was remanded to the IHO, the undersigned SRO identified the respective burdens of proof—described above—with regard to the parent's request for

compensatory educational services as a remedy for the district's failure to offer the student a FAPE for two specific period of time: the start of the 2019-20 school year and from September 2020 through April 2021, when the parent unilaterally placed the student at iBrain (see Application of a Student with a Disability, Appeal No. 21-209). This guidance was provided to the parties and to the IHO on remand because the parent continued to seek an unspecified amount of compensatory educational services as relief in her prior State-level appeal, and at that time, neither party made any meaningful effort at all to develop the hearing record on this issue (id.). Significantly, the hearing record failed to include any evidence or arguments concerning the total amount of compensatory educational services by type with frequencies, durations, and location recommendations (id.).

However, when the impartial hearing resumed on remand, the parent changed course, and instead of seeking compensatory educational services in its typical form—that is, seeking specific services or instruction to make up for a failure of the district to offer the student a FAPE that would be provided to the student on a going-forward basis—the parent requested compensatory educational services by seeking, for the first time in the proceeding, the student's prospective unilateral placement and prospective funding at iBrain for one additional school year (see Tr. pp. 257-58).[11]

A. Prospective Placement and Prospective Funding as Compensatory Educational Services[12]

On appeal, the parent argues that the student is entitled to an additional year at iBrain as compensatory educational services for the district's failure to offer the student a FAPE for portions of the 2019-20 and 2020-21 school years. In support of her argument, the parent asserts that evidence in the hearing record demonstrates that the student was deprived of "therapists, communication devices, proper equipment, adequate transportation, and in-person learning" during the 2019-20 and 2020-21 school years.[13] In addition, the parent argues that the student was

[11] It is altogether unclear why the parent changed the type of relief she sought when the matter was remanded to the IHO, especially where, as here, the parent could have requested the student's prospective placement and prospective funding at iBrain as compensatory educational services prior to remand. Given that the primary relief sought initially by the parent was direct funding or tuition reimbursement for the student's tuition and transportation costs for his period of attendance at iBrain during a portion of the 2020-21 school year and entirety of the 2021-22 school year, the award of this relief to her in Application of a Student with a Disability, Appeal No. 21-209 may have informed her decision to seek an additional year of reimbursement of tuition and transportation costs at iBrain as compensatory education upon remand of the matter.

[12] For a detailed discussion of relief in the form of future placement in a nonapproved nonpublic school, including the varying characterizations of the relief as either as prospective placement, tuition reimbursement or funding, or compensatory education, see Application of a Student with a Disability, Appeal No. 19-018 (also discussing at length the potential pitfalls that may arise as a result of an award of prospective placement).

[13] To the extent that both the IHO and the undersigned SRO found the student's September 2019 IEP was appropriate, and is now the law of the case, the parent's attempt to argue that the district's alleged failures to provide the student with all of the recommended services or supports within that IEP during the 2019-20 school year when it was fully implemented cannot now serve as a basis for an award of compensatory educational services as relief. Similarly, to the extent that the parent's arguments assert a failure to provide services to the student via remote instruction during the COVID-19 pandemic, or take issue with the executive decision to close

not "making the kind of progress she was entitled to" make through the district's programs, noting that the student's OT and PT recommendations were "increased from twice per week to three times per week in May 2020" due to the student's "significant delays."[14] The parent asserts that, based on the evidence in the hearing record, she was concerned about the student's "lack of physical progress and communication skills, and regression due to remote learning." Additionally, the parent contends that the student was "subjected to an inappropriate" 12:1+3 special class placement for a "major part" of the 2020-21 school year.[15] The parent further argues that the IHO erred by failing to award compensatory educational services on the basis that the parent had already received an award of tuition reimbursement in Application of a Student with a Disability, Appeal No. 21-209 and the IHO awarded evaluations in his prior decision, and also contends that her decision to unilaterally place the student at iBrain cannot be used to absolve the district of "any responsibility or consequences to [the student]."

In response, the district asserts that the parent's allegations constitute nothing more than conclusory allegations that, neither alone nor combined, support the parent's conclusion that the student required compensatory educational services. The district also asserts that, contrary to the parent's contention, the evidence in the hearing record does not support a conclusion that the student's unilateral placement at iBrain "would be insufficient to place [the student] in the position [she] would have occupied" had the district offered the student a FAPE for the 2020-21 and 2021-22 school years. The district notes that the purpose of compensatory educational services is not to

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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 for that matter, have plenary authority to pass judgment on the Governor's or the district's policies to protect the public health during an unprecedented emergency involving a life-threatening infectious disease.

[14] The parent alternatively argues that, even if the IHO found that an additional school year at iBrain was not an appropriate form of compensatory educational services as relief, the IHO "erred by failing to exercise his discretion in crafting any appropriate remedial award" (Req. for Rev. ¶ 46). The parent asserted a similar (if not identical) argument in the prior State-level appeal, to no avail (see Application of a Student with a Disability, Appeal No. 21-209). Having been cautioned in the prior State-level appeal that it was not an IHO's or an SRO's responsibility to fashion a compensatory education award, whole cloth, without the benefit of arguments or the specific amounts of relief sought, this argument finds even less traction in the parent's second State-level appeal on the same issue of an award of compensatory education and will not be addressed.

[15] Contrary to the parent's assertion, it is unclear if the student ever attended a 12:1+3 special class placement to receive in-person instruction at ADAPT during the 2020-21 school year, rather than attending a 12:1+3 special class via remote instruction (see, e.g., Parent Ex. L at pp. 1-3 [reflecting an email exchange that described, in part, continued full-time remote instruction at ADAPT in February and March 2021, prior to the student's unilateral placement at iBrain at the beginning of April 2021]; Dist. Exs. 11 at pp. 1-2, 7 [indicating that the student had just joined the 12:1+3 special class placement but attended via remote instruction]; 15 at p. 1 [reflecting the student's receipt of remote instruction for four days per week]). The hearing record includes in a January 2021 IEP, which includes a recommendation for a 12:1+3 special class placement that was to be implemented on January 18, 2021 (see Dist. Ex. 10 at p. 21).

extract a measure of responsibility or consequences from the district or to provide the parent with a windfall of relief. As a result, the district argues that the IHO properly denied the parent's request for an additional school for the student at iBrain as compensatory education.

The parent's requested relief is not supported by the evidence in the hearing record and is unwarranted. As explained in the prior State-level appeal in this matter, an award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]; see generally Application of a Student with a Disability, Appeal No. 21-209).[16,17]

At this point, the school years at issue—2019-20, 2020-21, and 2021-22—are either over or near completion and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2022-23 school year or should do so prior to the conclusion of the 2021-22 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record particularly since the parent has been awarded tuition reimbursement and transportation costs for the student's attendance at iBrain during a portion of the 2020-21 school and the entirety of the 2021-22 school year. To award tuition reimbursement and transportation at iBrain for the 2022-23 year for district failures that occurred in fall 2019 and the earlier part of the 2020-21 school year would, in effect, provide an award for the 2022-23 school year that bears no relation to whether or not the district's recommended program or placement for that year is appropriate. Indeed, such an award would demonstrate that prospective placements almost always serve to circumvent the statutorily required CSE process and generally, except in rare circumstances not present here, constitute an improper usurpation of the CSE's role by the due

[16] For a detailed discussion of relief in the form of future placement in a nonapproved, nonpublic school, including the varying characterizations of the relief as either as prospective placement, tuition reimbursement or funding, or compensatory education, see Application of a Student with a Disability, Appeal No. 19-018 (also discussing at length the potential pitfalls that may arise as a result of an award of prospective placement). Here, were I to view the parents' request for future funding of the student's attendance at a nonapproved nonpublic school as compensatory education as it is framed in the request for review, the outcome would not differ.

[17] In the parent's prior State-level appeal, the undersigned reversed the IHO's order directing the district to develop an IEP with a specific program and services on this basis (see Application of a Student with a Disability, Appeal No. 21-209).

process system, rather than serve as appropriate remediation for the district's denial of a FAPE to the student for the time periods claimed.

VII. Conclusion

In summary, having reviewed the evidence in the hearing record, there is no reason to disturb the IHO's finding that the parent was not entitled to a prospective placement and prospective funding for an additional school year at iBrain.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 22, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER