The University of the State of New York

The State Education Department
State Review Officer
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No. 22-094

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

Appearances:
MSR Legal & Consulting Services, PLLC, attorneys for petitioner, by Oroma Mpi-Reynolds, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, 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 a decision of an impartial hearing officer (IHO) which denied the parent's request for compensatory education to remedy the respondent's (the district's) failure to offer her son an appropriate educational program and services for the 2019-20 and 2020-21 school years. The district cross-appeals from that portion of the IHO's decision which found that it did not offer a free appropriate public education (FAPE) for the 2020-21 school year. The appeal must be sustained in part. The cross-appeal must be sustained. The matter must be remanded to the IHO for further administrative proceedings.

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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP,

which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 presented with delays in social skills, expressive, receptive, and pragmatic language skills as well as cognitive, adaptive, and fine and gross motor skills (see Dist. Exs. 2 at pp. 14-15; 5 at pp. 3-7). The student received a diagnosis of autism spectrum disorder at approximately two and a half years of age (Dist. Ex. 2 at pp. 14-15).

Evaluations of the student were conducted between May and August 2019, including a bilingual psychoeducational evaluation, a bilingual speech-language evaluation, a bilingual developmental evaluation, a bilingual occupational therapy (OT) evaluation, a bilingual social history update, and a behavioral observation (see Dist. Exs. 2; 5). Through the Early Intervention Program (EIP), the student received speech-language therapy, OT and applied behavior analysis (ABA) services (Dist. Ex. 2 at pp. 5-6).

A CPSE meeting convened on October 29, 2019 (see Dist. Ex. 1). The CPSE found the student eligible for special education as a preschool student with a disability (id. at pp. 1, 3). The CPSE recommended a 12-month program consisting of a bilingual, 12:1+2 special class placement in an approved preschool with two 30-minute sessions per week of individual, bilingual speech-language therapy, and two 30-minute sessions per week of individual OT to begin January 2, 2020 (id. at pp. 1, 17-18).

In final notice of recommendation dated October 29, 2019, the district summarized the CPSE's recommendations and identified a preschool location where the student would receive a "partial English" program and services (Dist. Ex. 11 at pp. 1, 2).[1] Subsequent to the CPSE meeting, the district's special education evaluation, placement, and program officer who was the CPSE administrator (CPSE administrator) at that time looked for bilingual programs for the student to no avail, as bilingual Mandarin 12:1+2 classes were not available (Tr. pp. 50, 54-55, 67-68).

On a form entitled "Notice of Eligibility for Partial Services," dated December 6, 2019, the district informed the parent that the student would receive the recommended 12:1+2 special class and related services in English rather than as a bilingual program as recommended by the October 2019 CPSE (Dist. Ex. 12 at p. 1). On an accompanying "Awaiting Placement Notification" form, the district stated that "at th[at] time, there [we]re no bilingual Mandarin classes" (id. at p. 2).[2]

According to the CPSE administrator, beginning in January 2020, the student was eligible to attend the assigned preschool program five days per week until the COVID-19 pandemic shut down of school buildings in March 2020; however, she did not "recollect how [the assigned

[1] During the impartial hearing, the district offered and the IHO entered exhibits 1 through 11 (see Tr. pp. 46-47); however, for the last three district exhibits, the documents were marked as exhibits 10 through 12 and there is no document marked as exhibit 9. The description of district exhibits 9, 10, and 11 during the impartial hearing (Tr. p. 47) corresponds with the documents included with the hearing record on appeal and marked as district exhibits 10, 11, and 12, respectively. For purposes of this decision, the three district exhibits are cited by reference to the exhibit numbers identified on the documents themselves (i.e., 10 through 12).

[2] The particular preschool location identified in the October 2019 final notice of recommendation (Dist. Ex. 11) notified the district in a letter dated December 17, 2019, that the school could provide the student with the 12:1+2 special class with speech-language therapy and OT services mandated on the student's October 2019 IEP beginning January 2, 2020 as a "partial placement" with English as the language of instruction (Dist. Ex. 10).

preschool] provided services at that time" (Tr. p. 73). The parent testified that, from the time the school building closed until June 2020, the student used an iPad to access the preschool's remote learning online, one class per day for instruction along with his OT and speech-language therapy with his mother assisting and translating (Tr. pp. 118-20). The CPSE administrator testified that subsequent to the student's placement at the assigned preschool the student's father worked with her on a regular/weekly basis to find a bilingual program for the student and that the student's father ultimately found a bilingual program for the student to attend beginning in July 2020 (Tr. pp. 68-72; see Dist. Ex. 7).

A preschool acceptance letter dated May 8, 2020 indicated that the student was accepted to a bilingual 12:1+2 preschool class with his CPSE mandated related services of bilingual speech-language therapy and OT (Dist. Ex. 7). The parent testified that the bilingual preschool program provided remote learning to the student in July and August 2020 and then transitioned to a hybrid model in September 2020, at which time the student attended three days in school and participated in two days of remote learning per week (Tr. p. 121).

The bilingual preschool program conducted a social history update on September 23, 2020, which noted the student was enrolled in a full day, five day per week 12:1+2 bilingual special education program with twice weekly speech-language therapy and OT (Dist. Ex. 6 at pp. 1-2). A bilingual speech-language pathologist prepared a progress report dated September 30, 2020, in which she recommended the addition of one group speech-language therapy session to the student's program (see Parent Ex. B at pp. 1, 7).

A CPSE convened on October 9, 2020 and added one session of group speech-language therapy to the student's IEP to be implemented beginning October 26, 2020 (compare Dist. Ex. 1 at pp. 1, 17, with Dist. Ex. 3 at pp. 1, 17). In addition, the CPSE recommended approximately 13 annual goals with corresponding short-term objectives and transportation to and from school (Dist. Ex. 3 at pp. 10-14, 20).

In January 2021, personnel from the bilingual preschool program prepared reports that included a social history update, a bilingual educational progress report, a bilingual speech-language report addendum, and an OT "Turning Five" report (see Parent Exs. C; D; Dist. Ex. 8 at pp. 1-10, 18-22).[3]

Reportedly, a CSE convened in May 2021 and developed an IEP for the student for the 2021-22 (kindergarten) school year (see Parent Ex. A at p. 2). As of the beginning of the 2021-22 school year, the student attended kindergarten in the district (see Parent Exs. A at p. 2; F at p. 1). According to information contained in a neuropsychological evaluation report, the CSE found the student eligible for special education as a student with autism and the parents reported that his program was "divided" in that he received academic instruction in an 8:1+1 special class and was placed in an integrated co-teaching (ICT) "class" for "non-academic areas" (Parent Ex. G at p. 1). According to the report, the student also received speech-language therapy and OT (id. at p. 2).

[3] The September 2020 speech-language therapy progress report was included with the January 2021 reports (Dist. Ex. 8 at pp. 11-17).

An undated teacher's report from the public school indicated that the teacher's overall impression of the student was that he was functioning below grade level and his ranking was in the bottom of the class (Parent Ex. F).[4] The report also indicated that the student needed ABA services (id.). The teacher reported that the student had "a lot of difficulty focusing and completing tasks," that he needed 1:1 support for all assignments, and that he had a lot of difficulty communicating his needs and wants (id.). The report noted that the student did not interact with his peers and that his adult interaction was limited (id.). In addition, the teacher indicated that the student's then-current program and related services were not appropriate (id.).

On February 2, 2022 a neuropsychologist conducted a neuropsychological evaluation of the student (see Parent Ex. G). The report indicated that formal evaluation of the student's cognitive abilities was not completed due to the student's poor behavioral relatedness, failure to show pragmatic communication skills, and an inability to respond to verbal directives (id. at p. 3). Cognitive testing by non-standard administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) indicated that the student's cognitive potential could extend to the low average range, but such an estimate was limited in validity given the non-standard administration of the test (id.). The neuropsychologist found that the student met the criteria for a diagnosis of autism spectrum disorder, moderate to severe type, which was accompanied by intellectual impairment and language impairment (id.). According to the neuropsychologist, the student required "placement within a program specifically dedicated to meeting the needs of children on the autism spectrum" which provided highly individualized instructional support, ABA "[t]herapy," speech-language therapy, and OT (id. at pp. 3-4).

The parents unilaterally placed the student at Gersh Academy (Gersh) in March 2022 (see Tr. p. 129; Parent Ex. A at p. 7).[5]

A. Due Process Complaint Notice

By due process complaint notice dated March 2, 2022, the parent asserted the district failed to offer a FAPE for the 2019-20, 2020-21, and 2021-22 school years (Parent Ex. A at p. 1).[6]

Following a timeline of alleged facts, the parent asserted thirteen enumerated claims she alleged resulted in the denial of FAPE for all three school years in dispute (Parent Ex. A at pp. 1-7). These claims included that the district failed to: evaluate the student in all areas of suspected disability, convene properly composed CPSEs and CSEs; develop appropriate measurable annual goals; provide/offer appropriate programs and placements; provide/offer behavioral therapy; provide/offer appropriate social skills instruction; provide/offer appropriate instruction in sensory integration and activities of daily living and OT; provide/offer physical therapy (PT); provide/offer assistive technology; provide/offer appropriate parent counseling and training; provide/offer other

[4] The teacher's report is undated but appears to have been transmitted via facsimile on January 24, 2022 (Parent Ex. F).

[5] Gersh has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] The hearing record contains a stipulation between the parties that agreed the statute of limitation was tolled during the period of March 2, 2020 to November 3, 2020 (Parent Ex. H at p. 3).

appropriate developmental or corrective support services including therapeutic recreation; provide adequate prior written notices; and consider compensatory education for the student's post-pandemic return to school (id. at pp. 4-7).

As relief for the alleged denial of FAPE, the parent requested prospective funding for tuition, related services including a 1:1 paraprofessional, and fees related to the unilateral placement of the student at Gersh beginning March 2, 2022 (Parent Ex. A at p. 7).[7] Further, the parent requested "[c]ompensatory education, independent educational evaluations, and/or such further and other relief as deemed appropriate" and a reconvene of the CSE to recommend a deferral to the district's central based support team (CBST) in order to search for a nonpublic school placement (id. at p. 8).

B. Impartial Hearing Officer Decision

The IHO convened an impartial hearing on April 4, 2022, which concluded on May 6, 2022, after the second day of proceedings (see Tr. pp. 1-151). At the May 6, 2022 hearing date, the parties indicated that they had settled the claims related to the 2021-22 school year (Tr. pp. 38, 43). Therefore, the remaining issues for the impartial hearing included whether the student was denied a FAPE for the 2019-20 and 2020-21 school years, and, if so, whether the student was entitled to compensatory education services (Tr. pp. 38-39, 43). At the impartial hearing, the parent's counsel indicated that she was seeking a minimum of 780 hours of compensatory education services, but later qualified the request, indicating that the parent sought a proportionately lesser amount given that the student received services through the EIP during the beginning of the 2019-20 school year through December 2019 (Tr. pp. 43, 148-49).

The IHO rendered a decision on June 5, 2022, finding that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years but denied all of the relief the parent requested (IHO Decision at pp. 5, 7). The IHO held that, regarding the 2019-20 school year, the district had recommended bilingual services which were not provided until seven months later in July 2020 (id. at p. 5). Further, the IHO determined that the bilingual preschool program ultimately would not have been located if not for the student's father's diligence, and that the district did not offer any evidence of its efforts to find a bilingual placement or mitigate the student's placement in a non-bilingual school (id.). For the seven-month gap of unimplemented services, the IHO determined there was a denial of FAPE (id.).

For the 2020-21 school year, the IHO held that the district "did not present sufficient evidence showing that the [s]tudent's ability to access remote services was considered when designing the October 2020" IEP (IHO Decision at p. 5). The IHO noted that the district did not present any evidence "to describe the effectiveness of services implemented via the hybrid model" (id. at pp. 5-6). Although, the CPSE administrator testified how and why services were recommended, "she was not able to describe to the extent to which recommended services were impacted due to Covid-19" nor did she "describe any measures taken to address impacted services"

[7] The parent also requested reimbursement for any monies paid to Gersh incurred related to her tuition deposit and implementation of immediate door-to-door transportation services to and from Gersh (Parent Ex. A at p. 8).

(id. at p. 6). As such, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year (id.).

Regarding the request for compensatory education services as relief, the IHO held that the parent's initial request for 780 hours was reduced to 585 hours of ABA services (IHO Decision at p. 6). The IHO noted that the parties resolved the 2021-22 school year through stipulation and the parties indicated the terms of the stipulation were confidential (id.). The IHO then indicated that, according to the hearing record, the student was unilaterally placed at a school that provided ABA services, though at the time of the impartial hearing those services had not yet started as the student was still in the observation period (id.). Also, the IHO noted that, according to the hearing record, when ABA services began at the private school, those service would not exceed two hours per day (id.). "Given these and other facts evident in the record," the IHO found "that an order for compensatory [district] funded ABA services [was] not warranted under the circumstances" (id. at p. 7). The IHO noted that, despite the confidentiality of the partial settlement of this proceeding, the 2021-22 school year seemed to have been resolved through an agreement for tuition reimbursement (id.). Since the private school "intend[ed] or ha[d] the capacity to provide the [s]tudent with ABA services based on his needs," the IHO found "it [wa]s not only inequitable but also unreasonable to require the [district] to fund additional ABA services" (id.).

Moreover, the IHO found that an award for compensatory education services was not warranted because the parent failed to present sufficient evidence of the student's present levels of performance (IHO Decision at p. 7). The IHO opined that, since the goal of compensatory education was to make a student whole, "it [wa]s important to understand the present education levels and abilities of the [s]tudent" (id.). The IHO noted that the parent only presented "one non-party witness" who had never met the student and only offered evidence as to rates of compensatory education services (id.). The IHO further noted that the parent offered a neuropsychological evaluation report into evidence but did not present the evaluator as a witness (id.). As such, the IHO concluded that, despite the district's failure to offer the student a FAPE for the school years at issue, a compensatory education award was not warranted and denied all other requested that the parties had not otherwise resolved (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO incorrectly denied relief despite finding that the district failed to provide the student with a FAPE for both the 2019-20 and 2020-21 school years. The parent contends that, "[w]ithout reasonable relief, [the student's] FAPE right is illusory" and the decision that FAPE was denied is "an empty victory." The parent argues that the student is eligible for compensatory education services and that the hearing record demonstrates the student lost skills and regressed during the two-year denial of FAPE. Moreover, the parent contends that the United States Department of Education (USDOE) encouraged the use of compensatory education services to make up for the lack of educational programs and services during school closures related to the COVID-19 pandemic.[8]

[8] The parent also argues that there was enough evidence in the hearing record to support an award of compensatory relief but that, if the IHO did not believe there was sufficient evidence to make a determination regarding compensatory relief, the IHO should have ordered an independent educational evaluation (IEE) to obtain that missing information.

The parent contends that IHO presumed that ABA services from Gersh "would be used as compensatory education for prior school years" even though there was no evidence from Gersh regarding such services. Notably, the parent points to the fact that the student did not start at Gersh until March 2022 and had yet to receive any ABA services from Gersh at the time of the impartial hearing. The parent asserts that any ABA services at Gersh are irrelevant to the issue of whether the student should be granted compensatory services as relief.

Lastly, the parent argues that the IHO unfairly and unreasonably drew a negative inference against her for the refusal to place the stipulation regarding the 2021-22 school year into the hearing record. The parent contends that each school year needs to be treated separately and the settlement was not relevant.

The parent requests that the IHO decision's decision be reversed to the extent the IHO declined to award compensatory education in the form of "ABA-SETSS." Specifically, the parent requested 660 hours of such services for the 24-week period from January 2020 to June 2020 during the 2019-20 school year, the six-week extended school year for July and August 2020, and the 36-week period from September 2020 to June 2021. The parent requests that she be permitted to select the provider of the compensatory education services.

In an answer with cross appeal, the district concedes that it did not offer the student a FAPE for the 2019-20 school year as it did not implement the bilingual aspects of the student's programming as recommended in the October 2019 IEP. However, the district cross-appeals from the IHO's finding that FAPE was not offered for the 2020-21 school year.

Specific to the 2020-21 school year, the district asserts that the October 2020 CPSE evaluated the student in all areas of disability, was duly constituted, developed classroom goals, and recommended appropriate social skills instruction and sufficient instruction for sensory skills. Further, the district argues that there was nothing before the CPSE to warrant conducting a functional behavioral assessment or developing a behavioral intervention plan for the student. The district asserts that the IHO erred in finding a denial of a FAPE for the 2020-21 school year based on student's purposed lack of progress during remote learning because the issue was not raised by the parent in the due process complaint notice. Moreover, as such claims "are systemic in nature," the district argues that neither the IHO nor the SRO have jurisdiction over such policies and claims.

As to the request for compensatory services, the district argues that the IHO correctly denied the parent relief and that there was insufficient evidence to support the requested compensatory services. The district noted that per the USDOE, the CSE should be given the first opportunity to determine whether a student requires compensatory services due to remote learning during COVID-19 school building closures and that there was no indication that this has occurred for the student.[9]

In response to the parent's request for review, the district asserts that the IHO did not presume that the ABA services offered by Gersh would be used as compensatory education. The district argues that the IHO's discussion about the placement at Gersh "could have just as easily

[9] The district also asserts that an interim IEE was not warranted. The district contends that there was no request for an IEE at the impartial hearing and the parent had every opportunity to present additional evidence at the impartial hearing but failed to do so.

been related to an analysis of whether or not the [s]tudent could tolerate compensatory education on top of the unilateral placement's program." The district contends that such an analysis is permitted. Lastly, the district asserts that there was no indication that IHO made an adverse inference related to the stipulation of settlement not being offered as evidence. The district argues that the IHO's discussion of the settlement was "merely an anecdotal reference to the case's procedural history." The district argues that the IHO's denial of compensatory education relief was well-reasoned and articulated.

The parent, in an answer to the cross-appeal, asserts that the IEP for the 2020-21 school year was not appropriate and that the IEP was not fully implemented since the student was not able to access remote education and group speech-language therapy was not provided. The parent contends that she did raise the issue of a denial of a FAPE due to the student's inability to access remote learning in the due process complaint notice. The parent asserts that the IHO abdicated his legal duty by denying a remedy to a student who had been denied a FAPE. The parent again requests 660 hours of compensatory education ABA services.

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).

[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).

VI. Discussion

A. 2019-20 School Year

The IHO's finding that the student was denied a FAPE for the 24-week period from January 2020 through June 2020 based on the district's failure to provide the student with bilingual instruction and services is not appealed and, therefore, is final and binding on the parties (see IHO Decision on p. 5; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, the parent appeals from the portion of the IHO's decision that denied relief in the form of compensatory education to remedy the denial of a FAPE.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

"Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." (Stanton v. Dist. of Columbia, 680 F Supp 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at *1 [D.D.C. Jan. 3, 2017]). In denying compensatory education relief, the IHO cited the student's anticipated receipt of ABA services at Gersh for the 2021-22 school year pursuant to a stipulation between the parties (see IHO Decision at pp. 6-7). Under some circumstances, it would be appropriate to take into account a prospective program that a student would be attending when calculating a compensatory education award (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at *8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education

partially due to the prospective revisions to the student's IEP]). Likewise, it is understandable that the IHO would consider the student's tolerance for services and instruction before calculating an award (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [SDNY Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Ultimately, however, rather than supporting the IHO's determination to deny compensatory education for the 2019-20 school year in its entirety, these considerations could have weighed in the IHO's decision about what compensatory education award was appropriate.

In this instance, the hearing record was not developed as to the student's program going forward. The IHO seemed to fault the parent for the lack of evidence about the program at Gersh, noting that the parent's attorney cited confidentiality of the stipulation of settlement (see IHO Decision at p. 7). While the parent's attorney noted the confidentiality of the stipulation, the parent did not refuse to provide information about the student's programming at Gersh and responded to the IHO's inquiries (see Tr. pp. 38, 43-44, 129-31). The parent indicated that, at the time of her testimony in May 2022, the student had been attending Gersh for about a month and that, since he just enrolled, she had not yet noticed progress (Tr. p. 129). She also shared that Gersh would provide the student ABA but, as the student was "still under [an] evaluation observation period," the school had not yet delivered such services (Tr. p. 130). The parent indicated that she did not know how much ABA the student would receive since the school had not yet met to discuss his educational goals and behavior but that she believed he would receive up to two hours per day (Tr. pp. 130-31). She further testified that she believed the student needed more services "to make up for the progress he was not making over the last two-year period" (id.). The parent's testimony, without more, does not support the IHO's finding that the student's programming at Gersh would sufficiently remedy the denial of a FAPE for the prior school years and, particularly, the 2019-20 school year.

Moreover, the IHO's denial of relief on the basis that the parent failed to present sufficient evidence of the student's present levels of performance (see IHO Decision at p. 7) is problematic insofar as the district was required, under the due process procedures set forth in New York State law, to address its burdens of proof and persuasion by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M., 2017 WL 1194685, at *4 [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).[11] The district did not present any evidence or argument that the student's level of performance at the time of the impartial hearing supported a denial of compensatory education relief. Rather, the district simply raised questions about the parent's evidence—and, in particular, whether it supported an award of

[11] Additionally, while the evidentiary burden is allocated 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.

ABA services (see Tr. pp. 133-35)—but did not, alternatively, argue what appropriate compensatory education might be.

While the district failed to present its position about compensatory education during the impartial hearing, an outright default judgment awarding compensatory education—or and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]).[12]

For relief, the parent requests compensatory education services of two hours per school day of ABA instruction for the 24-week period of time from January 2020 through June 2020 in which the student did not receive mandated bilingual special education and speech-language therapy. As support for the request for ABA services, the parent points to the February 2022 neuropsychological evaluation (Parent Ex. G). However, the neuropsychologist did not contemplate ABA services as a compensatory remedy but instead opined that, on a going forward basis, the student's programming should offer ABA therapy (id. at pp. 3-4). The neuropsychologist did not offer an explanation for why the student would benefit from ABA in particular or how ABA services would allow the student to make-up for a lack of bilingual services for a period of time. Moreover, the neuropsychologist acknowledged the limited validity of testing administered as part of that evaluation given the non-standard administration of the test (with the parent serving as a Mandarin interpreter) and the student's lack of socio-behavioral response (id. at p. 3). The parent also points to an undated teacher's report that identified that the student needed ABA but the teacher's report not offer further elaboration or context (Parent Ex. F). Finally, a Board Certified Behavior Analyst (BCBA) from a private agency testified about ABA services but, as the IHO noted, the BCBA had never met the student and only offered generic testimony about the type and cost of services that could be offered (IHO Decision at p. 7; Tr. pp. 99-106; Parent Ex. I). Thus, while the evidence in the hearing record does not support the IHO's outright denial of relief to remedy the district's failure to provide the student a FAPE for the 2019-20 school year, it also does not support the parent's request for ABA services.

The CPSE administrator testified that, during the 2019-20 school year, no bilingual support was available to the student (Tr. p. 70). There is no evidence in the hearing record that the student was able to receive benefit from the English 12:1+2 special class and speech-language therapy services without the mandated bilingual support (see Dist. Ex. 1 at p. 17). The district did not offer into evidence any annual goal progress reports or other evidence of the student's progress during the 2019-20 school year or argue that the student received educational benefit despite the district's

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

failure to implement the recommended bilingual programming.[13] Thus, while the hearing record is not as fully developed as preferred on the question of compensatory education for the 2019-20 school year, given the nature of the denial of a FAPE, the student should be compensated with 240 hours of bilingual special education instruction to be completed by June 30, 2024.[14]

B. 2020-21 School Year

1. Scope of the Impartial Hearing

Prior to reaching the merits of the parties' dispute relating to the 2020-21 school year, it is necessary to address the district's position that the IHO addressed a claim that was not properly raised for consideration in the parent's due process complaint notice. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). 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 original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Regarding the 2020-21 school year, the IHO found that the district did not present sufficient evidence to demonstrate that the CPSE considered the student's ability to access remote services when the CPSE convened to create the October 2020 IEP (IHO Decision at p. 5). Further, the IHO determined that there was no evidence presented regarding the effectiveness of services implemented in the hybrid model and there was no description regarding how the recommended services were impacted by COVID-19 (id. at pp. 5-6). However, the parent did not raise the issue of whether remote or hybrid services prevented the student from receiving a FAPE for the 2020-

[13] With regard to annual goals, State regulation, consistent with federal regulation, states that "[t]he IEP shall identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents" (8 NYCRR 200.4[d][2][iii][c]; see 34 CFR 300.320[a][3]). The IHO is reminded that when being asked to craft compensatory education relief, the IHO can require the district to produce the student's educational records such as progress reports on the student's IEP goals from his teachers and providers while he attended programming offered by the district through its CSEs and CPSEs. Such reports—specifically called for by Congress—are one of the primary focal points that Congress identified for conducting an annual review and revision of a student's IEP and are required federal law (20 USC § 1415[d][1][A][i][III], [4][A][i]-[ii]). Yet these type of reports are rarely produced in due process cases involving this district before the undersigned and a severely underutilized area of inquiry in compensatory education cases within this district.

[14] This was calculated per the request of 10 hours per week or two hours per day for each week for 24-weeks (Tr. p. 148; Req. for Rev. at p. 9).

21 school year. In the due process complaint notice, the parent simply argued that the district should have considered compensatory education for the student's post-pandemic return to school (Parent Ex. A at p. 7).[15]

As the parent has pointed out, to address service delivery delays and other delivery-related issues that occurred as a result of the pandemic, the New York State Education Department (NYSED) and the USDOE 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" (see "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]; "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 also "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]; "Questions and Answer 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 https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf).[16] 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).

[15] The parent asserts in her answer to the cross-appeal that she raised this issue when she stated that the student missed significant in-person instruction during remote learning and was not able to access remote learning (see Parent Ex. A ¶ 3). However, this section of the due process complaint notice constituted the parent's recitation of background facts regarding the student and the paragraph that the parent cites explicitly describes purported events during the 2019-20 school year but does not relate to the 2020-21 school year, which is the school year for which the IHO found a denial of FAPE based on issues related to remote or hybrid delivery of instruction (see Parent Ex. A at pp. 2-3, ¶ 3). Accordingly, review of the due process complaint notice does not support the parent's assertion that she raised a claim relating to remote instruction during the 2020-21 school year as an issue to be resolved during the impartial hearing.

[16] NYSED's guidance entitled "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic" is also included in the hearing record as Parent Exhibit E.

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).

In this case, the hearing record does not demonstrate that the CPSE contemplated compensatory services for the student or that the parents requested the CPSE consider such services and the district refused.[17] To the extent the parent alleges that the CPSE or CSE has failed to examine the student's need for compensatory services, the remedy at this juncture is to direct that the CSE do so. The CPSE or CSE should be the first level of review for such a determination. Thus, if it has not already done so, when the CSE next convenes, it should consider 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.

Based on the foregoing, any request for compensatory education services relating to the delivery of instruction to the student via the remote/hybrid model during the 2020-21 school year must first be reviewed by the CSE.

2. Remand

Having found that the IHO erred in finding that the district denied the student a FAPE for the 2020-21 school year on grounds related to the student's receipt of instruction in a remote or

[17] After discussing the lack of bilingual services during the 2019-20 school year, the CPSE administrator testified that the October 2020 CSE did not offer compensatory services relating thereto because "there was no lapse in services in any way" insofar as the student attended a "partial placement" to which the parents agreed "in the interim" until a bilingual placement could be located (Tr. pp. 88-89). The CPSE administrator could not recall whether the October 2020 CSE discussed the student's ability to access remote learning but acknowledged that "all children . . . had difficulties at that time" (Tr. p. 89). The parent testified that there was no discussion at the October 2020 CSE meeting about the student getting any compensatory services because of the pandemic (Tr. p. 123). During the impartial hearing, there was no further discussion or questioning of either the CPSE administrator or the parent about whether the CPSE or CSE were asked or refused to consider compensatory education as it related to lost skills due to the remote delivery of instruction during the COVID-19 pandemic or whether it was discussed at the meetings that the student had lost any skills.

hybrid model, it remains to be determined whether there is merit to the allegations raised by the parent in her due process complaint notice.

The IHO failed to render a decision on any of the issues raised by the parent in the due process complaint notice. In particular, the IHO did not address the parent's claims raised in the due process complaint notice underlying the allegation that the district failed to offer the student a FAPE for the 2020-21 school year, including but not limited to those claims relating to the sufficiency and consideration of evaluative information before the CPSE(s), composition of the CPSE(s), appropriateness and measurability of annual goals, the appropriateness of the recommended program and placement including related services, the student's need for behavioral interventions, and the lack of recommendations for instruction in the areas of social and sensory skills (Parent Ex. A at pp. 4-6).[18]

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO's decision regarding the 2020-21 school year must be vacated and the matter remanded to the IHO to address the parent's claims as set forth in the March 2, 2022 due process complaint notice and, based thereon, to render a determination regarding whether the district offered the student a FAPE for the 2020-21 school year. It is left to the sound discretion of the IHO on remand to ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parent's claims listed in the due process complaint notice and requested relief including the type of evidence the parties should submit should the IHO reach the issue crafting equitable relief. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

The IHO's determination that the district denied the student a FAPE for the 2019-20 school year is final and binding on the parties; however, the IHO failed to award appropriate relief. Therefore, the district is hereby ordered to provide the student with 240 hours of compensatory bilingual special education instruction to be delivered no later than June 30, 2024. The IHO's decision regarding the 2020-21 school year is vacated and the matter is remanded to the IHO to make a determination on the claims raised in the parent's due process complaint notice, and, if necessary, whether any relief is warranted relating thereto.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[18] In addition, in its cross-appeal, the district defends against these claims (see Answer with Cross Appeal at p. ¶ 17).

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated June 5, 2022 is modified by vacating that portion which found that the district failed to offer the student a FAPE for the 2020-21 school year;

IT IS FURTHER ORDERED that, to remedy the district's failure to provide the student a FAPE for the 24-week period from January 2020 to June 2020, the district shall provide the student with 240 hours of bilingual special education instruction to be completed by June 30, 2024;

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 attendant to the COVD-19 pandemic; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to issue a determination regarding whether the district offered the student a FAPE for the 2020-21 school year based on the claims raised by the parent in the due process complaint notice and, if not, whether compensatory education is warranted.

Dated: **Albany, New York**
October 11, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER