The University of the State of New York

The State Education Department
State Review Officer
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**No. 22-099**

**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 City Department of Education.**

**Appearances:**

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 a decision of an impartial hearing officer (IHO) which determined the respondent (district) denied the student a free appropriate public education (FAPE) for the 2021-22 school year and ordered the district to provide a specified special education program to the student for the 2021-22 school year, including transportation, but denied the parent's request for compensatory education for the 2020-21 school year. The appeal must be sustained in part.

## II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. §1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur

between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

The student has been the subject of a prior State-level administrative appeal, Application of a Student with a Disability, Appeal No. 19-061 and a prior IHO decision dated January 15, 2021 (Parent Exs. B; L). Because of the arguments presented on this appeal and because the parties are familiar with the facts and procedural history preceding this case, as well as the student's educational history, it is not necessary to repeat the student's educational history in detail.

In Application of a Student with a Disability, Appeal No. 19-061, an SRO found the district denied the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years and awarded the student 1,260 hours of compensatory ABA services delivered by a board certified behavior analyst (BCBA) or a licensed behavior analyst (LBA) at a frequency of 10 hours per week until the 1,260 hours are exhausted (Parent Ex. L at p. 34). The SRO in that matter also awarded the parent a district funded behavior intervention plan (BIP) along with one hour per week of staff training and bi-weekly progress monitoring for the 2019-20 school year (id. at p. 35).

On January 15, 2021, an IHO presiding over a prior due process complaint notice related to the 2019-20 and 2020-21 school years found that the district denied the student a FAPE for those two school years and awarded the student, among other things, 310 hours of special education teacher support services (SETSS) as compensatory education (Parent Ex. B at p. 14). In addition, the IHO ordered that:

> 4. 7 hours of SETSS per week shall be delivered as a mandated, direct service.
>
> 5. 1 hour of SETSS per week shall be delivered as a mandated, indirect service.
>
> * * *
>
> 7. Five hours of direct ABA therapy shall be delivered as a mandated, district service to the Student by a BCBA at the Student's home.
>
> 8. 1 hour of indirect ABA therapy shall be mandated in order to communicate with the school.

(Parent Ex. B at p. 14). Neither party appealed the January 2021 IHO decision.

Sometime in March 2021, the parent received a form titled "Authorization for Independent [SETSS] for Parentally-Placed Student" indicating that in accordance with the January 2021 IHO decision the student was entitled to seven hours of SETSS per week by an ABA-trained provider to begin as of January 15, 2021 and to continue until either June 30, 2021 or 252 hours were used (Parent Ex. G at p. 6).

On March 2, 2021, the parent filed a State complaint with the New York State Education Department's (NYSED) Office of Special Education alleging that the district failed to timely implement the final order of the IHO issued on January 15, 2021 (Parent Ex. O at p. 3). On April

29, 2021, the NYSED Office of Special Education issued a written decision responding to the parent's allegation noting the district's failure to submit evidence indicating the implementation of the January 2021 IHO decision (id. at pp. 3-4). The NYSED Office of Special Education sustained the parent's allegation and directed the district to implement the IHO's decision and submit evidence to NYSED demonstrating implementation of the IHO decision by June 15, 2021 (id.).

**A. Due Process Complaint Notice**

In a due process complaint notice dated June 8, 2021, the parent raised allegations regarding the 2020-21 and 2021-22 school years (see Parent Ex. A).

Initially, the parent requested that the student receive the following services during the pendency of this proceeding: seven hours per week of home-based SETSS; one hour per week of indirect SETSS; five hours per week of direct home-based ABA therapy; and one hour per week of indirect ABA therapy (Parent Ex. A at p. 10).With respect to the 2020-21 school year, the parent asserted that the district failed to provide the student with appropriate instruction while school was shut-down due to the COVID-19 pandemic, beginning in March 2020 through June 2020 (Parent Ex. A at pp. 4-6). The parent also asserted that, during that time period, the student received related services of speech-language therapy, counseling, and physical therapy (PT), but did not receive his IEP mandated occupational therapy (OT) sessions (id. at pp. 7-8). According to the parent, the district still owed the student 18 half-hour sessions of make-up OT (id. at p. 8).

Additionally, the parent claimed that she provided medical documentation to the district over the course of the 2020-21 school year showing that the student's transportation should be no longer than 30 minutes each way to avoid maladaptive behaviors and motion sickness (Parent Ex. A at pp. 8-10).

The parent contended that the district incorrectly established an end date of June 30, 2021, for compensatory educational services awarded in the January 2021 IHO decision for the 2020-21 school year (Parent Exs. A at pp. 3-4, 11; B at p. 14). She argued that the student will only receive the ordered compensatory services for two months until they expire on June 30, 2021, the date set by the district (Parent Ex. A at pp 3-4, 11). The parent asserted that neither the January 2021 IHO decision nor the April 2021 Office of Special Education written decision set an end date for the use of the awarded compensatory education services and, therefore, the district incorrectly set an end date for the awarded compensatory services as June 30, 2021 (id. at p. 3). The parent further argued that the student required these services in order to receive a FAPE, that all of the services together had just started working for the student in the past month, and that not allowing the services to continue would halt the student's progress (id. at p. 4).

Relevant to this appeal, the parent requested that the IHO award the student the balance of unused services awarded as part of the January 2021 IHO decision, estimating that 300 hours of direct home-based SETSS, 40 hours of indirect SETSS, 210 hours of direct home-based ABA therapy, and 40 hours of indirect ABA therapy remained (Parent Ex. A at p. 11).

The parent also requested an order that the district provide the student with nine hours per week of SETSS for the 2021-22 school year, with eight hours per week provided as a home-based service and one hour as an indirect service so that the home-based providers could collaborate with

the school-based providers (Parent Ex. A at p. 11). As part of this request the parent indicated that she sought a bank of 368 hours of direct SETSS and a bank of 46 hours of indirect SETSS (id.). In addition, the parent requested six hours per week of ABA therapy for the 2021-22 school year, with five hours provided as a direct service and one hour as an indirect service (id. at p. 12). As part of this request, the parent sought a bank of 230 hours of direct ABA therapy to be delivered at home and a bank of 46 hours of indirect ABA therapy (id.).

Based on the parent's allegation that the district did not provide the student with appropriate services from March 2020 through June 2020, the parent requested 150 hours of compensatory educational services in the form of SETSS (Parent Ex. A at pp. 12-13). The parent also requested 18.5 sessions of make-up OT (id. at p. 13). Lastly, the parent requested that the student's IEP be changed to reflect a maximum 30-minute travel time (id.).

**B. Impartial Hearing Officer Decision**

As a result of a July 19, 2021 resolution meeting, the parties entered into a partial resolution agreement (see Parent Ex. U at pp. 1-2).[1] The resolution agreement required the district to provide a related services authorization (RSA) for 19 30-minute sessions of OT and to fund 150 sessions of direct SETSS at a rate of $175.00 per session, with both services to be completed between July 26, 2021 and August 31, 2022 (id.).[2]

On December 29, 2021, the IHO conducted a prehearing conference and the parties convened for the evidentiary phase of the impartial hearing on March 22, 2022, May 27, 2022, and May 31, 2022 (Tr. pp. 1-222).

In a final decision dated June 28, 2022, the IHO found that the district declined to offer any evidence or witnesses (IHO Decision at p. 5). The IHO noted that the parties entered into a partial resolution agreement for the instant case, and the parent testified that the remaining unresolved issues concerned the student's need for limited time travel to and from school, the student's continued need for SETSS and ABA services, and the balance of hours from the prior IHO decision concerning the 2020-21 school year that were not used by the end date of June 30, 2021, as prescribed by the district (Tr. p. 93; Parent Ex. U at pp. 1-2; IHO Decision at p. 10).

With respect to the parent's claims related to the 2020-21 school year, the IHO determined that the parent had filed a prior due process complaint notice related to the 2020-21 school year and in the January 2021 IHO decision, the parent was awarded relief for a denial of FAPE for the 2020-21 school year (IHO Decision at p. 11). The IHO noted that the January 2021 IHO decision specifically ordered that there was "no end date" for the compensatory education award (id. at p. 12). The IHO then found that she could not once again find another denial of FAPE for the 2020-

[1] The parties also entered into a pendency agreement dated June 14, 2021, in which the parties agreed that the student's placement for the pendency of the proceeding was based on the January 2021 IHO decision and included eight hours per week of SETSS and six hours per week of ABA therapy (Parent Ex. Q at pp. 3-4; see Tr. pp. 4-5).

[2] The district's authority to rely on RSAs to procure related services for public school services is limited (see https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

21 school year and could not re-award services to the student, because both were previously determined and granted by a prior IHO (id. at pp. 12-13). The IHO asserted that she lacked jurisdiction to implement the January 2021 IHO decision, and therefore denied the parent's relief related to the 2020-21 school year (id. at p.13).

Next, the IHO addressed the parent's claims related to the 2021-22 school year (IHO Decision at pp. 13-15). The IHO found that the district failed to meet its burden to establish that it provided the student with a FAPE during the 2021-22 school year, as it presented no evidence during the hearing (id. at p. 13). In addition, the IHO determined that the evidence in the hearing record showed that without ABA and SETSS, the student could not handle the social and academic demands placed on him (id.at p. 14). Accordingly, the IHO granted the parent's request for seven hours per week of direct SETSS, one hour per week of indirect SETSS, five hours per week of at home direct ABA therapy, and one hour per week of indirect ABA therapy and ordered the district to fund the cost for the services at the rates requested by the parent from July 2021 through June 30, 2022 (id. at pp. 14, 15).

Last, the IHO addressed the parent's contention that the student's travel time should be limited to 30 minutes (IHO Decision at p. 14). The IHO found that the evidence established that long bus rides "trigger[ed] the student's motion sickness, which cause[d] his disruptive behaviors to start or increase" (id. at pp. 14-15). Therefore, the IHO ordered the district to continue the student's special education transportation services, with his travel time limited to 30 minutes each way (id. at p. 15).

**IV. Appeal for State-Level Review**

The parent appeals from the IHO's June 28, 2022 denial of her request for the balance of compensatory services awarded in the January 2021 IHO decision.[3] Initially, the parent reiterates the steps she took to have the district implement the January 2021 IHO decision, including filing a complaint with NYSED. According to the parent, the district resolved some issues related to the 2020-21 school year as part of the resolution process in this proceeding and, therefore, has the ability to agree to award her the unused hours from the January 2021 IHO decision. According to the parent, she is simply seeking a way for the student to be allowed to use the hours of compensatory services that were already granted in the prior proceeding, with the district having conceded that it denied the student a FAPE over an extended period of time. The parent asserts that her request can be granted as part of a due process proceeding as she argues that IHOs have broad discretion to award appropriate compensatory relief. The parent requests reversal of the IHO's decision denying her request for the balance compensatory hours not used by the student during the 2020-21 school year, specifically requesting an award of 274 hours of direct SETSS,

[3] I note that the parent has filed another appeal for State-level review of an IHO decision regarding the same student dated August 28, 2022 in which another IHO noted that the parent returned to due process again and similarly noted that he lacked authority to enforce certain aspects of the June 28, 2022 IHO decision underlying this State-level review proceeding. Asking two administrative hearing officers in different forums to act on the same IHO decision at the same time is a recipe for disrupting the orderly administration of the due process system. Both the parent and the district should be prepared, going forward to disclose complete list of all due process proceedings that have concluded or are currently pending with respect to the student.

36 hours of indirect SETSS, 192 hours of direct ABA therapy, and 32.5 hours of indirect ABA therapy.

In an answer, the district first asserts that the parent failed to serve the request for review upon the district in accordance with State practice regulations. Specifically, the district alleges that the parent did not include a confirmation email from the district in her proof of service for the request for review showing that the district received her appeal. According to the district, the parent included an email showing receipt for the notice of intention to seek review. The district argues that this shows the parent was aware of the process for serving the district and did not follow it.[4] The district also submits an affidavit indicating that it conducted a review of its records and did not find any documents filed with the district with respect to this appeal, other than the notice of intention to seek review. Therefore, the district requests that the parent's request for review be dismissed. Next, the district asserts that the IHO correctly declined to award compensatory education for unused hours of compensatory education awarded in a prior IHO decision because she lacked authority. Likewise, the district contends that an SRO lacks the authority to enforce a prior IHO decision.

In a reply to the district's answer, the parent contends that the district failed to properly serve her with the answer. Next, regarding service of her request for review, the parent asserts that since serving her last appeal in 2019, the district established a web site that included the email at which the district accepts service and that she followed the district's instructions for service via email. According to the parent, she attempted to confirm the instructions, the district did not return her call or email her regarding the message she left. The parent includes, among other documents, a copy of an email that she sent to the district that indicates the request for review was attached. The parent also responds to the district's assertion that IHO's and SRO's lack authority to enforce IHO decisions and argues that "[district] supervisors" do have the authority to award hours of compensatory educational services not utilized due to lack of appropriate implementation. The parent provides redacted documentation concerning another student, which the parent asserts shows the district engaged in discriminatory practices by agreeing to extend the expiration dates for awarded services for some students as part of the resolution process and not others.

## 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

[4] Along with her request for review, the parent included documentation from the district explaining that it accepts service via a specific email address; however, within the documentation, there does not appear to be any mention of service not being complete until the filer receives an email generated response or receipt from the district.

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]).[5]

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

## VI. Discussion

### A. Preliminary Matters – Service of Pleadings

As a threshold matter, the district contends that it was not served with a request for review in this matter and that the parent's appeal should be dismissed for lack of service of the request for review. Conversely, the parent asserts that the district did not properly serve a copy of its answer on her via mail.

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]).

In this instance, the district has selected a process by which service can be made on the district via email at a designated email address (see Answer Ex. 1 at ¶4).

On July 5, 2022, the parent served the notice of intention to seek review by email to the email designated by the district for service. The parent included a copy of the email and a copy of a "proof of service receipt" she received back from the district in her filing of the notice of intention to seek review.

The parent filed an affidavit of service with her request for review, attesting that she served the district with the request for review by email on August 3, 2022. Along with the affidavit of

[5] 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).

service, the parent filed a copy of the email that she sent the district, which appears to include an attachment labeled request for review.

The district asserts that the parent did not follow the process for serving the district by email in serving her request for review. According to the district, if the parent had properly served the request for review she would have received a proof of service receipt similar to the receipt she included with the notice of intention to seek review. Additionally, the district includes an affidavit indicating that a search of the district records, including its "computerized filing system," was conducted to find any documentation regarding this matter and the search only revealed the parent's notice of intention to seek review (Answer Ex. 1 at ¶5). According to the affidavit, the search "did not reveal any notice of claim, written verified claim, claim letter, general correspondence, or any other materials filed or served by or on behalf of [the parent]" after July 5, 2022 (id.).

Considering the affidavit of service, including the copy of the attached email, as well as the affidavit presented by the district, there is not a sufficient basis for finding that the parent did not properly serve the request for review in this matter. While the affidavit shows that the district represents that it conducted a "diligent search" of its records, it does not show how that search was conducted or that all emails sent to the district's designated email account are received by the district and, accordingly, it is insufficient to prove that the email the parent said that she sent in a sworn statement was not actually sent. Any error in the system that occurs after an email is sent to the district does not negate service. Within the web site documentation setting forth the district's own policy for accepting electronic service, the district could have indicated that service would not be considered complete unless the individual making service receives and can reproduce an auto-generated response or receipt from the district; however, there is no indication that the district's published agreement agreeing to service via electronic mail on August 3, 2022 contained such an additional requirement. Accordingly, I conclude that the parent adhered to the terms for service of the request for review that there is no indication that such service was improper. Accordingly the district's request that I reject the request for review as improperly served is rejected.

Turning to the parent's assertion that the district failed to properly serve her with a copy of the answer, the district's answer included a "Declaration of Service" indicating that the answer was served on the parent by mail to the parent's address listed in the request for review on September 9, 2022. On the same day, the attorney for the district sent the parent an email with a courtesy copy of the answer (Reply Ex. A). The parent responded to the district's email on September 14, 2022 indicating that she had not yet received the district's answer by mail (id.). The parent filed her reply to the district's answer on September 15, 2022, in which she requests that the district's answer be dismissed for improper service. The parent does not allege that the answer was not timely mailed, rather she argues that the answer was not received within six days after it was sent. As there is insufficient cause to question the accuracy or reliability of the district's declaration of service, the answer is also accepted.[6]

[6] However, even if the answer was excluded from my consideration, the ultimate resolution of this matter would remain the same, as I am required to render an impartial decision based upon an independent review of the entire hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

**B. Prior IHO Decision - Enforcement**

The issue presented on appeal is the parent's request that the student be allowed to use the compensatory SETSS and ABA therapy awarded to him in the January 2021 IHO decision based on a denial of FAPE for the 2020-21 school year (see Req. for Rev.). Specifically, the parent requests an award of 274 hour of direct SETSS, 36 hours of indirect SETSS, 192 hours of direct ABA therapy, and 32.5 hours of indirect ABA therapy all at the enhanced rate of $175.00 per hour with no expiration date (id. at p. 6).

Upon review of the parent's allegations and the January 2021 IHO decision, it appears the parent's request for an award of specific amounts of SETSS and ABA therapy is based on the January 2021 IHO decision's directive that the district provide the student with a set amount of hours per week of SETSS and ABA therapy (see Parent Ex. B at p. 14). As noted above, the January 2021 IHO decision did not award a set amount of SETSS and ABA therapy as compensatory education for the denial of FAPE for the 2020-21 school year, and instead ordered seven hours of direct SETSS per week, one hour of indirect SETSS per week, five hours of direct ABA therapy (per week), and one hour of indirect ABA therapy (per week) (id.). The January 2021 IHO decision also awarded the student 310 hours of SETSS as compensatory education (id.).

There is some confusion in the email correspondence between the parent and the district seeking implementation of the student's programming, as, in a March 22, 2020 email, the parent references both that the student had not received "IEP mandated SETSS" after they were recommended and that she had been "waiting over 2 months for the implementation of [the January 2021 IHO decision]" (Parent Ex. G at p. 4). However, in subsequent email correspondence dated March 30, 2021, the parent explained that she was seeking implementation of the IHO decision, indicating "[the] order is clear, the rate and methodology are listed" (id. at p. 1).

The hearing record shows that the January 2021 IHO decision was not implemented until the end of April 2021, and in the authorization for implementation of SETSS, the district set an end date for the services of June 30, 2021 (see Tr. pp. 6-7, 40-41, 210; Parent Exs. G at pp. 6, 8; O).

There is no evidence that explains why the district indicated that the services could not be provided after June 30, 2021 as there is no such time limit set forth in the January 2021 IHO decision. However, it is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers, much less to enforce decisions of the courts (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

As the hearing record and the arguments presented on appeal establish that the parent is seeking enforcement of the January 2021 IHO decision, the IHO's determination that she lacked jurisdiction to address the parent's claims for the 2020-21 school year because they involved

enforcement of the January 2021 IHO decision was proper. As determined by the IHO, she could not alter services already awarded to the student as part of a prior IHO decision.

Nevertheless, the district's conduct throughout this proceeding and regarding enforcement of an award from a prior proceeding is troubling and the parent's exasperation with the district's alleged refusal to comply with a final order from an IHO is understandable. As noted by the parent, a class action lawsuit was filed against the district regarding its failure to implement IHO decisions in a timely manner on a system-wide basis (LV v. New York City Dep't of Educ., 2005 WL 2298173, at *8 [S.D.N.Y. Sept. 20, 2005]). To the extent the district has not appealed from the January 2021 IHO decision, the district's "only lawful course of action [wa]s to implement those Orders, full stop" and, having failed to do so, the parent would likely succeed in efforts to compel enforcement through judicial means (LV v. New York City Dep't of Educ., 2021 WL 663718, at *8 [S.D.N.Y. Feb. 18, 2021]).

Generally, when a district has failed to implement a due process hearing decision, federal regulation provides that the parent may file a State complaint against the district through the administrative complaint process (34 CFR 300.152[c][3]; see 8 NYCRR 200.5[l]). However, in this instance, the parent has already sought enforcement through the State complaint process and, according to the parent's allegations, once the State complaint process concluded in her favor, the district shortly thereafter stopped complying with the January 2021 IHO decision (see Parent Ex. O). At this juncture, it is unclear as to how effective a second State complaint would be regarding the district's compliance with January 2021 IHO decision as "[t]he complaint must allege a violation that occurred not more than one year prior to the date that the State complaint is received" (8 NYCRR 200.5[l][1][iii]), and such matters are beyond my purview.

The parent may seek to enforce the January 2021 IHO decision through the judicial system (see Y.S. v. New York City Dep't of Educ., 2021 WL 1164571, at *1 [S.D.N.Y. Mar. 26, 2021]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 78 n.13).

## VII. Conclusion

Having determined that the hearing record supports the IHO's determination dismissing the parent's request for enforcement of the January 2021 IHO decision, the necessary injury is at an end.

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

**THE APPEAL IS DISMISSED.**

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

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**