The University of the State of New York

The State Education Department
State Review Officer
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No. 22-132

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 that respondent (the district) denied the student a free appropriate public education (FAPE) for the 2022-23 school year and ordered the district to provide a specified special education program to the student for the 2022-23 school year but denied the parent's request for certain compensatory education services for the 2021-22 school year. The district cross-appeals from that portion of the IHO's decision which directed the district to develop a particular set of program and service recommendations for the student for the 2022-23 school year and fund certain compensatory related services for the 2021-22 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative appeal, Application of a Student with a Disability, Appeal No. 19-061, related to the 2016-17, 2017-18, and 2018-19 school years, a prior administrative proceeding that resulted in an unappealed IHO decision dated January 15, 2021, related to the 2019-20 and 2020-21 school years, and a prior State-level administrative appeal, Application of a Student with a Disability, Appeal No. 22-099, related to the 2020-21 and 2021-22 school years (Parent Exs. C; E; P). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational

history—is presumed, and such history will not be repeated unless relevant to the disposition of the issues presented in this appeal.

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 applied behavior analysis (ABA) services, at a frequency of 10 hours per week until the hours were exhausted (Parent Ex. C at p. 34). In the prior unappealed IHO decision dated January 15, 2021, an IHO found that the district denied the student a FAPE for the 2019-20 and 2020-21 school years and awarded the student, among other things, 310 hours of special education teacher support services (SETSS) as compensatory education as well as: "7 hours of SETSS per week" to be delivered as a mandated, direct service; "1 hour of SETSS per week" to be delivered as a mandated, indirect service; "Five hours of direct ABA therapy" to be delivered as a mandated, direct service to the student by a Board Certified Behavior Analyst (BCBA) at the student's home; and "1 hour of indirect ABA therapy. . . in order to communicate with the school" (Parent Ex. E at p. 14).

According to the parent, for the 2021-22 school year, the student attended a charter school (Parent Ex. A at p. 4). The parent filed a due process complaint notice dated June 8, 2021, raising challenges relating to the 2020-21 and 2021-22 school year (see Application of a Student with a Disability, Appeal No. 22-099).

Email correspondence between the parent and the district dated January 12, 2022, reflects that, from approximately September 2021 through November 4, 2021, the district did not provide the "IEP mandated paraprofessional" services and, therefore, a BCBA who was supposed to provide some of the student's compensatory education services from prior matters delivered the paraprofessional support (Parent Ex. F at pp. 1-2). The district indicated that it would "be returning" 76 hours of compensatory BCBA services (id. at p. 1). In an email correspondence dated April 6, 2022, the district notified the parent that the student's speech-language therapist for the 2021-22 school year was no longer available due to maternity leave (Parent Ex. J at p. 4). The district notified the parent on April 29, 2022 that a new speech-language pathologist had been located (id. at p. 2). The parent requested that the district provide a related services authorization (RSA) for compensatory speech-language therapy services "for the past weeks of no service" as well as for missed sessions of speech-language therapy and occupational therapy (OT) since "the beginning of the school year" (id. at p. 1). In response, the district acknowledged that services were owed for sessions missed "in the beginning of the school year," including six 30-minute sessions of individual speech-language therapy, 12 30-minute group sessions of speech-language therapy, and 11 30-minute session of individual OT (id.). The district indicated that the CSE would calculate the speech-language therapy services missed during the "last few weeks" (id.).

A CSE reconvened on June 13, 2022 to review additional assessments and amend the student's IEP for the 2022-23 school year (Dist. Ex. 1 at p. 2).[1, 2] Finding the student eligible for

[1] According to the hearing record, a CSE convened on January 12, 2022 to conduct the student's annual review and reconvened on February 9, 2022 (see Dist. Ex. 1 at p. 6). The hearing record does not include IEPs generated as a result of the January 12 or February 9, 2022 CSE meetings.

[2] While Parent Exhibit R and District Exhibit 1 are both IEPs for the 2022-23 school year, District Exhibit 1

special education as a student with autism, the CSE recommended a special education teacher and assistant in a general education classroom in an innovative charter school program (id. at p. 39). The student had been recommended to receive seven periods of SETSS per week in English language arts (ELA) and math to be delivered as an individual, direct service, outside of school and one period of SETSS per week to be delivered as an indirect service outside of school; however, the June 2022 CSE specified on the IEP an end date for these services of August 12, 2022 (id.). For related services, the CSE recommended one 30-minute session per week of individual counseling; one 30-minute session per week of counseling in a group of three; two 30-minute sessions per week of individual OT in the general education classroom; one 30-minute session per week of individual OT; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of three; two 30-minute sessions per week of speech-language therapy in a group of three in the general education classroom; and three 45-minute sessions per year of parent counseling and training (id. at pp. 39-40). The CSE also recommended a group behavior support paraprofessional daily, as well as a portable word processor, staff training for all staff working with the student on appropriate implementation of his behavioral intervention plan (BIP), and extended school year services (id. at pp. 40-42).

In a June 14, 2022 email, the parent notified the district that she disagreed with the CSE's recommendation to reduce the student's 1:1 paraprofessional to a group service and with the "termination of his SETSS program" (Parent Ex. M). The parent also noted that the student was owed 106 sessions of speech-language therapy and OT and there was no discussion at the meeting of how these services would be made up, nor was there discussion of the 76 hours of compensatory SETSS "the CSE said they were returning from last fall and still ha[d] not" (id.). Additionally, the parent requested evaluations of the student including neuropsychological, speech-language, OT, and assistive technology evaluations (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 15, 2022, the parent raised allegations regarding the 2021-22 and 2022-23 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; one hour per week of indirect ABA therapy; and individual full-time behavior support paraprofessional services (Parent Ex. A at p. 2).

With respect to the 2021-22 school year, the parent asserted that the district denied the student his related services of OT and speech-language therapy and also denied the student his IEP mandated paraprofessional for several months (Parent Ex. A at pp. 2, 5, 9). The parent also alleged that the CSEs convened to engage in educational planning for the student for the 2022-23 school

differs in that it reflects that the summer program would be different than the program offered during the 10-month portion of the school year, since a summer program was not available at the student's charter school (Tr. pp. 58-65; compare Dist. Ex. 1 at pp. 40-42, with Parent Ex. R at pp. 40-41). For purposes of this decision, when referring to the June 2022 IEP, District Exhibit 1 will be cited.

year recommended inappropriate services and programs for the student, including a reduction to his speech-language therapy mandate, an inappropriate summer program, and a change of behavior support paraprofessional services from individual to group (id. at pp. 2, 7-8, 10-11). Further, the parent challenged the determination of the CSE to end the student's SETSS services as of August 2022 and its refusal to recommend a home-based ABA program (id. at pp. 7, 10-12).

According to the parent, the district owed the student 76 speech-language therapy sessions (29 sessions from the beginning of the 2021-22 school year and 47 sessions from April 1 to June 24, 2022), and 30 sessions of OT (19 from a previous resolution agreement and 11 sessions from the beginning of the 2021-22 school year) (Parent Ex. A at pp. 13-14). In addition, the parent asserted that the student was owed 76 sessions of SETSS that the CSE agreed to return, as the parent used a bank of compensatory hours received from a previous matter to have a BCBA support the student in the absence of a paraprofessional (id. at pp. 5-6, 11, 13).

With respect to the 2022-23 school year, the parent requested that the student be awarded eight hours of SETSS per week to be delivered in the home (seven hours of direct and one hour of indirect SETSS) and six hours of ABA therapy per week to be delivered in the home (five hours of direct and one hour of indirect ABA) (Parent Ex. A at pp. 2, 12-13). The parent requested the services be awarded as a bank of 368 hours of at-home SETSS (322 hours of direct and 46 hours of indirect services) and a bank of 276 hours of ABA therapy in the home (230 hours of direct and 46 hours of indirect services) without expiration (id. at pp. 12-13). The parent also requested the student be provided an individual full time behavior support paraprofessional (id. at p. 14).

B. Events Post-Dating the Due Process Complaint Notice

With respect to the pending impartial hearing that the parent had initiated by due process complaint notice dated June 8, 2021, an IHO issued a decision dated June 28, 2022, in which she considered the parent's claims related to the 2020-21 and 2021-22 school years and found that what the parent was ultimately requesting with respect to the relief sought for the 2020-21 school year was that the IHO enforce the prior unappealed January 15, 2021 IHO decision, which the parent argued had not been implemented by the district until April 2021 and had ceased being implemented on June 30, 2021 despite the decision stating that there be no end date for the compensatory hours (Parent Ex. P at pp. 12-13). The IHO in that matter found these allegations to be outside her jurisdiction and, therefore, denied the parent's requested relief (id.). Regarding the 2021-22 school year, the IHO in that matter found the district had failed to provide the student with a FAPE, and awarded 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 at the rates requested by the parent from July 2021 through June 30, 2022 (id. at pp. 13-15).[3]

[3] In Application of a Student with a Disability, Appeal No. 22-099, an SRO found that neither he nor the IHO had the authority to enforce the unappealed January 15, 2021 IHO decision's order for 310 hours of compensatory SETSS.

C. Impartial Hearing Officer Decision

Turning to the present matter, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH). On July 18, 2022, the IHO conducted a prehearing conference and issued a prehearing conference summary and order that, among other things, identified the issues to be addressed at the impartial hearing including denial of FAPE for the 2022-23 school year and appropriateness of the student's IEP, as well as requested relief of SETSS, ABA therapy, paraprofessional services, and compensatory awards for SETSS, ABA, OT, and speech-language therapy (see Prehearing Conference Summary and Order).[4] The impartial hearing took place on August 9, 2022 and concluded the same day (Tr. pp. 1-100).

In a final decision dated August 28, 2022, the IHO denied the parent's request for compensatory SETSS for the 2021-22 school year, finding that the parent's requested relief was for SETSS hours owed to the student as a result of a prior finding of fact and decision ordering the services, and that the IHO lacked jurisdiction to "relitigate settled matters" from the 2021-22 school year or to order implementation of a prior order (IHO Decision at pp. 10-11). The IHO granted the parent's request for compensatory speech-language therapy and OT for sessions owed to the student for the 2021-22 school year, finding that the district did not present any evidence to demonstrate that the parent was incorrect as to calculation of the service hours claimed to have been missed or due and the parent was entitled to 76 speech-language therapy and 30 OT sessions (id. at pp. 11-13).

Next, the IHO found that the district denied the student a FAPE for the 12-month 2022-23 school year (IHO Decision at pp. 14-18). Initially, although the IHO found that the district had amended the 2022-23 IEP without providing the parent with prior written notice in violation of the IDEA's procedural rules, as the parent testified that there was no substantive impact in that the district's IEP reflected her understanding of the services the student would receive, the IHO did not find the student's right to a FAPE was impacted by the procedural inadequacy (id. at p. 13). In finding a denial of a FAPE for the 2022-23 school year, the IHO found the testimony of the student's BCBA, special education teacher, and SETSS provider to be "credible and unrebutted," for among other things, their description that the student's behavior and learning would be negatively affected and the student would "regress" without ABA therapy, the SETSS he was receiving, and the support of a 1:1 paraprofessional (versus a group paraprofessional) (id. at pp. 14-18). The IHO also referenced the lack of any persuasive evidence offered by the district for the removal or change in services in the student's IEP and found that the IEPs at issue were not reasonably calculated to enable the student to receive educational benefits or to make progress (id. at pp. 18-19). With respect to equitable considerations, the IHO found no evidence the parent failed to cooperate with the district and, citing the parent's ongoing efforts to ensure the student received a FAPE, granted the parent's requested rate for the ordered services, but denied the parent's request for banks of compensatory hours (id. at pp. 19-20).

[4] The parties entered into a pendency agreement dated July 18, 2022, in which the parties agreed that the student's placement for the pendency of the proceeding was based on the June 28, 2022 IHO decision and included seven hours per week of direct ABA SETSS, one hour of indirect SETSS, five hours of at-home direct ABA therapy, and one hour of indirect ABA therapy (see Pendency Agreement).

As relief, for the 2021-22 school year, while the IHO denied SETSS compensatory services for lack of jurisdiction, he ordered as compensatory services, 76 30-minute sessions of speech-language therapy and 30 30-minute sessions of OT, each at "market rate . . . for the duration of the 2022-2023 school year" (IHO Decision at p. 20). For the 2022-23 school year, for the denial of FAPE, the IHO ordered seven hours per week of direct 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, each to be provided at no more than a specified rate "for the duration of the 2022-2023 school year," as well as the immediate reinstatement of the student's 1:1 paraprofessional, reimbursement of costs not already paid under pendency, and that the CSE amend the student's IEP in conformity with the IHO's order within 30 days (id. at pp. 20-21).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred by denying the parent's request for the "return" of 76 hours of compensatory SETSS services. The parent argues that the IHO, in asserting that he did not have the jurisdiction to relitigate settled matters from the 2021-22 school year or issue an order directing the district to implement an existing one, "mischaracterized" the events surrounding the parent's requested relief. In particular, the parent states that, as the student was not receiving his "IEP mandated behavior support paraprofessional" from September 24 through November 4, 2021, the parent "utilized" a bank of compensatory SETSS hours—granted in the unappealed January 15, 2021 IHO decision and authorized in April 2021 to an agency the parent selected—because the student was having a difficult time in school without the aid of a behavior support paraprofessional and "could not wait any longer, he needed support." To support this allegation, the parent submits additional evidence and requests that it be considered.

The parent also argues that the IHO erred by setting an expiration date of June 30, 2023, the end of the 2022-23 school year, for the use of the awarded compensatory related services of speech-language therapy and OT. The parent contends that, as of the date of her appeal, the IHO's order has not been implemented and no providers have been identified or contracted. The parent further maintains that it is not appropriate to force the number of sessions—a combined total of 106 sessions of OT and speech— to be used within a few months, arguing that it would not be beneficial to the student and could trigger behavioral regression, which she had been working to extinguish.

As relief, the parent requests reversal of the IHO's determination denying the student "the return of the 76 hours used during the time period the district failed to provide paraprofessional services," that the 76 hours of SETSS be awarded at a specified enhanced rate, and that there be no expiration date as they are compensatory in nature and will be used when appropriate. The parent also requests there be no expiration date for the awarded compensatory related services of speech-language therapy and OT, or alternatively, that the expiration date be June 20, 2028; the date the student will tentatively graduate from high school.

In an answer and cross-appeal, the district requests that the IHO's order be vacated, arguing that the IHO improperly usurped the district's responsibility to develop the student's next IEP by incorrectly ordering the district to develop an IEP with a particular program and related services recommendations as part of the relief to remediate the FAPE violation found in this matter, particularly given that the IHO had already awarded a "substantial amount" of services for the

2022-23 school year to remedy identified FAPE violations. For its second issue on cross-appeal, the district argues that the IHO's award of compensatory OT and speech-language therapy services relating to 2021-22 school year violated res judicata because, among other reasons, the parent could have raised the claims in the due process complaint notice underlying the prior proceeding as the compensatory hours of OT and speech-language therapy owed to the student "derive[d] primarily" "from the beginning of the 2021/2022 school year" or earlier, the parent had an opportunity to amend her due process complaint notice during the prior impartial hearing held between December 2021 and May 2022, and the IHO's decision in the prior proceeding "fully resolved" the parent's claim relating to the 2021-22 school year when it ordered "numerous hours of services" for the student and may not now be relitigated.

In addition, the district asserts that, if the IHO's order is not vacated, the expiration date "if any," set for the compensatory OT and speech-language therapy should not be disturbed. The district notes that the discretion to set expiration dates for the compensatory OT and speech-language therapy awarded was "well within [the IHO's] broad equitable authority" and any such expiration date should be affirmed. Finally, the district asserts that the IHO's denial of the parent's compensatory SETSS request relating to the 2021-22 school year should be affirmed as the IHO correctly found that an IHO does not have jurisdiction to relitigate settled matters or to order the district to implement an existing order. The district argues that the parent's additional evidence should be disregarded because it could have been offered at the time of the impartial hearing and is not necessary to render a decision.[5] Next, the district argues the IHO's denial of the parent's request for compensatory SETSS relating to 2021-22 should be affirmed as such an order would contravene the legal doctrine of res judicata. The district argues that the parent could have amended her due process complaint notice in the prior proceeding to include the allegations that the student lacked a paraprofessional from mid-September to mid-November 2021 as the impartial hearing was held between December 29, 2021 and May 31, 2022. Finally, the district argues that the SRO does not have authority to enforce implementation of any "corrective actions" ordered in the state complaint process. The district requests that its cross-appeal be sustained, and the parent's appeal be dismissed.

In a reply and answer, the parent responds to the district's answer and requests that the cross-appeal be dismissed in its entirety.

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

[5] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the parent's proposed exhibits were available at the time of the August 9, 2022 impartial hearing and are not necessary in order to render a decision in this appeal. Accordingly, the proffered documents have not been considered.

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]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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. 2021-22 School Year

1. Enforcement of Prior Compensatory Award

The first issue presented on appeal is whether the IHO erred by denying the parent the ability to recoup the 76 hours of compensatory SETSS that the parent used to provide the student with support in absence of an individual paraprofessional as recommended on the student's IEP

[6] 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).

for the period of September 24, 2021 through November 3, 2021. The district argues the IHO correctly found a lack of jurisdiction to award the compensatory SETSS to replenish the prior compensatory SETSS award when he found that an IHO does not have jurisdiction to relitigate settled matters or to order the district to implement an existing order.

It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (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]).

However, here the parent is not seeking enforcement of a prior order but relief for the district's failure to implement the student's IEP during the 2021-22 school year, which is a valid claim. The district failed to meet its burden to prove that, contrary to the parent's assertions, it did provide the student all of the mandated paraprofessional services. Instead, testimonial and documentary evidence in the hearing record shows that the district acknowledged it did not implement the student's paraprofessional services from September 24, 2021 through November 4, 2021 and, to make up for the lapse, the CSE agreed to "return[]" 76 hours of compensatory services delivered by a BCBA during this time period (Tr. pp. 48-50; Parent Ex. F at pp. 1-2; Dist. Ex. 1 at p. 10).

In particular, the CSE site supervisor testified that she was aware that the student was without the mandated 1:1 paraprofessional from September through November of the 2021-22 school year (Tr. p. 48). She further testified that as part of a State complaint corrective action, the State ordered a meeting on the impact of the student not having a paraprofessional, which was held in January 2022; at which time, the CSE determined that the student was impacted by not having a 1:1 paraprofessional (Tr. p. 49). In addition, she testified that as part of an agreement the CSE said they would return to the student the 76 hours of compensatory services that were utilized by a BCBA to provide the student with support during the day in the absence of the paraprofessional (Tr. p. 50). She indicated that, to her understanding, the parent would be sending a schedule as well as what provider would deliver those hours and that she would be "putting that into the system," and that this arrangement was "agreed upon and taken care of" (Tr. p. 50).

Corroborating this testimony is email correspondence between the parent and the district from January 2022, in which the district acknowledges the lapse in paraprofessional services and the agreement that the district would "return[]" the 76 hours of compensatory services (Parent Ex. F at pp. 1-2), as well as a statement in the June 2022 IEP that: "At the reconvene meeting (2/9/22), the team discussed the impact of the failure to provide paraprofessional services from September 24 to November 3rd 2021 and determined this impacted [the student]. The CSE is recommending that [the student] be provided with 76 compensatory hours of his BCBA" (Dist. Ex. 1 at pp. 10, 20).

To be sure, the parent's use of the prior compensatory award as a form of self-help to remedy a new violation committed by the district is unusual and creates some degree of confusion

in terms of the nature of the relief sought. However, the IHO's analysis is also problematic insofar as the compensatory award for which, he opines, the parent was seeking enforcement was not ordered until June 28, 2022, subsequent to the parent's request for return of the hours in the June 15, 2022 due process complaint notice (compare IHO Decision at p. 10, and Parent Ex. P at p. 16, with Parent Ex. A at pp. 5-6, 11, 13). In any event, the fact that the BCBA services utilized in lieu of the IEP-mandated paraprofessional services may have been funded based on a compensatory award from a prior administrative proceeding is beside the point in this instance. The district concedes that it failed in its obligation to implement paraprofessional services, the parent engaged in self-help, and the district also concedes that the BCBA services delivered were appropriate and makes no argument that the parent acted unreasonably.[7] In fact, the district agreed to the very arrangement that the parent executed and the relief she seeks.

Thus, given the underlying FAPE violation—the failure to implement the paraprofessional services during the 2021-22 school year—and the request for relief to remedy the same, this is not an instance where the parent is seeking enforcement of a prior order, and the IHO erred in finding that he did not have jurisdiction to award the parent the relief she sought on the grounds that it constituted a request for enforcement. Moreover, the evidence in the hearing record supports a finding that the student is entitled to an award of district-funding of 76 hours of SETSS to remedy the district's failure to implement paraprofessional services during the months of September through November 2021.

2. Res Judicata

In its answer and cross-appeal, the district argues that the IHO's award of compensatory OT (30 sessions) and speech-language therapy (76 sessions) and the parent's request for compensatory SETSS (76 sessions) relating to 2021-22 school year are barred by the doctrine of res judicata because, among other reasons, the parent could have raised the claims in the prior due process proceeding as the hours owed to the student primarily derived from the beginning of the 2021-22 school year or earlier, the parent had an opportunity to amend her due process complaint notice during the prior impartial hearing held between December 2021 and May 2022, and the IHO's decision in the prior proceeding "fully resolved" the parents claim relating to the 2021-22 school year when it ordered "numerous hours of services" for the student and may not now be relitigated. The parent asserts that the district's failure to implement OT, speech-language therapy, and paraprofessional services were not in question in the prior proceeding pertaining to the 2021-22 school year as those issues were "allegedly resolved" between the parties outside of an impartial hearing but that "[u]nfortunately the CSE never followed through with their obligation." And further, that as she "did not foresee the CSE reneging on these agreements," there was no reason for her to amend her prior due process complaint notice to raise issues that were already resolved.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl

[7] In this sense, putting aside the reference to the original source of the funding for the BCBA services (i.e., a prior compensatory award), the relief the parent seeks to remedy the district's implementation failure is similar to a request for reimbursement for privately-obtained services under the Burlington/Carter framework (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70).

River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

Here, even assuming for the sake of argument that the district established the first two elements of the res judicata principles, the district cannot establish that its failure to implement the services in the student's IEP during the 2021-22 school year was raised, or could have been raised, in the prior proceeding about the 2021-22 school year. First, the parent's due process complaint notice underlying the prior proceeding was dated June 8, 20212, prior to the alleged implementation failures (see Application of a Student with a Disability, Appeal No. 22-099). While the underlying due process complaint notice for the prior proceeding was not included in the hearing record for the present matter, review of the IHO's June 2022 decision does not reveal that he addressed any claims about implementation of the student's services during the 2021-22 school year (Parent Ex. P).[8] The IHO found that the district presented no evidence during the impartial hearing and, therefore, failed to meeting its burden to prove that it offered the student a FAPE for the 201-22 school year (id. at p. 13).

Given the timing and nature, any argument that the parent's claim should nevertheless be barred under res judicata because she could and should have raised an allegation about the implementation failures in the prior proceeding as arising from the same nucleus of operative facts

[8] Although the parent's allegations regarding implementation of the student's educational program are not precluded under the doctrine of res judicata based on the prior proceeding regarding the appropriateness of the student's educational program, it may not be proper to award separate relief for challenges to implementation of an educational program and the appropriateness of an educational program where the allegation is a failure to implement an educational program that is also being challenged as inappropriate. However, while the due process complaint notice underlying the prior matter is not in the hearing record, review of the hearing record in the prior State-level administrative appeal involving the student reveals that the parent alleged a denial of a FAPE for the 2021-22 school year based generally on the district's "ongoing FAPE denial" in years past and the student's continued need for SETSS and home-based ABA therapy (see Application of a Student with a Disability, Appeal No. 22-099, Ex. A at pp. 1, 3-4, 11-13). Considering the above, in this instance, the parts of the student's educational program that are being challenged as not being implemented, i.e. the 1:1 paraprofessional services and the related services of OT and speech-language therapy, were not challenged as being inappropriate services for the student and were not a basis for the relief granted to the student due to the prior allegations of inappropriate educational programming. Thus, there is no reason the parent should not be able to receive relief based on her allegation that the district failed to implement the recommended 1:1 paraprofessional services and related services.

must fail.[9] That is, the key facts that form the basis for a failure to implement claim were not known to the parents at the time of the June 2021 due process complaint notice that initiated the first proceeding. For instance, as noted above, the district's failure to implement the paraprofessional services occurred between September and November 2021 (see Tr. pp. 48-50; Parent Ex. F at pp. 1-2; Dist. Ex. 1 at p. 10). Further, the evidence in the hearing record shows that the lapses in OT and speech-language therapy occurred at the beginning of the 2021-22 school year and that the student missed additional sessions of speech-language therapy due to the maternity leave of the speech-language pathologist between approximately April and June 2022 (Tr. pp. 56-58; Parent Ex. J at pp. 1-4; see District Ex. 1 at pp. 12, 19).

Moreover, contrary to the district's implication, there is no requirement under the IDEA that mandates a parent to seek permission to amend a then-pending due process complaint notice to raise claims based on events occurring contemporaneous with the pending matter, and the district does not point to any rule to the contrary.[10] In view of the forgoing, the doctrine of res judicata did not preclude the parent from pursing her claims that the district failed to implement the student's paraprofessional and related services during the 2021-22 school year and, therefore, there is no basis to deny the parent the requested compensatory SETSS or to disturb the IHO's award of compensatory OT and speech-language therapy.[11]

3. Expiration Date of Compensatory Services

Turning to the parent's appeal, the parent argues that the IHO erred by setting an expiration date of June 30, 2023 for the use of the awarded compensatory speech-language therapy and OT, in light of the student's unique circumstances. The district argues that the discretion to set expiration dates "if any" was well within the IHO's authority.

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[9] "In determining whether the same nucleus of facts is at issue," relevant considerations include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011] [internal quotations omitted]; see Dutkevitch v. Pittston Area Sch. Dist., 2013 WL 3863953, at *3 [M.D. Pa July 24, 2013] [identifying relevant considerations including whether the acts complained of and relief demanded were the same, whether the theory of recovery was the same, whether the material facts were the same, and whether the same witnesses and documentation would be required to prove the allegations]; see also Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 42 [D.D.C. 2013] [finding that a parent's claim that a school could not implement a student's IEP arose from the same nucleus of facts as a previously adjudicated claim that the school did not offer groups and minimal distractions]).

[10] The IDEA and its implementing regulations provide that 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]).

[11] Other than alleging that the parent's claims were barred by res judicata, on appeal, the district does not otherwise argue that the IHO erred in his factual determination that the district failed to implement the related services or his calculation of compensatory education to remedy the same. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme 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"]).

Here, the IHO ordered as compensatory services, "76 sessions, 30-minute each" of speech-language therapy and "30 sessions, 30-minute each" of OT, each at market rate, with a provider of the parent's choice "for the duration of the 2022-2023 school year" (IHO Decision at p. 20). The parent argues that the student cannot use all of the awarded compensatory services by end of the 2022-23 school year citing reasons such as that providers not been identified or contracted with, the appropriateness of "cramming" the services into the student's schedule as the student is receiving seven hours of SETSS in the home and five hours of ABA in the home and community, as well as attending a religious education program, a social skills class, boy scouts, and two 30-minute sessions of speech-language therapy outside of school "due to the CSE's failure to implement his 2022 ESY program" (see Req. for Rev. at p. 5; Tr. 30, 31). This is in addition to the student's school program for the 2022-23 school year.

With respect to the parent's requested relief of no expiration date or June 28, 2028 the student's projected date of graduation, as noted above, the purpose of compensatory services is to 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, not to continuously carry forward a balance of compensatory services that remain unused. However, given the parties' past difficulties arranging for the delivery of compensatory services, the passage of time, and the student's overall schedule, I will exercise my discretion to extend the time in which the student may use the award for the sessions of

compensatory OT and speech-language for one additional year throughout the duration of the 2023-24 school year. While I acknowledge the parent's concerns regarding the difficulties of finding and arranging providers and scheduling, I urge both the parent and the district to avoid further delays and to cooperate in arranging for the student to receive the awarded services.

B. 2022-23 Prospective Relief

The district argues in its cross-appeal that the IHO improperly usurped the district's responsibility to develop the student's next IEP by incorrectly ordering the district to develop an IEP with a prescribed program and services. The parent argues that the district has "proven, repeatedly" that it is not capable of developing and implementing an appropriate IEP for the student as evidenced by the seven-year denial of a FAPE and asserts that the only reason the student has made progress is due to the 15 hours per week the student has spent with his BCBA who has provided behavioral support services that are not reflected on his IEP but were awarded as relief in prior proceedings. The parent further asserts that the student's IEP should reflect his current functioning, needs, and services received regardless of whether the services were recommended by the CSE or ordered by an IHO or SRO. In addition, the parent indicates that she is awaiting a CSE meeting to be scheduled to review recently completed evaluations and that conforming an existing IEP to a hearing order does not stop the review of new evaluations or hinder any future recommendations.

Initially, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

Here, the IHO's order for the district to amend the student's IEP and provide the student with specified services during the 2022-23 school year was tied to his determination that the district failed to offer the student a FAPE for the 2022-23 school year, which is still ongoing with

approximately six months remaining as of the date of this decision (IHO Decision at pp. 14-21). Accordingly, the same concerns that the CSE process would be circumvented are not as clearly applicable. Therefore, I am persuaded that the IHO's order for the 2022-23 school year—of seven hours per week of direct 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—each at a rate not to exceed $175 per hour "for the duration of the 2022-2023 school year," as well as the immediate reinstatement of the student's 1:1 paraprofessional and amendment of the student's IEP to conform to the IHO's order—should be upheld. Moreover, the district does not appeal the merits of the IHO's determination or allege that the IEP amendments would be inappropriate. The district has had the opportunity to convene and reconvene to develop an appropriate IEP for the student for the 2022-23 school year. Having failed to do so and having failed to challenge the appropriateness of the IEP amendments ordered by the IHO, there is insufficient basis in the hearing record to disturb the IHO's order providing for specified services to be added to the IEP and provided to the student for the remainder of the 2022-23 school year.

VII. Conclusion

As set forth above, the IHO erred in denying the parent's request for 76 hours of compensatory SETSS to remedy the district's failure to implement the student's paraprofessional services during the 2021-22 school year. There is no basis in the hearing record to disturb the IHO's award of 76 sessions of compensatory speech-language therapy and 30 sessions of compensatory OT to remedy the lapses in the district's implementation of the student's related services during the 2021-22 school year, provided that the expiration date for the use of such services will be extended until the end of the 2023-24 school year. Finally, the IHO's order requiring that the district amend the student's IEP and provide specified services during the 2022-23 school year to remedy the district's failure to offer the student a FAPE for the 2022-23 school year will not be disturbed.

IT IS ORDERED that the IHO's decision, dated August 28, 2022, is modified by reversing that portion which found that he did not have jurisdiction to address the parent's request for compensatory SETSS;

IT IS FURTHER ORDERED that the IHO's decision, dated August 28, 2022, is modified to provide that the 76 sessions of compensatory speech-language therapy and 30 sessions of OT ordered therein must be used by no later than the end of the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall fund the cost of 76 hours of compensatory SETSS in the form of services from a BCBA of the parent's choosing at a rate of no more than $175 per hour to be used no later than the end of the 2023-24 school year.

Dated: **Albany, New York**
December 9, 2022

STEVEN KROLAK
STATE REVIEW OFFICER