The University of the State of New York

The State Education Department
State Review Officer
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No. 22-145

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 those portions of a decision of an impartial hearing officer which denied certain compensatory education relief and declined to modify the student's IEP upon a finding that respondent (the district) failed to provide her daughter with an appropriate educational program for the 2018-19, 2019-20, and 2020-21 school years. The appeal must be sustained in part.

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

This appeal arises from an IHO decision issued after remand by an SRO (see Application of a Student with a Disability, Appeal No. 21-104). The only evidence in this matter was offered by the parent, therefore a full recitation of facts relating to the student's educational history is not possible. Information about the student was solely available from the independent evaluators' reports submitted into evidence by the parent during the impartial hearing underlying the appeal and unless otherwise specified, all factual references in this decision are drawn from the parent's allegations in her September 8, 2020 due process complaint notice (Parent Ex. A).

According to the parent, for the 2018-19 school year, the student attended preschool as a regular education student (Parent Ex. A at p. 3). The parent indicated that the student attended the

same preschool for the 2019-20 school year and in fall 2019 was referred for an initial evaluation to determine whether she was eligible for special education as a preschool student with a disability (id.). According to the parent, on November 20, 2019, a Committee on Preschool Special Education (CPSE) meeting was held, and an IEP was developed for the student, which set forth the CPSE's recommendations for five one-hour sessions per week of special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of speech-language therapy in a group (2:1) (id. at p. 4).

The parent further set forth that, on May 13, 2020, a CSE convened to conduct a review of the student's programming as she transitioned to school-age services (described as a "Turning 5" review) and determined that the student was eligible for special education as a student with a speech or language impairment (Parent Ex. A at p. 5). According to the parent, the May 2020 CSE recommended two 30-minute sessions per week of individual OT, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (2:1) (id. at pp. 5-6). The parent enrolled the student in an Ascend Public Charter School for kindergarten (Parent Ex. K at p. 3).

A. Due Process Complaint Notice

In a 15-page due process complaint notice dated September 8, 2020, the parent asserted that the district failed to meet its child find obligations to the student for the 2018-19 school year and failed to offer or provide the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years based on numerous procedural and substantive allegations pertaining to the November 2019 CPSE and the May 2020 CSE meetings and the resultant IEPs (see generally Parent Ex. A). The essence of the parent's claims was that the district failed to adequately evaluate the student, the CPSE and CSE meetings were procedurally infirm, and that the resulting IEPs were inappropriate due to inadequate goals, placements, and related services (Parent Ex. A). The parent also asserted claims concerning various district policies, including systemic violations of the IDEA and section 504 of the Rehabilitation Act of 1973 (section 504), affecting the CSE's ability to offer specific programming and services (see id.).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, and the State Education Law and that the student was denied a FAPE for the 2018-19, 2019-20, and 2020-21 school years; pendency consisting of the services set forth in the most recent CPSE IEP; independent educational evaluations (IEEs) including speech-language, auditory processing, neuropsychological, OT, and assistive technology evaluations, as well as an independent functional behavioral assessment (FBA) and "positive behavior plan for home and school"; and compensatory education (Parent Ex. A at pp. 13-14).[1] Regarding compensatory education, the parent requested: 1:1 instruction, SEIT services, tutoring, behavior therapy, assistive technology, vision services, OT, physical therapy (PT), speech-language therapy, counseling,

[1] The parent and district agreed that pendency arose from the November 2019 IEP, which consisted of five one-hour sessions per week of direct SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of speech-language therapy in a group (2:1), all on a 12-month basis (Parent Ex. B at pp. 1-2).

social skills training, and if warranted, "1:1 instruction with a researched-based strategy, including behavior therapy, such as ABA" (id. at pp. 14-15).

B. Impartial Hearing Officer and State Review Officer Decisions

In an interim decision dated January 29, 2021, an impartial hearing officer (IHO 1) ordered the district to fund speech-language, auditory processing, neuropsychological, OT, and assistive technology evaluations, as well as an observation by an expert in behavior, an FBA and a positive behavior plan for both home and school (Jan. 29, 2021 Interim IHO Decision at p. 3).[2] The impartial hearing before IHO 1 convened on March 17, 2021, on which date the parties discussed the status of the matter and the expected date for completion of the ordered IEEs, and IHO 1 expressed his "willingness" to proceed in one of two ways (Tr. p. 7; see Tr. pp. 1-17).

Specifically, the parent's attorney represented that the IEEs had been scheduled, including a speech-language evaluation (April 7, 2021), an auditory processing evaluation (April 10, 2021), and a neuropsychological evaluation (May 7 and 10, 2021), while the FBA, assistive technology evaluation, PT evaluation, and OT evaluation had not yet been scheduled (Tr. pp. 3-4). Given the timeline for the IEEs, IHO 1 stated during the March 17, 2021 telephonic prehearing conference that he was willing to schedule the hearing within the month for the district to defend its IEPs or, if the parent believed that she could not "adequately make [her] case without the information from the IEEs," he was willing to dismiss the matter without prejudice or the parent could withdraw her complaint (Tr. pp. 7-8). The parent's attorney expressed that the parent's preference was "to keep the matter open" while the IEEs were completed, expressing concerns about the statute of limitations if she had to re-file; however, IHO 1 opined that her claims would not accrue until the IEEs were completed (Tr. pp. 9-10). As for the option of keeping the matter open, IHO 1 expressed "pragmatic" concerns about case management and judicial resources and further opined that "conceptual[ly]" the IEEs were necessary, not only to calculate compensatory education, but to evaluate the parent's claims that the district failed to offer the student a FAPE (Tr. pp. 10-11).

On March 28, 2021, IHO 1 issued a final decision dismissing the parent's claims without prejudice (Tr. pp. 1-17; see IHO 1 Decision). IHO 1 reiterated his determination that the parent was entitled to the IEEs listed in his January 2021 interim decision (IHO 1 Decision at pp. 8-9). In addition, IHO 1 determined that the parent was entitled to relief for the length of time that elapsed prior to his appointment (id. at pp. 10-11). Consequently, IHO 1 found that there was a six-month delay in the parent obtaining the requested IEEs (id. at p. 11). As relief for the student's loss of six months of "educational due process," IHO 1 ordered the district to "create a bank of 200 hours of 1:1 services by a duly licensed special education teacher or speech pathologist" to be used on or before August 31, 2023 (id.). IHO 1 further held that this award of compensatory services should not "be counted against any potential compensatory award for any deprivation of FAPE that may be determined" later (id.). Finally, IHO 1 directed the district to determine whether the

[2] During the impartial hearing, the parent's attorney notified IHO 1 that the parent had intended to request an independent FBA and behavioral intervention plan (BIP) and not a "positive behavior plan" and requested that the January 2021 interim decision be amended to reflect such change (Tr. p. 4; IHO 1 Decision at p. 9). IHO 1 issued a separate interim decision reflecting this change (see March 28, 2021 Interim IHO 1 Decision).

student had received any pendency services and, if the student had not received pendency services, to provide "a bank of make-up services" equal to the services missed (id. at p. 12).

The parent challenged IHO 1's decision to dismiss the parent's claims prior to the completion of the IEEs and an evidentiary hearing and the district agreed that IHO 1 erred (Application of a Student with a Disability, Appeal No. 21-104). In a decision dated June 23, 2021, an SRO reversed IHO 1's determination that the parent's claims were not ripe and remanded the matter to IHO 1 for a full and complete hearing on the merits (Application of a Student with a Disability, Appeal No. 21-104).

C. Impartial Hearing Officer Decision After Remand

In an interim decision dated July 27, 2021, IHO 1 recused himself because he did not agree with the SRO's decision and could "see no reason why the matter is now or was then justiciable" (Jul. 27, 2021 Interim IHO Decision at pp. 3-4). On July 28, 2021, an impartial hearing officer (IHO 2) was appointed to hear the matter (IHO 2 Decision at p. 2). The impartial hearing reconvened on August 23, 2021 for a status conference and concluded on August 19, 2022 after 15 nonconsecutive hearing dates (Tr. pp. 18-119).[3] By decision dated September 17, 2022, IHO 2 found that the district "did not present any testimony to support a finding that it offered the [s]tudent a FAPE for the 2018-2019, 2019-2020, and 2020-2021 school years" (IHO 2 Decision at p. 4). IHO 2 further found that the district failed to meet its burden of proving that it provided the student with a FAPE during the 2018-19, 2019-20, and 2020-21 school years (id.).

As relief, IHO 2 awarded 173 hours of compensatory 1:1 special education itinerant teacher (SEIT) services, which represented missed services, 92 hours of compensatory speech-language therapy, and 69 hours of compensatory OT (IHO 2 Decision at pp. 7-8, 16; see Parent Post-Hr'g Br. at p. 10). IHO 2 further ordered that the banks of compensatory educational services would "expire on October 15, 2024, paid at the lowest rates paid to providers by the [district]'s Impartial Hearing Implementation Unit or comparable rates to comparable providers, for the same or similar students" (id. at p. 16). In addition, IHO 2 ordered the district to fund a neuropsychological reevaluation and a PT evaluation at reasonable market rates, and for the district's CSE to conduct all appropriate evaluations, reconvene within 20 days after receipt of the evaluations, and develop an IEP that comprehensively described the student and included appropriate related services and goals (id. at pp. 16-17). IHO 2 declined to award the parent's requested 1,133 hours of compensatory 1:1 special education instruction/tutoring at an enhanced rate and further denied the parent's request for a change in the student's programming in accordance with the recommendations of the independent evaluators (id. at pp. 7, 15-16).

IV. Appeal for State-Level Review

The parent appeals and asserts that IHO 2 erred by failing to award all of her requested relief. The parent further appeals all of IHO 2's adverse rulings and alleges IHO 2 erroneously suggested that the parent was seeking a default judgment award. The parent argues that because the district chose not to present any testimonial or documentary evidence and failed to offer a

[3] Status conferences were held on September 10, 2021, October 5, 2021, November 4, 2021, December 7, 2021 and January 5, 2022 (Tr. pp. 26-53).

closing statement on the issues of FAPE and an appropriate compensatory education remedy, the parent's requested relief was uncontested. The parent also alleges that IHO 2 failed to make specific findings related to her determination that the student was denied a FAPE for three school years and that IHO 2 failed to state the ways in which she found the student's program deficient. The parent further asserts that among the reasons she alleged the student was denied a FAPE in the due process complaint notice was the district's failure to provide sufficient 1:1 instruction.

Next, the parent alleges that IHO 2 failed to hold the district to its burden and erroneously shifted the burden to the parent. The parent further asserts that IHO 2 erroneously denied any compensatory relief for the failure to offer the student 1:1 instruction. The parent argues that the evidence established that the student should have received ten hours per week of 1:1 instruction during the 2018-19, 2019-20, and 2020-21 school years. The parent also argues that the district failed to cross-examine any of the parent's witnesses, failed to proffer an alternative remedy or rebut the parent's request for compensatory relief and IHO 2 should have awarded the parent's requested relief of 960 hours of 1:1 instruction and 138 hours of counseling for the three-year denial of a FAPE.

With regard to IHO 2's rate determinations, the parent asserts that there was no evidence in the hearing record relating to rates, the district did not propose or object to rates and IHO 2's rate language was confusing and vague. In addition, the parent alleges that IHO 2's rate language would impact the parent's ability to obtain providers and her ability to use her compensatory award. The parent requests that compensatory education services be funded at reasonable market rates. The parent also challenges IHO 2's two-year expiration date on the award of compensatory education. The parent requests a minimum of six years for the student to use the bank of hours awarded by IHO 2.

The parent also alleges that IHO 2 improperly denied her request for a change in the student's program and erroneously terminated the student's pendency services. As relief, the parent requests an award of 960 hours of compensatory 1:1 instruction and 138 hours of compensatory counseling, as well as an order changing the student's program to include 12-month services consisting of ten hours per week of 1:1 special education teacher instruction, one 60-minute session per week of individual counseling, one 40-minute session per week of individual speech-language therapy, two 40-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual OT, and an FM Unit.[4]

[4] The parent also alleged that IHO 2 erred in failing to determine that the district violated section 504. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504.

In an answer, the district responds to the parent's allegations with general denials and argues that IHO 2's decision should be upheld in its entirety. The district contends that IHO 2's decision was well-reasoned and entitled to deference, and that the compensatory educational services awarded by IHO 2 were sufficient to remedy the denial of a FAPE for the 2018-19, 2019-20 and 2020-21 school years.

In a reply, the parent argues that the district raised arguments and defenses that were not raised at the impartial hearing and should not be considered in the appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[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).

[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).

VI. Discussion

A. Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). In addition, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

The SRO in Application of a Student with a Disability, Appeal No. 21-104, noted that neither party had appealed those portions of IHO 1's decision which ordered compensatory education and make-up services relating to the delay in his appointment or the provision of pendency services (see IHO Decision at pp. 10-12). As such, those orders for relief became final and binding on the parties and were not reviewed in the prior appeal and the SRO indicated that those orders should not be further addressed after remand (34 CFR 300.514; 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]).

Likewise, in this appeal, neither party challenged IHO 2's findings that the district failed to offer the student a FAPE for the 2018-19, 2019-20 and 2020-21 school years, the order for the district to fund a neuropsychological reevaluation and a PT evaluation, to conduct all appropriate evaluations and reconvene the CSE within 20 days after receipt of the evaluations, or the compensatory services awards for 173 hours of 1:1 SEIT services, 92 hours of speech-language therapy, and 69 hours of OT. These findings have also become final and binding on the parties and will not be reviewed on appeal (id.).

B. Prospective Relief

On appeal, the parent seeks prospective relief in the form of a requirement that the district provide specific IEP programming that is consistent with IEEs obtained as a part of this proceeding, including, at a minimum, ten hours per week of 1:1 special education teacher instruction, one 60-minute session per week of individual counseling, one 40-minute session per week of individual speech-language therapy, two 40-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual OT, and an FM Unit all provided in a 12-month school year.

Relief in the form of specific IEP recommendations and the prospective placement of a student in a particular type of program and placement, such as the order sought by the parent in this matter directing the specific contents of a future IEP, under certain circumstances, have 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"]).

The evidence in this matter indicates that the parent filed a due process complaint notice at the beginning of the 2020-21 school year to challenge the 2018-19, 2019-20, and 2020-21 school years and seek prospective relief as a means of remediating the denials of FAPE for those school years (see Parent Ex. A). In addition, the parent agreed to extensions of IHO 2's time to render a decision while the requested IEEs were completed. These pleading and litigation choices have to some extent also inured to the benefit of the district. At this point, the school years at issue—2018-19, 2019-20, and 2020-21—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce IEPs for the 2021-22 and 2022-23 school years (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). In this case, there is no evidence regarding whether the CSE convened to consider the IEEs ordered by IHO 1; IHO 2 correctly directed the CSE to convene to consider the IEEs awarded as a part of this proceeding and further ordered the district to conduct all appropriate evaluations, reconvene within 20 days after receipt of the evaluations, and develop an IEP that comprehensively described the student and included appropriate related services and goals. Thus, while the IEEs are relevant to the issue of compensatory education relief, in terms of IEPs going forward, the CSE should be provided with opportunity to review the evaluations and make educational program and placement recommendations for the student in light of his or her educational progress in the charter school that the parent selected for the student, and those recommendations are susceptible to challenge by the parent in a future proceeding if she continues to disagree with the district. Accordingly, the more appropriate course in this proceeding—given that it relates exclusively to the 2018-19 through 2020-21 school years, and those years are now at least two school years removed from the student's current educational programming—is to address the remediation of past harms through compensatory means as opposed to ordering the CSE to adopt a specific future programming or placement(s) for the student.

Assuming for the sake of argument, that the parties reach an impasse again, the parent can choose to challenge the student's subsequently developed IEPs and seek compensatory relief, similar to the way it was awarded by IHO 2 in this matter. The parent also has the option to file a State administrative complaint, which may be particularly useful if the parent feels the CSE process is deficient. If the district, through a public school (or Ascend Public Charter Schools) is not able to provide the student with what the parent believes are appropriate special education services, the parent may also object to the student's current educational programming and unilaterally place the student at a nonpublic school of her choosing and seek reimbursement for the cost of the private school tuition if she finds that the services offered by the board of education are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations weigh in favor of reimbursement (see Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). Each option comes with its respective benefits and risks, but it does not alter the fact that if the parent continues to disagree with the district's recommendations, her recourse is to utilize the procedural safeguards afforded by the IDEA, such as challenging any subsequent IEPs in a

future due process proceeding (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]).

Based on the foregoing, I decline to overturn IHO 2's decision on the basis of a failure to order that the parent's requested prospective changes to the student's IEP programing be adopted by the CSE in future IEP(s) developed for the student.

C. Compensatory Education

Next, the parent asserts that IHO 2 improperly denied her request for an award of 960 hours of compensatory 1:1 special education tutoring/instruction and 138 hours of compensatory counseling.

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]). 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 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; 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 district conceded, or at least failed to meet its burden to prove, that it offered the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years. The parent now requests all of the compensatory 1:1 special education instruction/tutoring and counseling recommended in the parent's independent neuropsychological evaluation and sought as relief during the impartial hearing. To be sure, the district was required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been

but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing, the district failed to offer any documentary evidence, witnesses, an opening statement, a closing brief, and failed to cross-examine any of the parent's witnesses.

However, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]).[6] Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts.

Notwithstanding the above, IHO 2's rationale for denying the parent's request for 1:1 special education instruction/tutoring and counseling in its entirety was, in this case, inconsistent with her other findings. In awarding compensatory speech-language therapy and OT services, IHO 2 relied on the recommendations set forth in an independent evaluation and an affidavit prepared by the evaluator. The parent's request for 1:1 special education/tutoring and counseling was also supported by an independent evaluation, an observation, and an affidavit prepared by the provider; nevertheless IHO 2 found the recommendation for 1:1 special education instruction/tutoring and counseling—based on the same type of evidence—was unsupported by the hearing record, and she failed to explain why (compare Parent Exs. H; I; M; N, with Parent Exs. K; L; O; see IHO 2 Decision at p. 7).

Generally, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" or partially mitigated as the case may be (N. Kingston Sch.

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

Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Somberg v Utica Community Schs., 2017 WL 242840, at *4 [E.D. Mich Jan. 20, 2017] [declining to award full-time tutoring for years during which student was denied a FAPE, since the student "did make some advancement over the course of his time in high school, even though he was not presented with what he was due under IDEA"], aff'd, 908 F.3d 162 [6th Cir. 2018]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). As noted above, in this matter, the district failed to offer any evidence of the student's programming or services received during the relevant school years and notably failed to even proffer any of the student's challenged IEPs. Under the specific circumstances of this case and given that the district had nearly two years to begin to engage with the impartial hearing process and has failed to do so, the hearing record does not include any evidence to counter the parent's request for an hour-for-hour compensatory education remedy for the school years at issue. In addition, the district did not offer and the evidence does not provide any alternative qualitative approach to calculate the number of hours of compensatory 1:1 special education instruction/tutoring and counseling that were appropriate to remedy a three-year denial of a FAPE. In its answer, the district asserts that IHO 2's compensatory award for missed services was sufficient to remedy a three-year denial of a FAPE but offers no rationale or additional evidence.

Based on the lack of evidence of the program and services the student actually received during the school years at issue, the parent's quantitative approach is uncontested and remains the only available means for determining the relief to which the student is entitled on this hearing record. Therefore, I find IHO 2's denial of any compensatory 1:1 special instruction/tutoring and counseling was error. That is, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students" (Stanton v. Dist. of Columbia, 680 F. Supp 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at *1 [D.D.C. Jan. 3, 2017]). With this framework in mind, I turn to the parent's specific requests.

1. 1:1 Special Education Instruction/Tutoring and Counseling

The parent initially sought 1,133 hours of 1:1 compensatory special education instruction/tutoring, which represented 960 hours of compensatory services and 173 hours of missed SEIT services (Parent Post-Hr'g Br. at pp. 9-10). IHO 2 awarded the parent 173 hours of compensatory SEIT services and denied the parent's request for 960 hours of 1:1 compensatory special education instruction/tutoring (IHO 2 Decision at pp. 7, 16). The parent's independent neuropsychologist indicated that due to "insufficient and inconsistent services" the student received during the 2018-19, 2019-20, and 2020-21 school years, the student should have received ten hours per week of 1:1 "special instruction less the hours the [district] funded or provided" (Parent Ex. K at p. 12).

The student was evaluated by the parent's independent neuropsychologist on May 26, 2021, and June 2, 2021 and observed on May 24, 2021 and July 13, 2021 for a "[d]irect [o]bservation [a]ssessment" (see Parent Exs. K; L). According to a neuropsychological evaluation report dated June 22, 2021, the parent's independent neuropsychologist conducted interviews with the student,

the parent and the student's teacher, a classroom observation and a record review, which consisted of review of a November 20, 2019 CPSE IEP, a May 13, 2020 IEP and IHO 1's January 29, 2021 interim decision (Parent Ex. K at p. 1).[7] The parent's independent neuropsychologist also conducted cognitive, achievement and behavioral assessments (id. at pp. 5-9, 15-17). The student's results on measures of cognitive ability indicated that the student had "many cognitive abilities that [we]re within the average range" (id. at p. 10). The student's results on tasks measuring verbal reasoning, fluid reasoning, and rapid visual scanning yielded scores within the average range of functioning when compared with same-age peers (id.). The student's areas of relative weakness—where her scores placed her within the low average range of functioning—were on tasks assessing general background knowledge, visual-spatial construction and visual working memory (id.). Additionally, the parent's independent neuropsychologist noted that the student had mild difficulty expressing herself orally, "partially because she may not know the specific words necessary to articulate her ideas and partially because she ha[d] fleeting attention during lengthier conversational speech" (id.). According to the independent neuropsychologist, the student's "ability to understand spoken information, including understanding instructions and receptive vocabulary, was similar to that of her [same-]age peers" (id.). The independent neuropsychologist further observed that if the student was paying attention, she could "learn lists of information and hold it in memory for a few seconds, and she c[ould] remember it for later repetition" (id.). The student also demonstrated "several pragmatic language skills that were age-appropriate" (id.).

The student's results on academic achievement testing indicated that she had "underdeveloped phonological awareness and ha[d] trouble learning word-symbol associations" (Parent Ex. K at p. 10). The independent neuropsychologist also stated that "[t]he confluence of these weaknesses w[ould] certainly cause her difficulty in many areas of learning, but most immediately, she [wa]s likely to have difficulty understanding how sounds combine[d] to form words and [with] retaining letter-sound associations"(id.). The independent neuropsychologist further noted that the student could identify letters, "but she struggle[d] to match letters with their respective sounds, and she [wa]s unable to read most sight words" (id.). The independent neuropsychologist opined that "[t]his [wa]s very concerning, as children are expected to have mastered dozens of sight words at the end of their [k]indergarten year" and that the student was not presently "on track to meet this expectation" (id.). In addition, the independent neuropsychologist stated that "[w]eaknesses in phonological awareness typically also result[ed] in spelling impairments" and were sometimes "related to difficulties with automaticity of basic math facts", and her testing indicated that "this [wa]s also an area that f[ell] below age expectation for [the student]" (id.). The student's results on measures of basic writing skills reflected test scores that indicated she was "performing well below same-age peers… including both legibility and automaticity" (id.). The student was also described as presenting with "difficulties in fine motor and sensorimotor skills, which affect[ed] drawing, copying, basic handwriting, and written expression in all academic areas (including mathematics)" (id.). The independent neuropsychologist further opined that "[s]tudents with sensorimotor challenges c[ould] also demonstrate other sensory needs, like being easily overwhelmed by sensory stimuli, or avoiding sensory sensations" (id.). The independent neuropsychologist noted that her "[r]eview of records, discussion with [the student]'s teacher and mother, and test results show[ed] that [the student] ha[d] difficulties in sustained and selective attention to task and in class discussions" (id.). The

[7] The hearing record does not include any of the student's IEPs.

independent neuropsychologist also reported that "[d]espite apparent effort to please and put forth her best effort, [the student] [wa]s impulsive, ha[d] inconsistent attention, and ha[d] difficulty shifting her mental set when rules or the situation change[d]" (id. at pp. 10-11). In addition, the student's mind reportedly wandered "when she d[id] not have a strong interest in the material and/or when she perceive[d] it as too hard" (id. at p. 11). The independent neuropsychologist observed that the student could "be an active learner, but she d[id] not always notice when she ma[de] a mistake or what she [wa]s reading d[id] not make sense" (id.). The independent neuropsychologist further opined that the student's "attentional difficulties [we]re likely a strong factor contributing to her academic problems, and in turn adversely affect[ed] her motivation, effort, and tendency to procrastinate as she s[ought] to avoid that which [wa]s difficult for her" (id.). In addition, she stated that the student's "lack of support in the classroom may have led to some demoralization and reduced confidence with respect to her scholastic abilities" (id.). Although the independent neuropsychologist's evaluation did not indicate that the student met the criteria for a separate mood disorder, she noted that "it [wa]s important that [the student] receive social-emotional supports and [that the student's] emotional well-being [be] closely monitored" (id.). Ultimately, the parent's independent neuropsychologist diagnosed the student as having an attention deficit/hyperactivity disorder-combined presentation (ADHD), and specific learning disorders with impairments in reading, written expression, and mathematics (id.).

The independent neuropsychologist's recommendations related to academic instruction included that the student required "a small and nurturing classroom setting where she w[ould] have the opportunity for instruction with educators who [we]re expert in treating children with language disorders and learning disabilities" (Parent Ex. K at p. 11). The independent neuropsychologist also recommended that the student's educational setting utilize an evidence-based, multi-sensory approach to literacy and numeracy instruction, and that this specialized setting should provide opportunities for speech-language therapy and social/emotional supports embedded throughout the school day (id.). It was also recommended that the student's classroom "have a low student-to-teacher ratio and be comprised of children with similar profiles with whom she c[ould] socialize with at an age-appropriate level" (id.). In addition, the independent neuropsychologist recommended that the student receive "12-month, year-round individual special instruction and related services given her missed opportunities for not being provided with the appropriate frequency of interventions over the past three school years" (id.). The independent neuropsychologist further opined that "[i]ndividual special instruction or tutoring [wa]s imperative to help 'close the gap' between the academic requirements and her current skill level" (id.). According to the independent neuropsychologist, "this level of support [wa]s necessary so [the student] [did] not fall further behind her peers," due to the increased academic demands that the student would face throughout elementary school (id. at pp. 11-12). As a result of what the independent neuropsychologist described as the student's inconsistent access to special instruction for most of kindergarten, she indicated that the student needed "immediate, intensive levels of support" and "[g]iven the increased academic demands that she w[ould] face throughout elementary school, [the student] require[d] an increase" to ten hours per week of "push-in individual (1:1) special instruction/tutoring with a highly qualified provider" (id. at p. 12).

To remedy the deficiencies in the student's program for the 2018-19, 2019-20, and 2020-21 school years, the parent's independent neuropsychologist recommended that the student receive "compensatory remediation hours for individual (1:1) special instruction/tutoring… calculated for the insufficient and inconsistent services over the past three school years… during which time [the

student] should have received ten hours per week of individual (1:1) special instruction, less the hours the [district] funded or provided" (Parent Ex. K at p. 12). The independent neuropsychologist stated that the "bank of hours should be non-expiring and flexibly used as needed" (id.).

The independent neuropsychologist provided direct testimony by affidavit and opined that because the student did not receive special education and related services during the 2018-19 school year and received an insufficient amount of 1:1 special instruction/tutoring after she was found eligible for special education and related services, the student was "in need of compensatory education to make up for the insufficient services that she received during the three school years at issue" and "require[d] at least 960 hours of compensatory 1:1 instruction/tutoring" (Parent Ex. O ¶¶96, 97). For the 2018-19 school year, the independent neuropsychologist recommended that the student receive 460 hours of 1:1 compensatory special education instruction/tutoring for this time period (ten hours per week x 46-week school year = 460 hours) (id. at ¶97[a]). According to the independent neuropsychologist, the student was "also owed 14 weeks of compensatory special education instruction/tutoring" at a duration of ten hours per week for the period beginning July 1, 2019 through November 20, 2019, when that student had not yet been found eligible for special education and related services (id. at ¶97[b]). For the period beginning November 20, 2019 through June 30, 2020, the independent neuropsychologist determined that the student had only received five hours per week of SEIT services and was therefore entitled to 160 hours of 1:1 special education instruction/tutoring during this time period (five hours per week x 32 weeks = 160 hours) (id.). For the 12-month 2020-21 school year, the independent neuropsychologist determined that because the student only received five hours per week pursuant to the pendency order, the student was entitled to 200 hours of 1:1 special education instruction/tutoring during this time period (5 hours per week x 40 weeks = 200 hours) (id. at ¶97[c]).

In my view, it is not clear why the independent neuropsychologist concluded that the 2018-19 school year was 46 weeks long and the 2020-21 school year was 40 weeks long. The amount of schooling generally included in a 12-month school year program is approximately 42 weeks; based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]). Thus, for purposes of calculating an award, I will rely on a 42-week school year.

For the 42-week, 12-month 2018-19 school year, I find that the student is entitled to 420 hours of 1:1 special education instruction/tutoring as compensatory education. For the portion of the 2019-20 school year prior to the student being found eligible for special education and related services, I find that the student is entitled to ten hours per week of 1:1 special education instruction/tutoring as compensatory education for the 11 weeks of the 12-month school year until the development of the November 20, 2019 IEP, for a total of 110 hours.[8] For the remaining 31 weeks of the 12-month 2019-20 school year, the student is entitled to an additional five hours per week of 1:1 special education instruction/tutoring as compensatory education for a total of 155 hours. For the 42-week, 12-month 2020-21 school year, the student is entitled to an additional

[8] The parent requested 14 weeks of compensatory education services for this time period, which included three weeks during the summer when schools were not in session.

five hours per week of 1:1 special education instruction/tutoring for a total of 210 hours of compensatory education. Based on the foregoing, I find that the student is entitled to 895 hours of 1:1 special education instruction/tutoring as compensatory education to remedy a denial of a FAPE for the 2018-19, 2019-20, 2020-21 school years.

With regard to counseling, the independent neuropsychologist recommended that the student receive 138 hours based on a calculation of one hour per week for a 46-week school year for three years, and her evaluation addressed social/emotional concerns (see, e.g., Parent Ex. K at p. 9), which is contrary to IHO 2's determination that the hearing record lacked a basis for awarding compensatory counseling services. As noted above, the appropriate length of a 12-month school year is 42 weeks, therefore the student is entitled to 126 hours of compensatory counseling services to remedy a denial of a FAPE for the 2018-19, 2019-20, and 2020-21 school years.

2. Rates for Compensatory Education Services

The parent next challenges IHO 2's rate determinations and two-year expiration date on the compensatory education services award. The parent asserts that there was no evidence in the hearing record relating to rates, the district did not propose or object to rates and IHO 2's rate language was confusing and vague. In addition, the parent alleges that IHO 2's rate language would impact the parent's ability to obtain providers and her ability to use her compensatory award. As relief, the parent requests that compensatory education services be funded at reasonable market rates. The parent also requests a minimum of six years for the student to use the bank of hours awarded by IHO 2.

There was no evidence presented by either party during the impartial hearing on the issues of rates for services or expiration of services. In its answer, the district argues that IHO 2's ruling on provider rates should be upheld, however, the district also concedes that "a rate awarded for compensatory education services is proper when it is based on reasonable market rates available to a parent" (Answer ¶19). As noted above, the parent is seeking reasonable market rates without the limitation of IHO 2's cumbersome language. Therefore, the parties appear to be in agreement that the parent is entitled to choose her own providers at reasonable market rates.

Here, the district did not present any evidence to challenge or otherwise rebut the parent's requested relief; however, IHO 2, nonetheless, placed limitations on the rates and a two-year time period for the parent to obtain her compensatory education services award. IHO 2 was not constrained to merely accept the relief proffered by the parent; however, IHO 2 should have directed the parties to develop the record with facts regarding terms like "enhanced rates," "reasonable market rates," "lowest rates paid to providers by the DOE's Impartial Hearing Implementation Unit" or the like if IHO 2 found such ambiguous terms unacceptable.[9] Without some kind of factual, numerical reference regarding her rate determination, there was no basis for IHO 2 to reduce it to another equally indefinite rate. IHO 2, in essence, limited the hourly rate awarded for the all awarded compensatory education services based upon her own knowledge and

[9] Were I to decide the issue de novo, I would likely have directed the regulated public agency, that is, the public school district, to provide the compensatory education services to the student, however, as further described below, this case is unusual in that the district and the parent have at this point agreed to rely on the parent's selected providers, as well as a rate for the services.

experience of similar cases (i.e., judicial notice).[10] Here, the district and parent have agreed to fund the student's compensatory education services at the reasonable market rates and it does not go unnoticed by the undersigned that both parties declined to share their views of that rate and I do not believe it was a mere oversight on the part of the parties. Therefore, because the parties have reached an accord to use parentally selected providers and using the term "reasonable market rates" I will vacate that portion of IHO 2's decision that ordered a different rate than the one they have selected themselves.

In light of the independent neuropsychologist's description of the student, particularly the observation summary and recommendations set forth in the direct observation assessment, which detailed the student's distractibility and limited availability for learning without sufficient supports, a two-year expiration date is overly ambitious at this junction, albeit I also note that I am providing more compensatory education hours overall than what IHO 2 envisioned, which accounts for the difference in time period for completion (Parent Ex. L at pp. 4-5). Therefore, the student's bank of compensatory education services should be utilized within five years.[11]

VII. Conclusion

Based on the foregoing, there is insufficient basis to modify IHO 2's determinations denying the parent's requests for a prospective change in the student's program. However, the hearing record does not support IHO 2's refusal to award compensatory 1:1 special education instruction/tutoring and compensatory counseling. Further, the hearing record does not support IHO 2's limitation on the rates for compensatory education services that were awarded and does not support a two-year expiration date of the compensatory education services. The bank of compensatory educations services awarded by IHO 2 shall be available to the parent at reasonable market rates to be utilized within five years. The compensatory education services awarded to the student in this case shall be utilized within five years from the date of this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO 2's decision, dated September 17, 2022, is modified by reversing those portions which denied the parent's request for compensatory 1:1 special education

[10] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). IHO 2's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

[11] This award is to make the student whole due to the district's failure to provide a FAPE for three years and an award related thereto should not exist into perpetuity. The parent's request, which represents twice the timeframe during which the student was denied a FAPE, is appropriate.

instruction/tutoring and compensatory counseling, and set a two-year expiration date for the compensatory education services; and,

IT IS FURTHER ORDERED that the district is directed to pay for 895 hours of 1:1 special education instruction/tutoring as compensatory education; and

IT IS FURTHER ORDERED that the district is directed to pay for 126 hours of counseling services as compensatory education; and

IT IS FURTHER ORDERED that IHO 2's decision, dated September 17, 2022, is modified by vacating that portion which specified that compensatory education be "paid at the lowest rates paid to providers by the DOE's Impartial Hearing Implementation Unit or comparable rates to comparable providers, for the same or similar students"; and

IT IS FURTHER ORDERED that the compensatory education services awarded to the student shall expire five years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
January 3, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER