The University of the State of New York

The State Education Department
State Review Officer
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No. 23-065

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 Abigail Hoglund-Shen, 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 the parent failed to timely request equitable services pursuant to Education Law Section 3602-c for the 2022-23 school year and dismissed the parent's due process complaint notice with prejudice. The district cross-appeals from that portion of the IHO decision which found that the student was entitled to pendency. The appeal must be sustained and 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

Given the limited information included in the hearing record, a full recitation of the student's educational history is not possible. Based on what is available in the hearing record, the student was assessed in March 2019 and based on the results of the Wechsler Intelligence Scale for Children-Fifth Edition, the student's IQ score was in the low-average range (Parent Ex. B at p. 1). Additionally, based on assessments conducted in March 2020, the student presented with moderate receptive and expressive language delays and based on a May 2020 assessment of the student's fine motor skills, the student's perceptual skills, handwriting, and upper body strength were noted as "concerning to the [e]valuator" (id.).

The CSE convened on June 3, 2020 to develop an individualized education services program (IESP) for the student as the student was parentally placed at a non-public school (see Parent Ex. B at pp. 1, 10). The student was found eligible for special education and related services as a student with a speech-language impairment (id.). The CSE recommended direct group special education teacher support services (SETSS) for eight "periods" per week in Yiddish (id. at p. 8). Additionally, the CSE recommended two 30-minute sessions of group speech-language therapy in Yiddish per week, two 30-minute sessions of individual occupational therapy (OT) per week, and two 45-minute sessions of group counseling per week (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 17, 2022, the parent asserted that the district "CSE has not held a meeting for [the student] since 2020" (Parent Ex. A at p. 2). The parent indicated that the student's last IESP recommended eight periods of SETSS per week, two 30-minute sessions of speech-language therapy per week, two 30-minute sessions of OT per week, and two 45-minute sessions of counseling services per week (id.).[1] The parent also contended that he contacted the district to obtain summer services, but did not hear back and as of the date of the due process complaint notice, the district "has not assigned a provider for any of [the student's] services for the 22-23 [s]chool [y]ear" (id.).

The parent requested that the district be ordered to pay enhanced market rates for each service the student was mandated for under the last IESP and to provide compensatory educational services for SETSS and related services not received due to the district's failure to assign providers (Parent Ex. A at p. 2). Moreover, the parent requested that the student be provided with pendency services based on the student's June 2020 IESP (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing. An IHO from the Office of Administrative Trials and Hearings (OATH) conducted status conference hearings on December 29, 2022, January 18, 2022, and February 17, 2023 (see Dec. 29, 2022 Tr. pp. 1-8; Jan. 18, 2023 Tr. pp. 1-7; Feb. 17, 2023 Tr. pp. 1-8). On March 20, 2023, the parties convened for a hearing on the issues raised in the due process complaint notice (see Mar. 20, 2023 Tr. pp. 1-61). At the March 2023 hearing, the district declined to enter into the hearing record any documentary or testimonial evidence (Mar. 20, 2023 Tr. pp. 5, 10). Further, the district's attorney waived an opening statement, but did reserve the right to present a closing argument (Mar. 20, 2023 Tr. p. 5). The parent entered evidence into the hearing record and made an opening statement (Mar. 20, 2023 Tr. pp. 6-10).[2] During the parent's opening statement, the parent asserted that the district's failure to create an IEP or an IESP for the student, or "even h[o]ld a meeting for [his] son in two and a half years [wa]s a denial of a free and appropriate public education" (Mar. 20, 2023 Tr. pp. 6-7). The parent also testified and was cross-examined by the district (Mar. 20, 2023 Tr. pp. 11-47). During the district's closing statement, the district contended that the parent was not entitled to pendency services under Educational Law Section 3602-c and that under Section 3602-c the parent was required to make a

[1] The parent asserted that the SETSS and speech-language services were to be in Yiddish (Parent Ex. A at p. 2).

[2] It is noted that the parent represented himself throughout the impartial hearing and appeal proceedings.

request for services for each new school year no later than June 1 of the proceeding school year (Mar. 20, 2023 Tr. p. 48). The district argued that the parent failed to present any evidence that such a request was made (Mar. 20, 2023 Tr. p. 49).

In a decision dated March 21, 2023, the IHO first addressed pendency, finding that it was undisputed that the June 30, 2020 IESP was the student's most recent IESP (IHO Decision at pp. 9, 10). The IHO also held that it was undisputed that the district did not provide the student with any of the services recommended in that IESP during the 2022-23 school year (id. at p. 9). Therefore, the IHO found that the student was "entitled to pendency based upon the placement contained in the Student's June 30, 2020 IESP from September 19, 2022 through the date of this decision" (id.).[3]

Next, the IHO determined that the parent failed to introduce any evidence or testimony that he made a timely request for services for the 2022-23 school year under section 3602-c by June 1, 2022 (IHO Decision at p. 9). Since the parent did not make a timely request, the IHO held that the parent was not entitled to bring claims asserting his disagreement regarding services for the 2022-23 school year and, therefore, the district did not fail to provide the student with a free appropriate public education (FAPE) for the 2022-23 school year (id. at pp. 9-10). The IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred in finding that the district did not fail to provide the student with a FAPE for the 2022-23 school year and that the student was not entitled to services for that school year. Regarding the finding that the parent had to provide notice to the district by June 1, 2022 to obtain services, the parent makes several arguments asserting the IHO's decision was in error. First, the parent contends that the district bore the burden of proof but failed to raise this issue until its closing statement. Next, the parent asserts that even if he failed to make a timely request for services, the district implicitly waived the June 1 deadline by its actions as it did not raise the defense in any filing, status conferences, or in its opening statement. Also, according to the parent, a review of the district's closing statement indicates that the district only raised the issue as it pertained to pendency. Moreover, the parent argues that the district has not historically asserted the June 1 requirement as a bar for services.[4] The parent

[3] Specifically, the IHO ordered:

> for the purposes of Pendency only, the DOE shall provide Student with the following SETSS Services and Related Services, as set forth in Student's IESP dated June 30, 2020, from September 19, 2022 through the date of this decision: 1) SETSS 8 periods per week in Yiddish; 2) Speech-Language Therapy 2x30 per week in Yiddish; 3) Occupational Therapy 2x30 per week; and 4) Counseling Services 2x45 per week; [and]
>
> [] if the DOE does not begin to provide Student with the services listed in the order directly above within fifteen (15) calendar days of the date of this decision, the DOE shall fund said services, by an independent provider of Parent's choosing, at a rate not to exceed $175.00 per hour;
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> (IHO Decision at p. 10).

[4] The parent asserts that this is supported by the fact that the district mailed him a SETSS Authorization form and

contends it is incumbent on the district to notify a parent of the June 1 deadline, and in this case, there is no evidence that the district notified the parent of this requirement. Lastly on this issue, the parent argues that the district, even when a student is parentally placed, retains all of its responsibilities to provide special education to students who reside within the district and the IHO should have determined whether the district met its basic obligations. According to the parent, the district has not evaluated the student since 2019 and has not developed a program for the student since 2020. The parent argues that the failure to convene a CSE for the student for two years is a clear denial of a FAPE. The parent further contends that if the district did not have notice of the parent's intent to privately place the student for the 2022-23 school year, the district should have offered the student a FAPE by creating an IEP because "absent an 'expressed intention' to enroll the child out of district, the District remained required to develop an IEP and offer a FAPE."[5]

The parent also asserts that the IHO erred on the issue of pendency as his order on pendency was unclear. Specifically, the parent argues that the "order that the DOE 'shall provide' services with a deadline of 'fifteen calendar days' has no practical meaning." The parent contends that he attempted to obtain clarification from the IHO, but the IHO did not respond.[6] The parent argues that the IHO should have ordered compensatory education for the student and requests the decision be "modified to order that compensatory services should be provided for the [district's] failure to implement services under Pendency."

The parent also argues that the IHO erred by capping the rate for pendency services at $175 per hour. The parent contends that he did not present evidence of a contracted rate for services and that the issue should be left open in order to allow the district to either implement the services or allow the parent to find a private provider. The parent contends that the IHO created the cap "out of thin air" because there was no evidence regarding rates for speech-language therapy, OT, or counseling; and the evidence regarding a SETSS rate was "scant." Additionally, the parent asserts that capping the rate for pendency services was in error because pendency is an automatic entitlement and must be implemented without cost limitations. The parent contends that by setting the rate for pendency, the IHO effectively released the district from their "absolute obligation to implement Pendency."

As relief, the parent requests that the IHO decision be reversed and an order granted directing the district to provide the student "with the following compensatory education services, for the failure to provide services for the" 2022-23 school year, consisting of 320 periods of group SETSS in Yiddish; 80 30-minute sessions of group speech-language therapy in Yiddish, 80 30-

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letter dated August 26, 2022, which the parent submitted as additional evidence (Parent Ex. C). The parent requests that the SRO accept proposed Parent Exhibit C into the hearing record. The parent asserts that he did not have prior knowledge that the district would raise this issue and did not believe the document was relevant at the time of the hearing. Additionally, the parent argues that the district website does not include the June 1 deadline in its guidance for parentally placed students, which he asserts is another example of how the district waived the June 1 deadline and has not used the deadline as a bar for services.

[5] The parent notes that the district did not dispute that it did not offer services to the student.

[6] The parent notes that he has attached the attempts to contact the IHO with the request for review as proposed Parent Exhibit D.

minute sessions of individual OT; and 80 45-minute sessions of group counseling services.[7, 8] The parent requests that the compensatory education services should be either implemented directly by district personnel or a provider of the parent's choosing and that they should be ordered as a bank of hours/periods with an expiration date of no less than two years.

In an answer with cross appeal, the district asserts that the IHO correctly dismissed the parent's due process complaint notice. The district contends that the IHO correctly found that the student was not entitled to equitable services for the 2022-23 school year due to the parent's failure to request services by the statutory deadline. According to the district, the parent only requested services on September 19, 2022 when the due process complaint was filed and since there is nothing in the hearing record to show that another request was made by June 1, 2022, the parent "forfeited any right to equitable services."[9]

The district further asserts that it did not waive the June 1 deadline. The district contends that this case is distinguishable from prior SRO decisions because, here, the district raised the issue at the impartial hearing. Moreover, the district also asserts that it met its burden by raising the issue at the impartial hearing as it cannot not produce "proof" that the parent did not meet the deadline because the "proof" is the lack of a June 1 letter. By affirmatively noting the lack of the letter, the district argues it has satisfied its burden. The district asserts that it was "merely required to raise the issue at some point during the impartial hearing" and the parent's contentions regarding lack of notice prior to the start of the hearing are unavailing.[10]

The district contends that the parent's argument regarding FAPE was denied because any assertion that the district failed to develop an IEP for the student for the 2022-23 school year was not raised in the parent's due process complaint notice. The district asserts that it did not consent to expand the scope of the impartial hearing to include this claim and therefore the parent cannot raise it on appeal.

Regarding the parent's request for compensatory education, the district argues that the hearing record is devoid of evidence regarding the student's need for compensatory services and

[7] The parent asserts that the number of sessions were calculated by multiplying the services recommended in the June 3, 2020 IESP by forty weeks.

[8] The parent asserts that if an SRO does not overturn the IHO's decision on the merits, the SRO should "order compensatory education services for the District's failure to implement any of the services under the Pendency/Stay-Put provision. The Pendency period will run from 9/19/22 until the date of the SRO decision. The SRO should order that the District provide compensatory services for each of the services that the child is entitled to under Pendency, to be calculated as a total amount of services for the number of weeks that this matter is under Pendency until the date of the decision by the SRO."

[9] In regard to the parent's assertion that the district only raised the argument of the June 1 deadline in relation to pendency, the district argues that this reflects too narrow of a reading of the district's closing statement.

[10] Regarding the parent's proposed additional documentation, the district argues that the documents should not be accepted into the hearing record. The district asserts that the parent did not mention the letter until the request for review even though it was available at the time of the impartial hearing; however, the district also argues that it does not demonstrate a waiver of the June 1 deadline.

the request should be denied. According to the district, compensatory education is meant to place the student where he would have been had the district provided appropriate services. However, the district also argues that should an SRO decide that the student is entitled to compensatory services, the issue should be remanded for the hearing record to be developed as an award for compensatory education is a fact-specific claim. Moreover, the district contends that the 40-week calculation used by the parent is incorrect as the student is a 10-month student and a 36-week calculation is more appropriate. Lastly, the district argues that the parent is not entitled to services at enhanced market rates because the parent provided no explanation for why services were unavailable at the standard rates.

In its cross-appeal, the district argues that there is no right to pendency under Education Law Section 3602-c for claims related to implementation of an IESP. The district asserts that Education Law Section 3602-c "contains no reference or mechanism for securing a pendency hearing or order" and due process with respect to an IESP is limited to a "review of recommendations" or compliance with child find obligations. The district contends that the statute does not contain any language relating to the implementation of IESPs, and therefore, "the due process mechanism is foreclosed" to pendency for implementation of an IESP. The district argues that there is no cross-referencing language in State law and that this signifies the State legislature did not intend for implementation of IESPs to be treated similarly to IEPs. Additionally, because the student is not entitled to pendency, the district contends that the student is not entitled to compensatory education for missed pendency services.

In a reply and answer to the district's cross-appeal, the parent asserts that the district incorrectly stated that the issue of a lack of an IEP for the 2022-23 school year was not raised in the due process complaint notice.[11] Regarding the cross-appeal, the parent asserts that the district is incorrect in its interpretation. The parent argues that the State Legislature was attempting to expand services to nonpublic schools through Education Law Section 3602-c and that "due process protections are part and parcel of that expansion of services." Further, the parent noted that in prior cases, the SRO has implicitly affirmed the right to due process for implementation claims under Education Law Section 3602-c and the district's argument ignores significant precedent. The parent requests that the IHO's determination that the student is entitled to pendency be upheld and requests that pendency services begin on September 19, 2022 and continue until the date the SRO decision is issued. Specifically, the parent requests that missed pendency services be awarded as compensatory education.

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.

[11] The parent argues that even if the issue was not raised, the issue is relevant based on the district's closing statement and IHO finding that the student was not entitled to any program for the 2022-23 school year. The parent contends that even if there is no June 1 letter, the district still had an affirmative requirement to create an IEP.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[12]

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

Initially, it is noted that there is no dispute between the parties that the student is a student with a speech or language impairment who qualifies for services under the IDEA. The district has not claimed that the student would not remain eligible for special education services had the parent made a request for services for the 2022-23 school year.

Turning to the district's argument that the parent did not raise the issue of FAPE in the due process complaint notice; this assertion is without merit. The district is attempting to circumvent

[12] 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., 580 U.S. at 402).

its responsibility to provide a FAPE to the student by arguing the parent's claims only fall under Education Law Section 3602-c. However, the parent in the due process complaint notice very clearly stated that the "CSE ha[d] not held a meeting for [the student] since 2020" (Parent Ex. A at p. 2). There was nothing in the parent's request limiting the matter to a request for equitable services and, according to the IDEA, the CSE was required to meet annually to review the student's educational programming (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).[13] Additionally, the parent specifically noted in the due process complaint notice that he had requested summer services (Parent Ex. A at p. 2). As summer services are separate from services provided under Education Law Section 3602-c, the district should have been aware that the parent was not just requesting equitable services.[14]

In this instance, the parent's claims are not solely based on implementation of an IESP as asserted by the district. Additionally, the district made no attempts during either the impartial hearing or in any pleadings to demonstrate that it offered the student in this case a FAPE. As such, it must also be determined that the student was denied a FAPE for the 2022-23 school year because the district failed to convene a CSE to develop an IEP for the student.[15] Accordingly, the issue of

[13] As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]). However, there is no requirement that a CSE reconvene "whenever additional information comes to its attention" (MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *12 [S.D.N.Y. Dec. 21, 2020]).

[14] State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c," VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/ policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[15] Regarding the additional documentation proffered by the parent on appeal, it is unnecessary to enter these documents into the hearing record. 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

whether the parent made a request for equitable services prior to the June 1 deadline set forth in Education Law Section 3602-c is irrelevant to the outcome of this proceeding. Additionally, the district's assertion in its cross-appeal that pendency cannot apply in this proceeding is equally unavailing as there is no argument that pendency would not apply in a proceeding that is asserting a denial of a FAPE.

Turning next to the issue of compensatory education, the parent is requesting compensatory education services for the entirety of the 2022-23 school year, based both on the student not receiving special education and on the student not receiving services under pendency, consisting of 320 periods of group SETSS in Yiddish; 80 30-minute sessions of group speech-language therapy in Yiddish, 80 30-minute sessions of individual OT; and 80 45-minute sessions of group counseling services to be provided by the district or obtained by a provider of the parent's choosing without a cap on the rate for the service. The district argues that the student is not entitled to compensatory education.

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 may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[16] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation

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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]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). In this instance, as I am finding a denial of FAPE due to the district's failure to convene a CSE meeting for the student, neither of these documents are necessary to resolve the parties' dispute. However, it is noted that proposed Parent Exhibit C would likely have been a useful exhibit had the due process complaint notice been limited to a request for equitable services only.

[16] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also 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] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; 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 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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County 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"]).

In addition, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the

stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

In this instance, as noted above, the district has not claimed that the student does not remain eligible for special education and related services as a student with a disability. Nor has the district alleged that the parent's statements that the student has received no special education or related services during the 2022-23 school year are false. Additionally, as noted above, the district's objection to pendency in this proceeding was based on faulty legal reasoning and the student should have received services under pendency from the filing of the due process complaint notice, September 19, through the date of this decision.[17]

The IHO found that the June 2020 IESP constituted the student's placement for the pendency of the proceeding, that the district did not provide the student with services during the 2022-23 school year, and that the student was entitled to pendency services from September 19, 2022 through the date of his decision (IHO Decision at pp. 6-9). In addition, the IHO ordered that the district shall provide the student with eight periods of SETSS per week in Yiddish, two 30-minute sessions of speech-language therapy per week, two 30-minute sessions of OT per week, and two 45-minute sessions of counseling per week from September 19, 2020 through the date of his decision (id. at p. 10). The IHO's award was consistent with the June 2020 IESP, which recommended that the student receive direct group SETSS for eight "periods" per week in Yiddish, two 30-minute sessions of group speech-language therapy in Yiddish per week, two 30-minute sessions of individual OT per week, and two 45-minute sessions of group counseling per week (Parent Ex. B at p. 8). However, the IHO did not order compensatory education for missed pendency services.

Considering the above, a compensatory award for the student should at least consist of the services the student missed during the pendency of this proceeding, which from the filing of the due process complaint notice through the date of this decision consisted of approximately 32 weeks of services.[18] Accordingly, at a minimum, under pendency, the student should receive 256 periods of SETSS, 64 30-minute sessions of speech-language therapy, 64 30-minute sessions of OT, and 64 45-minute sessions of counseling.

[17] Although the due process complaint notice is dated September 17, 2022, both parties refer to it as being filed on September 19, 2022 in their pleadings.

[18] Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, and a 12-month school year from June through July would generally consist of 42 weeks. This is 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]).

I next turn to the remainder of the parent's request, which the parent calculated by extending the weekly recommendations contained in the June 2020 IESP to the full 2022-23 school year on the basis of a school year consisting of 40 weeks.

The district argues that there is no record that compensatory educational services are appropriate as the parent failed to present any progress reports to show that the student was not making any progress without receiving special education (Answer at ¶ 20). The district also argues if the student is eligible for compensatory education, the matter should be remanded for a fact-specific hearing to develop the hearing record on the issue (id.). However, the district's argument that the student is not entitled to compensatory education without progress reports is not persuasive. In this instance, the district was obligated to offer the student a FAPE and provide services to the student; however, the district failed not only in the provision of services, but also in its obligation to evaluate the student's needs and convene a CSE meeting to discuss those needs. Without having completed its most basic obligations under the IDEA, it is difficult for the district to challenge the parent's request, especially where that request is based entirely on recommendations made by the district for the student in a prior school year.

However, it must be noted that the June 2020 IESP did not make a recommendation for summer services and the parent acknowledged that the student was a 10-month student (Mar. 20, 2023 Tr. p. 8; Parent Ex. B at p. 8). As there is no indication in the hearing record that the student was recommended for or required 12-month services, an appropriate compensatory education award should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). Accordingly, the student shall receive a total compensatory award of 288 periods of SETSS, 72 30-minute sessions of speech-language therapy, 72 30-minute sessions of OT, and 72 45-minute sessions of counseling.

Lastly, the IHO awarded services at a rate not to exceed $175 per hour (IHO Decision at p. 10). The parent asserts that there is nothing in the hearing record to support this finding; however, the parent did offer someone testimony regarding the rate of SETSS for prior school years and the school year in question (Mar. 20, 2023 Tr. pp. 18-19, 32).[19] The parent testified that based on personal knowledge he knew the district was offering $175 per hour for SETSS for the 2022-23 school year across several CSEs and that in the applicable CSE the district was frequently offering $195 per hour for Yiddish SETSS (Mar. 20, 2023 Tr. p. 32). This evidence supports the IHO's determination on rates in part as the parent is correct that there is no evidence in the hearing record regarding rates for OT, speech-language therapy, and counseling services. However, the parent's own testimony demonstrates that the IHO correctly awarded $175 per hour for SETSS. Although, the hearing record supports the IHO's determination regarding SETSS, there is no evidence to support a similar rate for speech-language therapy, OT or counseling services. The district failed to present any evidence or testimony to demonstrate that the parent's request for enhanced market rates is unjustified. Therefore, related services will be awarded at enhanced market rates.

[19] It is noted that the parent testified that he was no longer able to use the provider from the prior school year (Mar. 20, 2023 Tr. p. 23-24). Also, the student's nonpublic school does not provide SETSS, OT, speech-language therapy, or counseling services (Mar. 20, 2023 Tr. pp. 25-26). During the prior school year, the parent testified the rate for SETSS was $160 per hour (Mar. 20, 2023 Tr. p. 19).

VII. Conclusion

As discussed above, the district denied the student a FAPE for the 2022-23 school year by failing to convene a CSE meeting. As a CSE meeting is not limited to the development of an IESP, the district's arguments related to Education Law Section 3602-c are misplaced. Additionally, although the hearing record is lacking information as to the student's current functioning, based on the district's prior recommendations and its failure to convene to discuss the student's needs and educational programming prior to the school year at issue, the student is entitled to compensatory education services reflective of the most recent services deemed appropriate by the district for the student in the June 2020 IESP in the amount of 288 hours of SETSS in Yiddish, 72 30-minute sessions of speech-language therapy in Yiddish, 72 30-minute sessions of individual OT, and 72 45-minute sessions of counseling.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the March 21, 2023 IHO decision is modified by reversing those portions which found that the district did not deny the student a FAPE for the 2022-23 school year and that the student was not entitled to compensatory educational services;

IT IS FURTHER ORDERED that the district shall provide the student with a bank of compensatory educational services consisting of 288 hours of SETSS in Yiddish, 72 30-minute sessions of speech-language therapy in Yiddish, 72 30-minute sessions of individual OT, and 72 45-minute sessions of counseling;

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

Dated: **Albany, New York**
June 9, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER