The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-093

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 Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, 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 dismissed the parent's due process complaint notices that alleged respondent (the district) offered an inappropriate educational program and services to his son for the 2022-23 school year and granted the district's motions to dismiss. 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

The student in this case has been the subject of 18 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 23-022; Application of a Student with a Disability, Appeal No. 22-168; Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-

021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

The subject of this appeal is an October 13, 2022 IEP developed for the 2022-23 school year as well as a 2019 pendency agreement (see Dist. Exs. 15, 31).

Pending the development of the student's IEP for the 2022-23 school year, the district notified the parents that the student would remain in his stay-put placement (see Dist. Exs. 11 at p. 5; 15). A CSE convened on August 1, 2022 and October 13, 2022, to conduct the student's annual review (see Dist. Exs. 13, 29, 31). The CSE determined that the student remained eligible for special education as a student with an intellectual disability (Dist. Ex. 31 at p. 1).[1] According to the October 2022 IEP, the CSE relied on the following evaluations/reports: adapted physical education progress summary dated October 13, 2022; parent counseling/training progress summary dated October 13, 2022; parent report and observations dated October 13, 2022; speech-language therapy progress summary dated October 13, 2022; transition coordinator report dated October 13, 2022; parent report and observations dated August 1, 2022; educational consultant report dated June 10, 2022; adapted physical education progress summary dated June 3, 2022; parent counseling and training progress summary dated June 3, 2022; transition coordinator report dated June 3, 2022; progress report dated June 1, 2022; occupational therapy (OT) evaluation dated May 10, 2022; speech-language therapy evaluation dated April 8, 2022; educational consultant report dated April 7, 2022; New York State Alternate Assessment results dated April 7, 2022; progress report dated March 17, 2022; and physical therapy (PT) progress summary dated February 13, 2022 (id. at pp. 1-2).

The October 2022 IEP indicated that the student had "global developmental deficits" with "significant academic, cognitive, receptive and expressive language, fine motor and gross motor delays" and required a "small teacher-to-student ratio program" with adult supervision throughout the school day (id. at p. 10). The October 2022 CSE recommended a 12:1+1 special class with five 40-minute sessions in a 10-day cycle of individual adapted physical education and placement in an "[o]ther [p]ublic [s]chool [d]istrict" (id. at pp. 18, 24). In addition, the October 2022 CSE recommended two 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual PT; three 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of small group (5:1) speech-language therapy; four 90-minute sessions per week of individual special instruction; and two 60-minute sessions per month of individual parent counseling and training (id. at p. 18). The student was also recommended to receive the support of a 1:1 aide, checks for understanding, wait time to allow for a response, provision of a copy of class notes, and reteaching of materials (id. at pp. 18-19). With respect to

[1] The student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

assistive technology, the October 2022 CSE recommended an augmentative communication device and access to a computer and audible books (id. at p. 19). Lastly, the October 2022 CSE recommended supports for school personnel on behalf of the student, 12-month services, testing accommodations, transition activities, and special transportation (id. at pp. 19-24).

Ultimately, the parent disagreed with the October 2022 IEP (see Dist. Ex. 30 at p. 3).[2, 3]

A. Due Process Complaint Notices and Consolidations

In a due process complaint notice, dated September 14, 2022, the parent claimed that the student was not "afforded access to a guidance counselor, social worker, and librarian" and not "afforded access to extra-curricular activities, clubs, programs and sports" and that these benefits and services were necessary for the provision of a free appropriate public education (FAPE) for the student (Dist. Ex. 2). The parent alleged that he was informed by the district superintendent that only "enrolled students" were entitled to the educational benefits and services enumerated above (id.). As relief, the parent sought an order compelling the district to provide the student access to the listed benefits and services and an award of compensatory services for the preclusion of the student from any benefits and services (id.). On September 23, 2022, the district responded to the parent's allegations and simultaneously moved to dismiss the September 14, 2022 due process complaint notice (see Dist. Ex. 37). The parent submitted an undated affirmation in opposition to the district's motion to dismiss (see Parent Ex. C).[4]

In a second due process complaint notice, dated September 26, 2022, the parent alleged that the CSE failed to develop and implement an IEP prior to the start of the 2022-23 school year

[2] The request for review identified the student's father as the petitioner in this matter; accordingly, all references to "the parent" in this decision are to the student's father.

[3] Due to the nearly continuous nature of the administrative due process proceedings and State-level administrative appeals—and related federal district court proceedings—involving this student, he has been receiving his special education program under various pendency placements since approximately the 2015-16 school year (see generally Application of a Student with a Disability, Appeal No. 23-022; Application of a Student with a Disability, Appeal No. 22-168; Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

[4] It is unclear from the hearing record whether Parent Exhibit C was admitted into evidence during the impartial hearing, however, as it is a required part of the hearing record, it is considered on appeal (see Tr. pp. 1217-20, 1231; 8 NYCRR 200.5[j][5][vi] [providing that the hearing record shall include copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer"]; see also 8 NYCRR 279.9[a]).

(see Dist. Ex. 3). The parent asserted that the CSE "deliberately delayed" the student's annual review to submit an "age-variance application" for another younger student, which would have increased the age difference between the student and the other students in the district's alternatively assessed special class, the same class the parent wanted the district to submit an age-variance application for the student so the student could attend that class (id. at p. 1). The parent claimed that the CSE's "actions were deliberate, malicious, and specifically designed to alter the potential educational placement options available for the [student]" (id.). The parent argued that the district's actions compromised the student's right to a FAPE within the least restrictive environment (LRE) (id. at pp. 1-2). As relief, the parent sought an order requiring the district to complete the annual review for the 2022-23 school year, requiring the district to file for an age variance, and "back-end compensatory education" (id. at p. 2).[5] On October 7, 2022, the district responded to the parent's allegations and moved to dismiss the September 26, 2022 due process complaint notice (see Dist. Ex. 38).

In a third due process complaint notice, dated October 13, 2022, the parent alleged that the October 2022 IEP was not developed by the CSE in a timely manner, was not appropriately ambitious, and denied the student a FAPE for the 2022-23 school year (see Dist. Ex. 4). In addition, the parent alleged that the October 2022 CSE failed to use appropriate assessments to develop the student's present levels of performance, failed to use the updated triennial assessments, predetermined the student's placement, and failed to consider the LRE and that the CSE chairperson denied the parent meaningful participation (id. at pp. 1-2). As a proposed remedy, the parent requested an order directing the district to educate the student within the district and for an updated psychological triennial assessment (id. at p. 2). The parent further sought removal of the CSE chairperson and "back-end compensatory education" for the deprivations suffered by the student (id.). On October 21, 2022, the district responded to the parent's allegations and moved to dismiss the October 13, 2022 due process complaint notice (see Dist. Ex. 39).

In a fourth due process complaint notice dated October 31, 2022, the parent alleged that the district "breached" the 2019 pendency agreement by not providing the student with a certified special education teacher for the student's academic instruction (Dist. Ex. 5).[6] Additionally, the

[5] In Killoran v. Westhampton Beach School District, 2023 WL 2760773, at *2 (E.D.N.Y. Mar. 31, 2023), the Court took judicial notice of a letter from the State Education Department filed by the parent in another case before the court, which advised the court that, on March 6, 2023, the State Education Department granted an age variance application for the student for the 2022-23 school year.

[6] On September 16, 2022, the student's special education teacher resigned, and the student received instruction from a substitute teacher who was not certified in special education while the district sought a replacement; the parent objected to this arrangement (Dist. Ex. 1 ¶¶ 33, 35, 41; see Dist. Exs. 17-19). The parent pursued a federal court action seeking injunctive relief (Dist. Ex. 20 at pp. 5-6). After hearing arguments from both parties, the court denied the parent's request for injunctive relief because "issuing an order to show cause compelling the school district to immediately provide a special [education] teacher for [the student] c[ould]not prevent irreparable harm as the school district simply c[ould]not secure such a teacher, despite its best efforts" (Dist. Ex. 21 at p. 15). The court also pointed out that the parent had "two viable options" of either continuing to use the substitute teacher for instruction or accept the recommendation from the October 2022 IEP (id. at pp. 14, 16). Ultimately, at the end of the hearing, the parent agreed to have the substitute teacher continue to provide the

parent asserted that the district "prohibited" the student's educational consultant from providing instruction to the student's substitute teacher (id.). As relief, the parent sought an order that the district violated the IDEA and requested compensatory education for any regression sustained by the student (id.). On November 9, 2022, the district responded to the parent's allegations and made an application to dismiss the October 31, 2022 due process complaint notice (see Dist. Ex. 40). In response, the parent submitted an affirmation in opposition to the district's motion to dismiss (see Dist. Ex. 41).

On December 14, 2022, a prehearing conference was held (Tr. pp. 1-54). At the prehearing conference, the IHO reserved on deciding the district's motions to dismiss pending the impartial hearing on the merits (IHO Decision at pp. 47-48).

On December 15, 2022, the IHO consolidated the September 14, 2022 and September 28, 2022 due process complaint notices for the "interests of judicial economy" and in the "interests of the student" (see IHO Ex. VIII). On December 15, 2022, the IHO consolidated the October 14 and October 31, 2022 due process complaint notices again in the interests of the parties (see IHO Ex. IX).

In a fifth due process complaint notice dated December 16, 2022, the parent alleged that at the beginning of the 2022-23 school year the district restricted/prohibited the student's educational consultant and transitional coordinator from working with the student's special education teacher and related service providers (see Dist. Ex. 6). The parent also alleged that, on December 15, 2022, he received a letter from the district that the location of the student's pendency instruction would change from the public library to the high school (id. at p. 2). The parent argued that this unilateral change of the location of the student's stay put placement was unlawful and a violation of pendency (id.). As relief, the parent requested an order for the district to follow the pendency agreement and compensatory education for any deprivations suffered by the student as a result of the pendency violations (id.). On January 3, 2023, the district responded to the parent's allegations and moved to dismiss the December 16, 2022 due process complaint notice (see Dist. Ex. 42).

On January 16, 2023, the IHO then consolidated the two consolidated matters together with the December 16, 2022 due process complaint notice and all matters were consolidated together under one impartial hearing case number (see IHO Exs. XI).[7]

student academic instruction until a replacement special education teacher could be located (id. at pp. 17, 24). On December 8, 2022, the district notified the parent that a special education teacher had been appointed to provide the student with academic instruction (Dist. Ex. 23).

[7] The IHO incorrectly identified the due process complaint notice being consolidated as one dated December 19, 2022, rather than December 16, 2022; it appears as though this was a typographical error and has no effect on the consolidation order which refers to the matters being consolidated by the assigned IHRS numbers (IHO Ex. XI).

B. Impartial Hearing and Impartial Hearing Officer Decisions

On January 13, 2023, the parent requested subpoenas for the testimony of several district employees and educational contractors, which the district opposed (Interim IHO Decision at p. 3; see IHO Exs. I; II).

The matter proceeded to an impartial hearing on the merits on February 13, 2023 and was completed on April 13, 2023 after nine days of proceedings (Tr. pp. 55-1233).

In an interim decision dated February 26, 2023, the IHO denied the parent's request for a subpoena for the testimony of the district superintendent and several district employees but granted the subpoena for the testimony of the educational contractors (Interim IHO Decision at pp. 4-7).

In a final decision, dated April 28, 2023, the IHO first detailed the procedural history, factual background, and positions of the parties, and addressed the alleged procedural violations by the district (IHO Decision at pp. 5-17). The IHO discussed the timeliness of the district's planning for the student's educational program for the 2022-23 school year and stated that, although the CSE did not complete the IEP until October 13, 2022, the district did attempt to schedule a CSE meeting beginning in January 2022 (id. at pp. 17-19). The IHO found that the delay in holding a CSE meeting for the student's annual review for the 2022-23 school year did not deny the student a FAPE or deprive the student of educational benefits (id. at pp. 18-19).

Next, the IHO found that the CSE used "appropriate assessments" to determine the student's present levels of performance and develop appropriate annual goals (IHO Decision at p. 22). The IHO found that, at both the August and October 2022 CSE meetings, the student's teachers and related service providers provided detailed reports of the student's present levels of performance and goals (id.). The IHO noted that the parent did not challenge or criticize the assessments or the annual goals developed from the present levels of performance (id.). Furthermore, the IHO found that, even though the district did not conduct a psychoeducational or social history evaluation prior to the CSE meetings, this was a result of the parent's refusal to initially give consent for the evaluations and provide the CSE with any private testing results, and that, therefore, the parent was "estopped" from arguing that the assessments that the October 2022 CSE relied on were insufficient (id. at pp. 22-23).

Turning to the parent's claims pertaining to parent participation and predetermination, the IHO found that the CSE "meaningfully" considered all placement options on the continuum at the August and October 2022 CSE meetings and the parents were permitted to ask questions about all of the placement options (IHO Decision at pp. 25). The IHO found that all CSE members, other than the parents, recommended placement of the student in a 12:1+1 special class (id. at p. 26). The IHO found that the parent's disagreement with the October 2022 IEP and placement recommendations did not rise to the level of a denial of the parent's meaningful participation in the CSE process (id.). The IHO addressed the parent's argument that the CSE failed to seek an age-based variance for the district's 12:1+1 special class and found a similar variance was denied in the prior school year and that, therefore, "it was not unreasonable for the CSE to decline the parent's variance request" (id. at p. 26).

Additionally, the IHO addressed the October 2022 CSE's program recommendations and determined that the recommended program "was capable of providing the student with a FAPE in the LRE" (IHO Decision at pp. 26, 28). The IHO indicated that the October 2022 IEP program recommendations offered the student life skills development and the development of "pre-employment skills through participation in a work experience program" (id. at p. 27). The IHO held that the work experience program would have offered the student "to the maximum extent possible, inclusion in regular classes, programs, lunch, and electives with general education students" (id. at p. 28).

The IHO next addressed the alleged pendency violations asserted by the parent (IHO Decision at pp. 28-38). First, the IHO addressed the student's exclusion from activities and services and found that the student's education was governed by the 2019 pendency agreement, which "did not provide for the student's access to a guidance counselor, social worker, and librarian, and did not provide for the student's access to extracurricular activities, such as clubs, program, and sports" and that, as such, the district did not breach the pendency agreement by not providing the activities and services (id. at p. 32). Second, the IHO discussed the certification of the substitute teacher and found that, pursuant to State regulations, the district was permitted to use a substitute teacher for a certain number of days for the student's academic instruction (id. at p. 33). However, the IHO found that the district breached the pendency agreement by withholding instruction from October 24, 2022 through October 28, 2022 and ordered the district to provide the student with compensatory services for the period of time in which instructional pendency services were not provided (id. at p. 34). Third, the IHO addressed the change in the location of the academic instruction (id. at pp. 35-36). The IHO found that the change of the student's instruction from the public library to the high school "was a good faith exercise of its preexisting and independent authority to determine how to provide the most recently agreed upon educational program to the student" and was not violative of the 2019 pendency agreement (id. at p. 36). Lastly, the IHO discussed the alleged change in the roles of the educational consultant and transition coordinator (id. at pp. 36-38). The IHO found that both individuals were independent contractors, and their roles and responsibilities were contractually defined (id. at p. 36). Although the IHO found some "diminishment" of the role of the educational consultant, he determined that the educational consultant's and transition coordinator's access to teachers and related service providers was not dictated by the 2019 pendency agreement and, therefore, pendency was not violated (id. at pp. 37-38). The IHO further held that, even if the providers roles were governed by the 2019 pendency agreement, the district had the discretion to determine how the student was provided instruction during pendency (id. at p. 38).

Based on the foregoing, the IHO dismissed the parent's claims alleging a denial of a FAPE for the 2022-23 school year (IHO Decision at p. 38). In addition, the IHO dismissed the parent's claims that the district violated the 2019 pendency agreement except that the IHO granted in part the parent's request for compensatory education services to remedy the lapse in pendency services from October 24 through October 28, 2022 (id. at pp. 35, 38-39). In particular, the IHO ordered the district to provide the student with 10 hours of "special education instruction" and six hours of "special instruction" as make up services, to be used within one year of the date of the decision (id. at p. 39).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim order pertaining to the subpoena of the district superintendent and the IHO's final decision dated April 28, 2023. Regarding the interim order, the parent argues that the IHO erred in denying the parent's request to subpoena the district superintendent for testimony at the impartial hearing.

Turning to the merits, the parent asserts that the IHO erred in finding that the delay in developing the student's IEP for the 2022-23 school year did not impede the student's right to a FAPE. In addition, the parent argues that the IHO erred in finding that the CSE's refusal to educate the student in an individual program or to seek an age-based variance for the district's 12:1+1 special class was not predetermination. The parent argues that the IHO erred in finding that the CSE "meaningfully considered all of the placement options available on the continuum" and did not engage in predetermination. Furthermore, the parent contends that the IHO erred in finding that the October 2022 IEP recommended placement was the LRE for the student.

The parent also claims that the IHO erred in finding that the district did not breach the 2019 pendency agreement by failing to provide the student with a certified special education teacher, by failing to provide the student with services and benefits he was entitled to as an enrolled student, and modifying the roles of the educational consultant and transition coordinator. Lastly, the parent appeals the IHO's award of compensatory education services, arguing that the award was neither appropriate nor sufficient.

As relief the parent seeks an award of "back-end compensatory education."

In an answer, the district generally denies the material allegations contained in the request for review and argues that the IHO's decision should be affirmed in its entirety. The district raises several objections and affirmative defenses to the request for review arguing that the request for an age-based variance was moot and that the request for review failed to set forth the specific relief requested.[8]

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.

[8] The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]). While the district is correct that the parent does not set forth the specific relief sought in the underlying proceeding as required by State regulation (8 NYCRR 279.8[c][1]), this is not an instance where the omission of such information warrants rejection or dismissal of the pleading.

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]).[9]

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

VI. Discussion

A. Conduct of the Impartial Hearing

The parent contends that the IHO erred in denying his request to subpoena the district superintendent for testimony at the impartial hearing. The parent further argues that the denial of the subpoena constituted a violation of the parent's "procedural due process" and "prevented [him] from adequately establishing his case" (Req. for Rev. at p. 3).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR

[9] 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).

200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

In an interim decision, the IHO reviewed and discussed each of the parent's requested subpoenas (see Interim IHO Decision; see generally IHO Ex. I). In connection with the subpoena for the testimony of the district superintendent, the IHO noted that parent wished to solicit testimony about an email dated June 2, 2022 from the superintendent to the parent "denying the parent's request to observe a 12:1+1 special class then-operating in the [d]istrict" (Interim IHO Decision at p. 4; IHO Ex. I at p. 15). The IHO acknowledged the parent's argument that the superintendent's email was "an administrative directive from the [s]uperintendent prohibiting the [CSE] from considering the student's placement in the [d]istrict's 12:1+1 special class" (Interim IHO Decision at p. 4; IHO Ex. I at p. 15). In denying the parent's request for a subpoena for the district superintendent to testify, the IHO referred to case law that: "Parents have no right to visit a proposed school or classroom before the recommendation is finalized or prior to the school year" (Interim IHO Decision at pp. 4-5, citing S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]). The IHO found that the IEP for the 2022-23 school year was not final until October 13, 2022 and that, therefore, the district superintendent had the "discretion" to deny the parent an opportunity to tour the district's 12:1+1 special class because the request came before the final October 2022 IEP which recommended a program outside of the district (Interim IHO Decision at p. 5).

Upon my independent review of the impartial hearing record, there is insufficient evidence to support the parent's contention that the IHO prevented the development of the hearing record or violated the parent's due process rights. Rather, the IHO weighed the parent's proffer regarding the testimony and found that the stated purpose was not relevant or material to the issues to be determined (8 NYCRR 200.5[j][3][xii][c]-[e]). Moreover, the superintendent's email was entered in evidence and the parent was free to and did make arguments relating to the content thereof (see Parent Ex. D at pp. 7-; IHO Ex. I at p. 15). I find that the IHO acted within his discretion in declining to sign the parent's proposed subpoena for the testimony of the district superintendent.

B. 2022-23 School Year

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached certain conclusions on claims raised by the parent relating to the 2022-23 school year other than those discussed in more detail below. In particular, I find that the following of the IHO's determinations were well-reasoned and supported by the evidence in the hearing record: that the district did not deny the parent meaningful participation in the CSE process or predetermine the placement recommendation for the 2022-23 school year; the October 2022 IEP recommended an appropriate placement for the student in the LRE; and the district did not violate the 2019 pendency agreement by employing a substitute teacher or by restricting the duties of the educational consultant and transition coordinator (see IHO Decision at pp. 23-38).[10]

[10] The parent does not appeal the IHO's findings that the CSE used appropriate assessments of the student or that

As to these issues, the IHO accurately recounted the relevant facts of the case and set forth the proper legal standards to determine whether the district offered the student a FAPE in the LRE for the 2022-23 school year, and applied those standards to the facts as presented in this proceeding (id. at pp. 8-17, 23-38). Review of the IHO's decision shows that, for these issues, the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify these determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO described above are hereby adopted.

I will next separately address the parent's appeal of the IHO's determinations regarding the timeliness of the CSE's annual review meeting and the student's access to services and benefits as part of the student's pendency placement.

1. FAPE—Meeting Timeliness

The parent argues that the IHO erred in finding that the district's failure to complete the student's annual review prior to the 2022-23 school year did not impede the student's right to a FAPE and did not deprive the student of educational benefits. The parent contends that the district delayed the annual review so as to avoid submitting an age variance application for the student to attend a 12:1+1 special class within the district public school for the 2022-23 school year.

The IHO found it "undisputed" that the CSE did not complete an annual review or develop an IEP prior to the beginning of the 2022-23 school year (IHO Decision at p. 18). The IHO reviewed the district's attempts to schedule meetings and the reasons offered for cancelling scheduled CSE meetings, attributing fault to both the parent, for meetings scheduled prior to June, 2022, and the district, for meetings scheduled in June 2022, and finding that the cancellation of at least one meeting in September 2022 was justified (id. at pp. 18-19). The IHO found that although the 2022-23 annual review was untimely it did not result in a denial of a FAPE or a deprivation of educational benefits to the student as, after the CSE convened and recommended a placement for the student in October 2022, the parent decided to reject the district placement and keep the student in his pendency placement (id.). The IHO reasoned that if a timely annual review had occurred it would have resulted in a similar outcome (id.).

The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8

---

the district's act of changing the location for delivery of instruction during pendency from the public library to the high school was not a violation of the 2019 pendency agreement (see IHO Decision at pp. 22-23, 35-36). Further, the district does not cross-appeal the IHO's finding that a lapse in the student's pendency occurred in October 2022, which warranted an award of compensatory education (see id. at pp. 34, 38-39). Therefore, the IHO's findings regarding the sufficiency of evaluative information before the CSE, the location of the student's pendency placement, and the lapse in the delivery of pendency in October 2022 are final and binding and will not be further addressed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]).[11] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Initially, the hearing record in this matter does not include much information regarding the last IEP developed for the student prior to the October 2022 IEP, which would have been the IEP in effect while the parties were attempting to schedule a CSE meeting to consider the student's programming for the 2022-23 school year. However, review of decisions in the parties' prior proceedings indicated that the parent challenged a program recommended for the student at a June 2021 CSE meeting for the 2021-22 school year (Application of a Student with a Disability, Appeal No. 22-163).

According to the district's director of pupil personnel services (director), beginning in January 2022, the district attempted to schedule the student's annual review (Dist. Exs. 1 ¶ 8; 7 at p. 3). However, according to the district's prior written notice, the parents "demanded that the annual review take place in June of 2022" (Dist. Ex. 7 at p. 3; see Dist. Ex. 1 ¶ 8). Thereafter, a series of CSE meetings were scheduled, cancelled, and rescheduled as detailed below.

In an effort to conduct a "timely" annual review, the district director sought to conduct the student's triennial evaluation in March 2022 after the completion of a reevaluation of the student (Tr. pp. 227, 237; Dist. Ex. 1 ¶ 9). On March 1, 2022, the district sent a letter to the parents requesting consent to conduct a reevaluation of the student (Dist. Ex. 8 at p. 5). The letter also indicated that consent to reevaluate the student was requested in writing on December 9, 2021, January 6, 2022, and February 4, 2022 (id.). In a March 2, 2022 e-mail response to the district,

[11] Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

the student's mother indicated that she did not receive the request for consent to reevaluate the student prior to March 1, 2022 and requested that certain evaluations be conducted by specific identified evaluators (id. at pp. 1-2). The parties then in engaged in some back and forth discussion as to who should select the evaluator to conduct different aspects of the reevaluation and the student's mother indicated that she would not give consent for BOCES to conduct a reevaluation of the student (Dist. Exs. 1 ¶ 9; 8 at pp. 6-10).[12] Thereafter, on April 8, 2022, the district's director sent a letter to the parents that the CSE was available for an annual review on May 17, 2022 or May 19, 2022 (Dist. Ex. 11 at p. 16).

In e-mail correspondence dated May 13, 2022, the district's director requested that the parents indicate whether they wanted an in-person or virtual CSE meeting (Parent Ex. B at p. 28). The student's mother responded on the same date that she wanted all meetings in person (id.). On May 20, 2022, the mother followed up with the CSE asking whether the CSE was available on June 6, 2022, June 9, 2022, or June 15, 2022 for an in-person annual review (id. at pp. 28, 31). By written notice dated May 26, 2022, the district scheduled the student's annual review for June 9, 2022 (id. at p. 29).

On June 7, 2022, the district's director sent a letter to the parents that she was in receipt of their request for items to be provided to the parents prior to the scheduled June 9, 2022 CSE meeting (Dist. Ex. 11 at p. 15).[13] The district's director stated that given the "insufficient notice" of the parents' requests the district was unable to respond to the demands by June 9, 2022 and the meeting needed to be rescheduled (Dist. Exs. 1 ¶ 13; 11 at p. 15). Further, on June 8, 2022, the district's director sent a letter to the parents that she was in receipt of their "emails" from June 7, 2022 reducing the list of requests for information; however, the director stated that due to the insufficient notice, she was unable to respond to the requests prior to the scheduled CSE meeting (Dist. Ex. 11 at p. 14). Another letter was sent by the district's director on June 8, 2022 regarding the parent's request to have the CSE meeting on June 9, 2022 but she stated that the meeting was cancelled (id. at p. 13). The district's director further stated she would send notice of the rescheduled annual review date in the "near future" (id.). The district responded to the parents' requests for information by letter dated June 13, 2022 (Parent Ex. A).

According to the director, the student's annual review was next scheduled for June 16, 2022 but had to be cancelled due to illness (Dist. Ex. 1 ¶ 14). Review of the email correspondence between the parties shows that, on June 14, 2022, the district's director emailed the parent that a court reporter was unavailable for the June 16, 2022 CSE annual review and that no one was available to meet in person on that date because the illness of a CSE member (Parent Ex. B at pp. 41, 45; Dist. Ex. 1 ¶ 14). The district's director stated that on June 16, 2022, the annual review

[12] The parent's refusal to consent to evaluations was the subject of a due process complaint notice brought by the district, in which the district sought to override the parent's refusal to provide consent (Dist. Exs. 1 ¶ 10; 9; 10). During a pre-hearing conference on August 24, 2022, the parent consented to the triennial psychological and educational evaluation (Dist. Ex. 1 ¶¶ 10, 159; see Dist. Ex. 10). Thereafter, the district withdrew the April 11, 2022 due process complaint notice (Dist. Ex. 1 ¶¶ 10, 159; 10 at p. 4).

[13] Although referenced in the district's letters, the parents' requests for information sent on June 6, 2022 and June 7, 2022 were not included in the hearing record (see Parent Ex. A; Dist. Ex. 11 at pp. 14-15).

could be held virtually, or an in-person meeting could happen on June 24, 2022 (Parent Ex. B at pp. 41, 45). The student's mother responded by e-mail, on June 14, 2022, indicating that the parents had been able to secure a court reporter and to "not reschedule the in person meeting" on June 16, 2022 (id. at pp. 42-50). On June 15, 2022, the district's director replied that she was "prepared to conduct [the student's] annual review virtually on June 16, 2022" (id. at p. 51). The parent responded by asking why the district could not conduct the June 16th meeting in-person and reiterating that the parents would not agree to a virtual meeting (id. at p. 52). In an email to the student's mother, dated June 15, 2022, the district superintendent indicated that the June 16, 2022 CSE meeting could not proceed in-person because "a critical member of the CSE" tested positive for COVID and could not attend in person or virtually (Parent Ex. B at p. 55; Dist. Ex. 1 ¶ 14). In response, the mother requested a subcommittee on special education convene instead (Parent Ex. B at pp. 57-59, 61). The district cancelled the June 16, 2022 CSE meeting and the parents stated they were unable to attend a CSE meeting on June 24, 2022 (Parent Ex. B at pp. 49, 54).

On July 5, 2022, the district's director sent a letter to the parents seeking their availability on July 26, 2022 or July 28, 2022 for the student's annual review (Dist. Ex. 11 at p. 12). The district's director acknowledged receipt of the parents' communication on July 7, 2022, which indicated that the parents were not available on July 26, 2022 or July 28, 2022, but were available for a CSE meeting on July 19, 2022 or July 21, 2022 (id. at p. 11). The district's director responded that the CSE was not available on July 19, 2022 or July 21, 2022 but the CSE could meet on July 27, 2022 or July 29, 2022 (id.).

On July 11, 2022, the district's director indicated that a virtual CSE meeting could be held on July 21, 2022, and in another letter of the same date, confirmed that the parents were available to participate in the July 21, 2022 annual review (Dist. Exs. 11 at pp. 9-10; 12). However, the director also notified the parents that the student's special education teacher was unavailable on July 21, 2022 and offered alternative dates for the CSE annual review in July and August 2022 either in-person or virtually (id. at p. 9).

On July 15, 2022, the student's mother sent an email to the district superintendent that she received a letter for an invitation to a July 26, 2022 CSE meeting but indicated that the parents were unavailable as they had previously communicated to the district's director (Parent Ex. B at p. 81). In another e-mail to the district dated July 18, 2022, the mother stated that the parents were available on August 1, 2022 or August 5, 2022 (id. at p. 82).

On July 18, 2022, the district's director sent a letter to the parents indicating that she received their communication that they could participate in a CSE meeting on July 21, 2022 but that the district was unable to hold a meeting on that date; the director stated that, due to the availability of CSE members, she would schedule a virtual CSE meeting and, if necessary, a follow-up meeting (Dist. Ex. 11 at p. 8). The letter further indicated that the parents stated they would be out of the State for the week of July 25, 2022 and asked them to provide available dates for a CSE meeting to be held in August 2022 (id.).

Then, on July 27, 2022, the district sent a letter to the parents confirming availability for the parents to participate in an annual review scheduled for August 1, 2022 (Dist. Ex. 11 at p. 7). The district's director further notified the parents that the student's speech-language therapist was

unavailable to participate in the August 1, 2022 CSE meeting and inquired whether the parents would waive attendance of the speech-language therapist or wanted to reschedule the meeting (id.). On July 28, 2022, the district's director confirmed that an annual review meeting would be held on August 1, 2022, and for the parents to provide additional dates if it was necessary to schedule another meeting thereafter (Parent Ex. B at p. 84).

On August 1, 2022, the CSE convened for an annual review, but the meeting ended prior to the CSE making any program recommendations (Dist. Ex. 1 ¶ 15; see Dist. Ex. 13). A further CSE meeting was scheduled for August 11, 2022, but the parents were not available at the time scheduled (Parent Ex. B at pp. 90-91). The district's director stated that the CSE was unavailable to accommodate the time requested by the parent and, therefore, needed the parents to provide additional dates of availability to continue the student's annual review (id. at p. 92).

On August 18, 2022, the district sent a meeting notice to the parents scheduling a virtual CSE meeting on September 1, 2022 (Parent Ex. B at p. 93). The student's mother responded that the parents would be away until September 4, 2022 and could not attend the CSE meeting on September 1, 2022 (id. at pp. 97, 102). Thereafter, on August 19, 2022, the district's director sent a letter to the parents indicating that she was notified the parents would "be away" for the scheduled September 1, 2022 CSE meeting (Parent Ex. B at p. 101; see Parent Ex. B at p. 103; Dist. Ex. 1 ¶ 17). The district's director stated that the September 1, 2022 CSE meeting would be held virtually and hoped that the parents could make themselves available for the meeting (Parent Ex. B at p. 101; Dist. Ex. 11 at p. 6). Thereafter, on August 22, 2022, the student's mother sent an email to the district's director requesting to reschedule the CSE meeting for September 6, 2022, September 9, 2022, or September 14, 2022 (Parent Ex. B at p. 104). The district notified the parents that the rescheduled meeting would be held on September 9, 2022 (id. at pp. 106, 108). On August 30, 2022, the district's director sent a letter to the parents indicating that the student would receive home instruction through the 2019 pendency agreement for the 2022-23 school year until an IEP was developed for the student (Dist. Ex. 11 at p. 5). In an email to the district dated September 6, 2022, the student's mother stated that September 9, 2022 was not a "viable" date and the meeting needed to be rescheduled (Parent Ex. B at pp. 120-23; Dist. Ex. 1 ¶ 16). On September 7, 2022, the district director sent the parents a letter to confirm that the parents did not want the CSE to meet on September 9, 2022 and indicated that, although the district disagreed with delaying the meeting, the parents' request to cancel the annual review meeting would be granted and she would await dates when the parent would be available (Dist. Ex. 11 at p. 2).

On September 12, 2022, the district's director sent a letter to the parents to inform them that the district was not available for a CSE meeting on September 30, 2022 (Dist. Ex. 11 at p. 3). In an e-mail, dated September 15, 2022, the student's mother stated the parents would be available for a CSE meeting on October 4, 2022 or October 6, 2022 (Parent Ex. B at p. 126). Next, on September 19, 2022, the district sent a letter to the parents that the district was unavailable for a CSE meeting on the parent's proposed dates in October 2022 but was available on October 3, 2022, October 11, 2022, or October 13, 2022 (District. Ex. 11 at p. 1). Ultimately, the CSE reconvened on October 13, 2022 (Dist. Ex. 1 ¶ 18; see Dist. Exs. 29, 31).

Although the parties made efforts to conduct a CSE meeting prior to the 2022-23 school year, it is clear that there was no IEP in effect at the beginning of the 2022-23 school year for the

student (see 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). The district bore the responsibility to comply with developing a completed IEP for the student and failed to locate and identify a placement for the student to attend school by the beginning of the school year and its failure to do so constitutes at least a procedural violation. To be sure, the late development of an IEP for the student does not necessarily result in an per se denial of a FAPE and the IHO was correct in considering the degree to which the failure to develop an IEP impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Mitigating factors might be present, for example, if a CSE meeting occurred prior to the school year, at which the parents actively participated and were given "sufficient information to make a timely decision regarding the IEP" but the IEP was delivered or finalized after the school year began (see E.L. v. Bedford Cent. Sch. Dist., 2022 WL 3667189, at *16 [S.D.N.Y. Aug. 25, 2022], quoting K.M. v. New York City Dep't of Educ., 2015 WL 1442415, at *15 [S.D.N.Y. Mar. 30, 2015]).

However, contrary to the IHO's reasoning, the student remaining in his pendency placement and the parents' relative fault in the scheduling difficulties do not factor into an analysis of whether the lack of a timely IEP impeded the student's right to a FAPE or the parent's opportunity to participate. Pertinently, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ. Of the Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004]; Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). Instead, such factors may be weighed in assessing what relief, if any, is warranted to remedy a denial of a FAPE arising from the district's failure to ensure an IEP was in effect for the student prior to the beginning of the school year.

Here, it is undisputed that the first CSE meeting did not occur until August and the IEP was not finalized with program recommendations until October. Thus, the parents were unaware of the CSEs' recommendations and the student was without an IEP at the start of the 12-month 2022-23 school year. Accordingly, a review of the hearing record shows that, because the district did not have an IEP in place before the start of the 2022-23 school year, the district denied the student a FAPE.

2. Implementation of Pendency—Access to Services and Benefits

On appeal, the parent argues that the IHO erred in not finding that the district's refusal to provide the student with "services and benefits" during the 2022-23 school year was a violation of the district's pendency obligations.[14] The parent argues that the student was "an enrolled student"

[14] In his due process complaint notice, the parent identified such "benefits and services" as including things like "access to a guidance counselor, social worker, and librarian" as well as "access to extra-curricular activities, clubs, programs and sports" (Dist. Ex. 2).

and, therefore, "entitled to such services and benefits" and that the 2019 pendency agreement did not exclude provision of such services.

Based on the evidence in the hearing record, the IHO found that although the student was "enrolled" in the district he was not "enrolled" in the district's high school (IHO Decision at p. 32). The IHO further found that the 2019 pendency agreement "did not provide for the student's access to extracurricular activities, such as clubs, program[s], and sports" and, therefore, the denial of access to the services and benefits were not a breach of the pendency agreement (id.).

In an email to the district superintendent dated September 6, 2022, the student's mother requested that the student be given access to the district's guidance counselor, librarian, social worker, extracurricular supports, and services (Dist. Ex. 14 at p. 4). In a letter, dated September 8, 2022, the superintendent responded by stating that the guidance counselor, librarian, and social worker "work only with students who are enrolled in classes within the Westhampton Beach High School" (id. at pp. 1, 8). The district superintendent also stated that the request did not specify the extracurricular supports in which the student wished to be included (id.). Further, with respect to the request for the student to participate in senior activities, the district superintendent stated that the student would be invited to senior activities, i.e., graduation, once the student was exiting the district (id.).

In response to an inquiry about a student with a disability's right to continue to participate in an extracurricular activity while an administrative appeal was pending, the United States Department of Education's Office of Special Education Programs responded that:

> If the activity is included in the student's IEP, it must be considered a part of the student's present educational placement and the student has a right to continue to participate. However, if the activity is not included in the child's IEP, it is not part of the student's present educational placement and the student has no right under Part B to continue to participate in the extracurricular activity.

(Letter to Heldman, 20 IDELR 621 [OSEP 1993]). OSEP's guidance tends to support the IHO's interpretation that the student's access would depend on the contours of the pendency agreement. However, OSEP also warned that: "[e]ven if there is no violation of Part B, depending on the facts of a particular case, denying the student the right to participate in the extracurricular activity could constitute discrimination on the basis of disability in violation of Section 504" (Letter to Heldman, 20 IDELR 621 [OSEP 1993]).[15]

[15] In addition, State regulation requires each board of education to adopt a written policy that establishes administrative practices and procedures:

> to ensure that students with disabilities residing in the district have the opportunity to participate in school district programs, to the maximum extent appropriate to the needs of the student including nonacademic and extracurricular programs and

Pursuant to the 2019 pendency agreement the student received related services at the high school and academic instruction at the public library (Dist. Ex. 15 at p. 2). The agreement is silent regarding other school district resources and extracurriculars activities (id.). To the extent the district's failure to provide the student access to such services and benefits is a matter failing under section 504 or another statute, review of such would be outside of my jurisdiction.[16]

Moreover, even if the matter was reviewable and constituted a violation of the IDEA or State regulation, the parent has not identified with any specificity the extracurricular activities or nonacademic services or benefits the student was precluded from participating in during the 2022-23 school year in either his due process complaint notice or his request for review (see Req. for Rev. at pp. 8-9; Dist. Ex. 2). Accordingly, it is unclear from the hearing record what the parent is seeking, and therefore, there is no basis for finding that any possible denial of services would amount to a denial of FAPE and there is no cognizable relief that can be awarded.

C. Relief - Compensatory Education Services

Turning to the relief requested by the parent, the parent seeks a "back-end compensatory education award" (Req. for Rev. at p. 10). 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

---

> activities, which are available to all other students enrolled in the public schools of the district, which may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities and employment of students, including both employment by the school district and assistance in making outside employment available.

(8 NYCRR 200.2[b][1]). Here, the district did not offer documentary or testimonial evidence about the district's policy, if such policy exists, with respect to students with disabilities' participation in nonacademic and extracurricular activities.

[16] Generally, under the IDEA and State law a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). However, an SRO lacks jurisdiction to consider challenges to an IHO's rulings, or failures to rule on section 504 or ADA claims, as 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. 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, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504 or the ADA, and the parents' arguments pertaining to section 504 and the ADA will not be further addressed.

is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Although the district's failure to develop an IEP before the 2022-23 school year was a procedural violation that denied the student a FAPE, the parent has not articulated in any detail the type of relief sought other than "back-end compensatory education."

In his memorandum of law, the parent claims he is "perplexed" as to how the IHO found that the parent failed to identify the relief he was seeking (Parent Mem. of Law at p. 28). The parent contends "that an appropriate award should reflect reimbursement for the entirety of time that the . . . district was in violation of the IDEA, as well as any additional time necessary to rectify the educational regression suffered by the [student], due to the . . . district's violations" (id. at pp. 28-29). Furthermore, the parent states that the student will age out of the district after the completion of the 2023-24 school year, and it would be "impossible to reimburse the [student] for the compensatory education due within such time frame" (id. at p. 28 n. 33). Accordingly, the parent believes that the "'back end' compensatory education award must be prospective in nature, and therefore must be issued in the form of a monetary judgment capable of facilitating a year's worth of tuition at a post-secondary learning institution" (id.).

The sort of compensatory fund sought by the parent, representing monetization of requested compensatory education services, may be appropriate in certain instance (see, e.g., Streck v. Bd. of Educ. of E. Greenbush Cent. Sch. Dist., 408 Fed. App'x 411 [2d Cir. Nov. 30, 2010] [awarding a student an escrow account with funds for additional reading instruction]; but see Millay v. Surry Sch. Dep't, 2011 WL 1122132, at *10-*12 [D. Maine Mar. 24, 2011] [declining to award a trust fund in light of its order of extended eligibility and setting forth other concerns with the trust fund remedy]); however, to the extent that it resembles monetary damages, particularly to extent the parent requests money to be used for an unspecified post-secondary educational program to be delivered past the student's age of eligibility, the IDEA does not provide for, nor have the courts allowed, monetary damages (see Baldessarre v. Monroe-Woodbury Cent.

Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor v. Vt. Bd. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483-86 [2d Cir. 2002]; R.B. v. Bd. of Educ. of City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]).

Further, the parent has failed to allege what services or instruction the student did not receive during the period of time when the 2022-23 IEP was not developed. In fact, the student continued to receive related services and instruction under the 2019 pendency agreement (see Dist. Ex. 11 at p. 5). Taking the pendency program into account, an award of compensatory education is not warranted (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [finding even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).

As one final matter that should be addressed, even if I were to find that compensatory education was warranted, the parent's actions regarding the scheduling of the CSE meetings for the student's annual review, if considered unreasonable, could be factored into an award of compensatory education and warrant a reduction or denial of an award on equitable grounds.

In a tuition reimbursement case, equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations in the tuition reimbursement context, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M., 758 F.3d at 461 [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

As noted above, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger, 979 F. Supp. at 151). As such, it may be similarly appropriate to consider the conduct of both parties in fashioning equitable compensatory education relief (see Reid 401 F.3d at 524; Puyallup Sch. Dist., 31 F.3d at 1496-97; Application of a Student

with a Disability, Appeal No. 19-120; Application of a Student with a Disability, Appeal No. 18-002).

The parent's actions with respect to the scheduling of the CSE meeting for the student's annual review, specifically, in first refusing to hold the CSE meeting prior to June 2022 despite the district's requests, and then in requesting additional information just prior to the scheduled June 9, 2022 CSE meeting and requiring that the meeting be held at specific times, taken together, establishes a lack of cooperation, which hindered the district's ability to offer the student a FAPE prior to the start of the 2022-23 school year (Parent Exs. A; B; Dist. Ex. 11). In this instance the delays in scheduling the student's annual review are directly corollary to the denial of FAPE, and as such, would warrant a complete denial of relief on equitable grounds (see Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *4 [S.D.N.Y. Mar. 16, 2023]; Ferreira v. New York City Dept. of Educ., 2023 WL 2499261, at *7 [S.D.N.Y. Mar. 14, 2023] [denial of relief on equitable grounds was warranted due to plaintiff frustrating district's ability to conform to IDEA's mandates]).

VII. Conclusion

Based upon the foregoing, the IHO correctly found that the district did not deny the parent meaningful participation in the CSE process or predetermine the placement recommendation for the 2022-23 school year; that the CSE had sufficient evaluative data; that the October 2022 IEP offered the student an appropriate placement in the LRE for the 2022-23 school year; and that the district did not violate the 2019 pendency agreement by employing a substitute teacher, by restricting the duties of the educational consultant and transition coordinator, or by denying the student access to services and benefits in nonacademic and extracurricular activities. However, the IHO's decision that the district's failure to have an IEP in place for the student at the start of the 2022-23 school year was not a denial of a FAPE must be reversed. Lastly, although the student was denied a FAPE, the student is not entitled to the requested compensatory relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated April 28, 2023, is modified by reversing the IHO's finding that the untimely 2022-23 annual review did not result in a denial of FAPE to the student.

Dated: **Albany, New York**
June 23, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER