The University of the State of New York

The State Education Department
State Review Officer
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No. 23-255

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

Appearances:
Gutman Vasiliou, LLP, attorneys for petitioner, by Mark Gutman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory education to remedy respondent's (the district's) failure to offer their daughter an appropriate educational program and services for the 2021-22 and 2022-23 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record in this matter is not well-developed regarding the student's educational history. The student resided in a different school district prior to the 2021-22 school year (prior school district) (see Parent Ex. B). A CSE from the prior school district met on April 8, 2020, found the student eligible for special education as a student with an other health impairment, and recommended that the student receive five 42-minute sessions per week of group resource room services for the 10-month 2020-21 school year (Parent Ex. B. at p. 5).

At some point leading up to or at the beginning of the 2021-22 school year, the student reportedly moved to the district (see Parent Ex. A at p. 2). A CSE convened on August 17, 2021, reviewed a July 2021 social history, a July 2021 psychoeducational evaluation, a July 2021

classroom observation, and a July 2021 occupational therapy (OT) assessment, and found the student ineligible for special education as a student with a disability (Supp. Ex. I).[1, 2] According to the parent, the student began attending a charter school in the district for the 2021-22 school year (Parent Ex. A at p. 2). In October 2021, the student was hospitalized for a week after suffering from an episode of "major depressive disorder" "after verbalizing suicidal intentions" (Parent Exs. C at pp. 1-2, E at pp. 1, 3).

In November 2022 the district completed a social history of the student and conducted a psychoeducational evaluation, followed by a classroom observation in December 2022 (Parent Ex. E at pp. 3, 4; see also Parent Ex. D). On January 5, 2023, a CSE convened to discuss the student's needs and again determined that the student was "not eligible for special education services" because she "d[id] not have a disability as defined in Part 200 of the Regulations of the Commissioner of Education" (Parent Ex. D).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated May 18, 2023, the parent, through her attorneys, alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years, arguing that the district failed to conduct sufficient evaluations of the student, "removed [the student's] access to special education services," and inappropriately found the student ineligible for special education (Parent Ex. A at pp. 1-3). For relief, the parent requested independent educational evaluations (IEEs) at district expense, an order for a CSE to reconvene to recommend the student's placement in an appropriate special education school program, and compensatory education (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on June 26, 2023 (June 26, 2023 Tr. pp. 1-8).[4] During the prehearing conference, the parties confirmed that "[t]here ha[d] been a partial resolution agreement that includes the IEEs and the CSE reconvening, but the compensatory education ha[d]

[1] Although not marked or entered into evidence as an exhibit, the district included the August 17, 2021 prior written notice with the hearing record filed with the Office of State Review, indicating on its certification of the hearing record that it was a supplementary document required by State regulations (see Dist. Cert. of Record). For purposes of this decision, the August 2021 prior written notice will be cited as "supplementary exhibit I" (i.e., Supp. Ex. I).

[2] The July 2021 evaluations relied upon by the August 2021 CSE were not included in the hearing record.

[3] The district's January 10, 2023 prior written notice indicated that "the IEP Team conducted a social history, psychoeducational evaluation, classroom observation, and other appropriate assessments or evaluations" (Parent Ex. D). However, copies of the assessments or evaluations were not included in the hearing record. In addition, although the prior written notice indicated that a summary of the CSE's "evaluation describing [the] child's present level of functioning" was attached, no such attachment is included with the document in evidence (id.).

[4] The transcript of the prehearing conference was not paginated consecutively with the transcripts for the subsequent proceedings. Therefore, for purposes of this decision, the cites to the prehearing conference transcript will be preceded by the date.

not been resolved" (June 26, 2023 Tr. p. 4). Status conferences were held on August 15, 2023 and September 28, 2023 (Tr. pp. 1-15). An impartial hearing took place October 19, 2023 (Tr. pp. 16-50). The district did not present any documentary or testimonial evidence during the impartial hearing (Tr. pp. 20, 22). The parent offered several exhibits into evidence, including the IEEs that had been completed pursuant to the parties' agreement, and the affidavit testimony of the clinical director of the agency that performed the November 7, 2023 independent neuropsychological evaluation, who also appeared for cross-examination during the impartial hearing (Tr. pp. 33-45, see Parent Exs. A-H).

In a decision dated October 25, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years but denied the parent's request for an award of compensatory education (IHO Decision at pp. 17, 20). Initially, the IHO found that the parent did not allege that, when the student moved to the district, the district failed to provide services comparable to those provided by the former school district pursuant to State regulation (id. at pp. 15-16). In addition, the IHO found that the district "followed proper procedures in re-evaluating the student prior to declassification" in fall 2021, that the district did not have to conduct an OT evaluation at that time given information that the prior school district had discontinued the student's OT, and that there was no basis for the district to conclude that autism testing was needed (id. at p. 16). The IHO went on to note that the hearing record was unclear with respect to the dates and contents of a social history, classroom observation, and psychoeducational evaluation conducted by the district and the with respect to the information made available to the CSE about the student's initial diagnoses or receipt of counseling services and attributes the lack of clarity, in part, to the parent's decision not to testify at the impartial hearing (id. at pp. 16-17). Nevertheless, the IHO concluded that the district "chose not to present witnesses or evidence, and did not provide a cogent and responsive explanation for the CSE's decision to declassify the student" and that, therefore, she was "constrained to find that the[] [district] failed to meet [its] burden of proving that [it] provided a FAPE to the student for the 2021-22 and 2022-23 school years" (id. at p. 17). Thus, although the IHO expressed "considerable concern about the lack of credible allegations in the [due process complaint notice], the conflicting evidence in the record, and other equitable considerations," she found that the district failed to meet its burden of proof (id.).

Regarding compensatory education, the IHO first noted that the parent chose not to testify to "fill[] in many of the gaps" in the evidence, opined that "a lot of relevant information was left out" of the due process complaint notice, and questioned why the parent did not file her complaint sooner (IHO Decision at p. 17). The IHO found the omissions in the due process complaint notice "significantly impact[ed] the credibility of the Parent's case and similarly weigh[ed] against [her] in terms of the equities" (id. at pp. 17-18). Next, the IHO questioned the "link" between the student's deficits and the alleged denial of a FAPE and noted information from the neuropsychological evaluation that the student demonstrated improved performance in certain areas "even without mandated services" (id. at p. 18). The IHO also found that the student received support during the disputed school years including private therapy and "at some point counseling" and access to "a quiet room for breaks . . . during school to help her when she felt overwhelmed" and was "on track to graduate" at the end of the 2023-24 school year (id.). However, the IHO also noted the lack of evidence regarding the student's performance in school during the 2021-22 and 2022-23 school years (id.). Regarding the IEEs, the IHO expressed concerns about the credentials of the individual who administered testing for the neuropsychological evaluation, the time spent completing the evaluation, the information reviewed, and the recommendations made (id. at pp. 7-

11, 18-20). Further, the IHO found that the IEEs did not inform the hearing record "about the student's needs two years ago and what should have been implemented at that time" (id. at p. 19). The IHO stated that the hearing record lacked information from the student's therapist or parent or information about school performance (id. at pp. 19-20). The IHO expressed concern that a large award of compensatory education could overwhelm the student (id. at p. 20). Regarding 12-month services and parent counseling and training, the IHO found insufficient explanation in the hearing record regarding the need for these services and noted that the parents received "family training and support" in December 2021 after the student was hospitalized (id. at pp. 15, 20). In summary, the IHO found that the compensatory education recommendations were "unsupported by the record, there is insufficient link between the student's current deficits and the alleged FAPE deprivation, the equities do not support a compensatory remedy, and such an award could overwhelm the student" (id. at p. 20).

As relief, the IHO ordered the district to conduct a psychiatric evaluation, a vocational assessment, a social history update, and a classroom observation of the student and to convene the CSE within ten days of the completion of those reports (IHO Decision at pp. 20-21). The IHO further ordered the district to provide the student with five 30-minute sessions per week of individual counseling (id.).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and, therefore, the allegations and arguments will not be recited here in detail. The gravamen of the parent's appeal is that the IHO erred in failing to award compensatory education to remedy the district's denial of a FAPE to the student for the 2021-22 and 2022-23 school years.[5]

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

[5] In its answer, the district argues that the parent abandoned her request for IEEs by not challenging the IHO"s adverse finding; however, the parties agreed during the impartial hearing that the district would fund the IEEs and the evaluations were completed and included in the hearing record (June 26, 2023 Tr. p. 4; Parent Exs. E; H). Accordingly, it is unclear to what adverse determination related to IEEs the district is referring.

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]).[6]

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, neither the parent nor the district appealed the IHO's determination that the district denied the student a FAPE for the 2021-22 and 2022-23 school years or the IHO's order that the district provide the student with five 30-minute sessions per week of individual counseling until the CSE reconvenes. Accordingly, these determinations are final and binding upon the parties and will not be further discussed (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]). The appeal is limited to the relief awarded by the IHO.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125 [2d Cir. [2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). 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

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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"]).

The parent submitted both documentary and testimonial evidence of the student's need for compensatory services (Tr. pp. 34-36; see Parent Exs. E, F, H). During the impartial hearing, the district did not offer any evidence related to the request for compensatory education, although the district disputed the parent's requested compensatory education (Tr. pp. 24, 26). Specifically, the district argued that, since the student was found ineligible for special education "by a duly constituted IEP team," the IHO should deny the parent's requested relief (Tr. p. 26). However, the district presented no evidence demonstrating that the CSEs' eligibility determinations were appropriate.

The parent sought an award of 184 hours of counseling, 92 hours of OT, and 92 hours of parent counseling and training as compensatory education to remedy the two-year denial of a FAPE (Tr. pp. 22-23; Parent Ex. E at pp. 20-21). The requested compensatory education was recommended and explained in the neuropsychological evaluation, the testimony of the clinical director of the organization that conducted the neuropsychological evaluation (clinical director), and the OT evaluation.

The IHO's concerns about the credentials of the individual who administered testing for the neuropsychological evaluation are not supported by the hearing record (see IHO Decision at pp. 7-8, 9, 19). The neuropsychological evaluation lists three individuals as the evaluators: a clinical extern who held a bachelor of science (BS), a doctor of education (EdD) who held certification as a speech-language pathologist (CCC-SLP) and as a Board Certified Behavior Analyst—Doctoral (BCBA-D), and a supervising neuropsychologist who held a doctor of philosophy (PhD) and certification by the American Board of Professional Psychology (ABPP) (Parent Ex. E at pp. 1, 21). The extern and the supervising neuropsychologist signed the evaluation (id. at p. 21). Under the heading "Informed Consent," the evaluation report reflects that the parent was informed of the extern's role "who would conduct the assessments and complete the report under the supervision of [the supervising] neuropsychologist" (id. at p. 5). The IHO questioned the clinical director during the impartial hearing about his role in the evaluation and the basis for his knowledge, but neither the IHO nor the district questioned the witness about the propriety of a clinical extern conducting aspects of the standardized assessments, how much of the evaluation

was conducted by the extern, or the degree to which that individual was qualified or supervised (see generally Tr. pp. 36-39).[7]

The neuropsychological evaluation was based upon "parent interviews, parent and teacher questionnaires, evidence-based measures, record review, and clinical observations" (Parent Ex. E at p. 1). For the record review, the evaluators reviewed the April 2020 IEP developed by the student's prior school district,[8] a December 2021 treatment plan developed as a result of the student's psychiatric hospitalization, a November 2022 psychoeducational evaluation that also reported results from a July 2021 evaluation of the student, a November 2022 social history, a December 2022 classroom observation, and January 2023 present levels of performance (id. at pp. 3-4). The evaluators attempted to contact the student's therapist but received no reply (id. at p. 4). The evaluation was conducted with the student over at least three sessions (id at pp. 5-6). The evaluators administered several tests and measures (id. at pp. 6-16, 22-36). The evaluation includes a summary of the results of the evaluation, indicates that the student met the criteria for diagnoses with major depressive disorder and generalized anxiety disorder, and offered recommendations for educational programming and compensatory education (id. at pp. 17-21).

The neuropsychological evaluation report indicated the student "ha[d] significant difficulties with her social emotional functioning" and that "her depressive and anxious symptoms significantly affect[ed] her adaptive functioning and academic performance" (Parent Ex. E at p. 18). According to the evaluation report, the student required "compensatory education programming" because of "the absence of appropriate educational services" during the time in question (id. at p. 20). The evaluators recommended compensatory education consisting of 92 hours of counseling (two hours per week times 46 weeks) per year, 46 hours of OT (one hour per week times 46 weeks) per year, and 46 hours of parent counseling and training (one hour per week times 46 weeks) per year (id. at pp. 20-21). The evaluation report stated that 12-month services were warranted "[d]ue to the magnitude of her social-emotional difficulties" and "to prevent regression during summer months" (id at p. 19; see Tr. p. 35). The clinical director testified that the recommendation for compensatory counseling services was "based on the level of pathology that was found during the course of the evaluation" (Tr. p. 35). The clinical director stated that "intensive counseling services" were required to address the student's "pretty severe" depressive disorder and anxiety disorders (id.).

[7] As additional evidence with her request for review, the parent offers an affidavit from the clinical director addressing the concerns raised by the IHO (see Req. for Rev. Ex. A). The district objects to the consideration of the additional evidence. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, as the IHO's concerns about the evaluation are not supported by the hearing record, it is not necessary to consider the additional affidavit.

[8] The April 2020 IEP listed September 8, 2020 as the projected date for implementation of the IEP (Parent Ex. B at p. 1). Therefore, in referring to the IEP dated September 8, 2020, it is understood that the evaluators were referring to the April 2020 IEP (see Parent Ex. E at p. 4).

The clinical director testified that in 2021 the student was hospitalized and "diagnosed with major depressive disorder" (Tr. p. 38). She stated that "[t]he only way that prior levels of functioning could be assessed [was] through interview and record review" (Tr. p. 39). Given that a review of the student's records and background information "suggest[ed] that the child's functioning [in 2021] was similar to how the child [was] functioning today, in that the child was not functioning well" (Tr. p. 38). The clinical director testified that the student had been "in crisis" in 2021, and that the student "continue[d] to be in crisis" although "[t]he pathology ha[d] changed somewhat" (Tr. p. 40). In 2021 the student "engag[ed] in self-injurious behaviors and had a high degree of suicidal ideation" but that now the student "report[ed] that she sometimes hears things that [are not] there, or sees things that [are not] there" (id.). The clinical director testified that "based on the evaluation, those psychotic features seem[ed] to be a function of the major depressive disorder, which [was] exactly what she was struggling with two years ago" (id.).

The OT evaluation was conducted on September 2, 2023 (Parent Ex. H at p. 1). The evaluation included a history and background provided the parent, information provided by the student's school counselor, observation of the student, a review of records similar to those reviewed as part of the neuropsychological evaluation, and administration of several standardized assessments (id. at pp. 1-2). In her report, the occupational therapist documented information from the student's school counselor who reported that the student's "biggest barrier[] to participation in school [was] her anxiety and becoming easily overstimulated" and "she struggle[d] to identify or use coping skills effectively" (id. at pp. 2, 23). The occupational therapist identified that the student "exhibit[ed] significant sensory processing and regulation difficulties" that "impact[ed] her ability to learn and function in the school and home environment" (id. at p. 23). The student "exhibit[ed] difficulty with some aspects of executive function" as well as "decreased strength and postural control" and "deficits in visual perception, visual-motor skills and fine motor coordination" (id. at p. 24). The occupational therapist indicated that the student's "deficits impact[ed] her ability to attend school, access learning in a classroom as well as participate appropriately in community settings" (id.). The occupational therapist indicated that the student was "not being provided with sufficient clinical intervention to meet her current needs" and she recommend the student receive OT (id. at p. 24). In addition, the occupational therapist recommended compensatory OT "based on a quantitative and qualitative approach considering what [the student] should have been receiving" (id. at p. 25). She indicated the student "need[ed] to minimize the gaps that [were] present and make up for a lack of appropriate mandate and intervention plan" since September of 2021 "which she needed" (id.). Based on these considerations, the occupational therapist recommended 80 hours of compensatory OT (one hour per week times 40 weeks times two years) (id.).

The concerns expressed by the IHO about the qualifications of the extern who participated in conducting assessments, the time the evaluators spent completing the evaluation, the information reviewed, and the recommendations made go to the weight to be accorded the recommendations (IHO Decision at pp. 7-11, 18-20). However, as the district offered no evidence against which to weigh the IEEs and offered no rebuttal testimony, I do not find that the diminished weight that the IHO accorded the IEEs was warranted in this instance. As summarized above, the evaluators described the basis for their recommendations, which were not, on their face, excessive or punitive in amount or nature given the district's uncontested failure to provide the student with special education for two school years. Further, contrary to the IHO's finding that the compensatory education was not sufficiently "link[ed]" to the denial of a FAPE (IHO Decision at

p. 18), the evaluators indicated that the student should have been receiving counseling and OT services for two years and that the recommendations were intended to make-up for that deprivation (see Parent Exs. E at p. 20; H at p. 25). The IHO cites to excerpts from a district evaluation that were set forth in the neuropsychological evaluation that the student had made "steady growth" despite the lack of special education but also acknowledged the lack of information in the hearing record about the student's performance during the school years at issue and other information that the student was failing classes at one point and had been experiencing severe depression and anxiety (see IHO Decision at p. 18). Accordingly, the evidence is not sufficient to determine that the student's progress was such that no compensatory education services were warranted. Finally, the IHO expressed concern that an award of compensatory education world overwhelm the student (id. at p. 20); however, the recommended services were intended to address the student's difficulties with anxiety and overstimulation and offer coping skills to help the student with such feelings.

The IHO found several areas in which the hearing record was not well developed. However, the IHO erred in faulting the parent for several of those gaps in the hearing record. For example, the IHO found that the hearing record was not well developed regarding the student's needs at the time of the August 2021 CSE meeting that found the student ineligible for special education or her performance during the 2021-22 and 2022-23 school years (IHO Decision at pp. 19-20 [finding that the IEEs did not inform the hearing record "about the student's needs two years ago and what should have been implemented at that time" and that the hearing record lacked a "school observation and information about current school performance"]). But it was the district's burden to present evidence of the student's needs during these time frames and, as it purportedly convened CSEs in August 2021 and January 2023 to consider the student's needs, it had that information within its custody and control but chose not to present it (see Parent Ex. D; Supp. Ex. I). This type of rationale—denying relief based on a lack of information about a student's needs—has been found to improperly switch the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

In addition to carrying the burden to defend the CSEs' ineligibility determinations, the district was also required under the due process procedures set forth in New York State law to address the parent's request for relief by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not the IHO's or the SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. Once again, during the impartial hearing, the district failed to offer contrary evidence regarding an appropriate compensatory education award, failed to offer any documentary evidence and called no witnesses (Tr. p. 20).

Although the district carries the burden of proof, parents are still expected to identify and take a position regarding how the requested relief would make up for the district's alleged violations. In this matter, the parent did so and provided a sufficient evidentiary basis for the requested remedy.

While I do not agree with the IHO's wholesale rejection of the recommendations set forth in the IEEs, there are some particular observations and concerns raised by the IHO which the parent does not grapple with in her appeal. For example, the IHO found insufficient evidence to support a calculation of compensatory education based upon a 12-month school year noting that the statement in the neuropsychological evaluation that the student needed year round instruction to prevent regression was unsupported and conclusory and that the OT IEE relied on a 10-month school year in calculating an appropriate compensatory award (IHO Decision at p. 15). Next, the IHO questioned the recommended compensatory parent counseling and training, finding insufficient explanation in the hearing record regarding the need for it (id. at p. 20). On appeal, other than requesting the full award of compensatory education, the parent does not challenge these particular findings and rationales of the IHO. Accordingly, I will award counseling, OT, and parent counseling and training services for a 10-month school year and will award only the equivalent of one monthly session of parent counseling and training instead of the weekly session requested by the parent.[9]

Finally, in denying compensatory education, the IHO also faulted the parent for not including more information in the due process complaint notice, for not filing the due process complaint notice sooner, and for not testifying (IHO Decision at p. 17). However, the parent's attorneys drafted the due process complaint notice complaint and included a sufficient recitation of the "nature of the problem of the student relating to [the district's] proposed or refused initiation or change, including facts relating to such problem" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]) within the two year statute of limitations period (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). That the parent did not present more than what was required by State regulation is not an appropriate equitable ground to deny relief under the circumstances of the present matter. Further, I agree with the parent that, had the IHO given the parent notice of her concerns with the gaps in the record, the parent, who was present at the impartial hearing, may very well have decided to testify. However, the parent reasonably believed that any factual omissions were attributable to the district's failure to present any evidence or argument at the impartial hearing.

Accordingly, and contrary to the IHO's findings, I find that there was sufficient evidence in the hearing record to support an award of compensatory education for the 2021-22 and 2022-23 school years.[10] While the hearing record could be better developed in some respects, "[o]nce a

[9] The 10-month school year consists of 36 weeks (180 school days divided by 5 days per week) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]).

[10] The student has not been deemed eligible for special education services since prior to moving to the district. There is some authority that supports the position that compensatory education relief may not be warranted in a dispute absent a finding that a student is eligible for a FAPE (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249-50 [3d Cir. 2012]; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. June 1, 2012]

plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students" (Stanton v. Dist. of Columbia, 680 F. Supp 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at *1 [D.D.C. Jan. 3, 2017]). Thus, based on the foregoing discussion, I find that the student is entitled to compensatory education for those school years in the amount of 144 hours of counseling, 72 hours of occupational therapy, and 20 hours of parent counseling and training. The compensatory education should be used within two years, which will give the student and her providers sufficient flexibility in using the hours awarded in this decision.

As a final matter, I decline to modify the IHO's order for district evaluations of the student or for the CSE to convene to consider the student's eligibility for special education based on the IEEs discussed herein and the new district evaluations. The parties are free to agree to forego the district evaluations if they prefer to rely on previously administered assessments. As to the reconvene, the parent requests that the district be ordered to develop an IEP for the student with specific programming recommendations; however, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Here, as the hearing record does not include the district's evaluations of the student or information about the student's performance in school, it would be premature to require an IEP and/or specific programming recommendations.

[holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225-26 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding consideration of alleged procedural errors of IDEA unnecessary when student was not eligible for special education services]; D.H.H. v. Kirbyville Consol. Ind. Sch. Dist., 2019 WL 5390125, at *6 [E.D. Tex. Jul. 12, 2019] [finding a school district does not violate the IDEA if it declines to provide special education to a student who does not need special education and does not qualify as a child with a disability under the IDEA]; see also Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 [5th Cir. 2003]). However, putting aside the student's eligibility, an IHO may find that procedural inadequacies rise to the level of a denial of a FAPE if they significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]) and there is no prerequisite in the statute or regulations that the student be eligible for special education prior to reaching such a conclusion. Moreover, the district has not pointed to any authority from a jurisdiction such as New York, which places the burden of proof on the district, that supports the premise that the district can avoid its burden of proof on the question of eligibility but ultimately prevail by relying on the challenged finding of the CSE that the district failed to defend (i.e., the student's ineligibility). To find otherwise would turn the burden of proof statute on its head and serve to encourage districts to disavow their statutory burden in future eligibility disputes.

VII. Conclusion

The evidence in the hearing record does not support the IHO's denial of compensatory education. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 25, 2023 is modified by reversing that portion which denied compensatory education relief for the 2021-22 and 2022-23 school years;

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the district shall provide the student with compensatory education consisting of 144 hours of counseling, 72 hours of occupational therapy, and 20 hours of parent counseling and training; and

IT IS FURTHER ORDERED that the compensatory education awarded herein shall be available for two years from the date of this decision and will expire thereafter.

Dated: **Albany, New York**
January 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER