The University of the State of New York

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

No. 23-305

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin McCormack-Herbert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied in part their request for compensatory educational services for the 2020-21 school year and a portion of the 2021-22 school year and which determined that the educational programs respondent's (the district's) Committees on Special Education (CSEs) had recommended for their son for the 2021-22 and 2022-23 school years were appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the proceeding and the IHO's decision will not be recited here in detail. Briefly, a Committee on Preschool Special Education (CPSE) convened on February 23, 2021, and found the student eligible for special education as a preschool student with a disability (Parent Ex. L at pp. 1, 4, 18). The CPSE recommended that the student receive 10-month services consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute

sessions per week of individual occupational therapy (OT) to be implemented beginning on March 8, 2021 (id. at pp. 4, 15-16, 18).

A CPSE convened on February 16, 2022 to conduct an annual review (Parent Ex. B at pp. 1, 3). The February 2022 CPSE recommended that the student receive seven hours per week of individual special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, and two 30-minute sessions per week of individual OT to be implemented beginning on March 15, 2022 (id. at pp. 1, 15).

A CSE convened on May 9, 2022 to develop an IEP for the student for the 2022-23 school year to be implemented on September 1, 2022 (Dist. Ex. 9 at pp. 1, 26). Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended 10-month services consisting of one period per week of direct, individual special education teacher support services (SETSS) in math, two periods per week of direct, individual SETSS in English language arts (ELA), three 30-minute sessions per week of individual counseling services, one 30-minute session per week of individual OT pushed in to the general education classroom, one 30-minute session per week of individual OT in a separate location, one 30-minute session per week of individual speech-language therapy in a separate location, one 30-minute session per week of individual speech-language therapy pushed in to the general education classroom, and one 30-minute session per week of speech-language therapy in a group of two pushed in to the general education classroom (id. at pp. 1, 20-21, 26).

For the school years at issue, the student attended the district placements as recommended by the CPSEs and CSE.

A. Due Process Complaint Notice

In a due process complaint notice, dated September 7, 2022, consisting of 94 enumerated paragraphs as well as a number of subparagraphs, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years (Parent Ex. A at pp. 2, 8-12, 14-15). The parents asserted that every IEP for the school years in question was procedurally and substantively deficient, that the district had failed to properly assess and address the student's needs, and that the district further violated the student's constitutional rights, his rights pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), and had engaged in systemic violations of the IDEA (id. at pp. 8-15). As relief, the parent sought findings that the district denied the student a FAPE for the 2020-21, 2021-22 and 2022-23 school years, district funding of independent educational evaluations (IEEs), and compensatory educational services (id. at pp. 14-15).

B. Impartial Hearing Officer Decision

An impartial hearing before the Office of Administrative Trials and Hearings (OATH) convened on August 17, 2023 and concluded on October 6, 2023 after five hearing dates devoted

to the merits (Tr. pp. 20-376).[1, 2] In an interim decision dated December 7, 2022, the IHO ordered the district to fund the cost of an independent neuropsychological evaluation, an independent autism/applied behavior analysis (ABA) assessment, an independent OT evaluation, an independent speech-language therapy evaluation, an independent assistive technology evaluation, an independent vision processing evaluation, and an independent observation of the student by a Board Certified Behavior Analyst (BCBA) for the development of a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) (Interim IHO Decision at pp. 4-5).[3]

By final decision dated November 9, 2023, the IHO determined that the district denied the student a FAPE for the 2020-21 school year based on the district's failure to timely develop an IEP when the student turned three in June 2020 (IHO Decision at p. 29). The IHO further found that the February 2021 IEP recommendations for speech-language therapy and OT were appropriate but that the failure to recommend SEIT services was not appropriate (id. at pp. 29-30). In sum, for the 2020-21 school year, the IHO determined that the student did not receive appropriate speech-language therapy and OT services from the first day of the 10-month 2020-21 school year through the implementation date of the February 2021 IEP, which was March 8, 2021 (id.). The IHO further found that the student did not receive the SEIT services that he required for a FAPE for all of the 10-month 2020-21 school year (id.).

Next, the IHO found that the district did not offer the student a FAPE for that portion of the 2021-22 school year which preceded the implementation of the February 2022 IEP (IHO Decision at pp. 30-32). The IHO found that the district did not provide the student with the SEIT services that he required to receive a FAPE from the first day of the 10-month 2021-22 school year through March 15, 2022, which was the implementation date of the February 2022 IEP (id. at p. 30).[4] The IHO then determined that the February 2022 IEP was substantively appropriate and

[1] A prehearing conference was held on November 4, 2022 (Nov. 4, 2022 Tr. pp. 1-28) and status conferences were held on December 5, 2022 (Dec. 5, 2022 Tr. pp. 1-16), January 19, 2023 (Jan. 19, 2023 Tr. pp. 1-9), February 15, 2023 (Feb. 15, 2023 Tr. pp. 1-8), March 21, 2023 (Mar. 21, 2023 Tr. pp. 1-9), April 19, 2023 (Apr. 19, 2023 Tr. pp. 1-8), May 19, 2023 (May 19, 2023 Tr. pp. 1-9), June 15, 2023 (June 15, 2023 Tr. pp. 1-7), and July 19, 2023 (Tr. pp. 1-19). The transcripts for the first seven conference dates were not paginated consecutively with the remaining transcripts. The transcript for the status conference held on July 19, 2023 and the remaining impartial hearing dates are paginated consecutively (Tr. pp. 1-376). To the extent that it is necessary to cite to any of the first seven transcripts for the conference dates, they will be cited by the hearing date and page number. However, because the transcripts for the last status conference and the impartial hearing dates are consecutively paginated, the transcript cites for the hearing dates will not be preceded by the hearing date in this decision (Tr. pp. 1-376).

[2] The IHO issued her first interim decision on pendency on November 15, 2022, after the November 4, 2022 prehearing conference, at which the district did not appear (Nov. 15, 2022 Interim IHO Decision at p. 1). The IHO issued two subsequent interim decisions on pendency based on an agreement between the parties (Dec. 9, 2022 Interim IHO Decision at pp. 1, 3; Dec. 13, 2022 Interim IHO Decision at pp. 1, 3).

[3] The IHO's interim decision stated that the BCBA would develop a "positive behavioral plan," however the parent clarified that the due process complaint notice was "misworded" and that she was requesting a BIP (Nov. 4, 2022 Tr. p. 11).

[4] The IHO's decision incorrectly listed the IEP implementation date as March 16, 2022 (compare IHO Decision at p. 30, with Parent Ex. B at p. 15).

offered the student a FAPE (id. at pp. 30-32). Next, the IHO addressed a six-week delay in the implementation of the SEIT services recommended in the February 2022 IEP (id. at p. 32). The IHO found that the district failed to offer an explanation for the delay and failed to demonstrate that any make up services were offered to the student (id. at p. 32). The IHO then determined that the student was denied a FAPE from the first day of the 10-month 2021-22 school year through April 26, 2022, when the district began providing the student with SEIT services (id.).

Turning to the 2022-23 school year, the IHO found the parents' claims lacked merit (IHO Decision at pp. 32-33). Specifically, the IHO found that the student had been properly evaluated, that the May 2022 CSE considered sufficient evaluative information, and the May 2022 IEP recommended appropriate 10-month services consisting of SETSS, OT, speech-language therapy, and counseling (id.). The IHO denied the parents' request for an independent physical therapy (PT) evaluation (id. at pp. 33-34).

With regard to the parents' requests for compensatory educational services, the IHO determined that the district failed to provide the student with appropriate speech-language therapy and OT from the first day of the 10-month 2020-21 school year through March 2021, and failed to provide the student with appropriate SEIT services for all of the 10-month 2020-21 school year and from the first day of the 10-month 2021-22 school year through April 26, 2022 (IHO Decision at p. 34). Utilizing a quantitative analysis, the IHO calculated that the student was deprived of one hour each of speech-language therapy and OT for 22 weeks and was deprived of seven hours per week of SEIT services for 65 weeks (id.). The IHO then found that speech-language therapy and OT were still areas of need for the student and that an award of 22 hours each of compensatory education was appropriate (id.). The IHO determined that there was no support in the hearing record to award the number of hours of compensatory educational services recommended by the parents' independent evaluators (id. at pp. 34-35). Turning to the parents' request for compensatory SEIT services, the IHO found that, although the student had not received approximately 65 weeks of SEIT services, the hearing record did not indicate a need for compensatory educational services (id. at p. 35). The IHO noted that, according to the hearing record, "the student ha[d] been performing grade-level academic work with no issues" and the independent neuropsychological evaluation report reflected that the parent had "no concerns over academics" (id.). The IHO further described that the SEIT report and the May 2022 IEP indicated that "the student responded positively to SEIT services and was doing quite well. He ha[d] been receiving SEIT services ever since – first under the 2/16/22 IEP and then through pendency" (id.). The IHO determined that there was no indication in the record that the student was not performing well academically, and as a result there appeared "to be no educational losses actually caused by the deprivation of SEIT services" (id.). The IHO went on to note that, even if the student had exhibited academic deficits, she was not inclined to award make-up services as the primary needs addressed by the SEIT were attentional and behavioral in nature and not academic (id.). The IHO then reviewed the parents' remaining requests for relief and declined to award them (id. at pp. 35-36). As relief for the above-described denials of a FAPE to the student, the IHO ordered the district to "provide" 22 hours each of individual speech-language therapy and individual OT as a bank of compensatory educational services to be delivered by a "provider of the [p]arents' choosing at the reasonable market rate," and that the bank of hours would expire one year after the date of the order (id. at p. 36). The IHO also ordered the district to reconvene the CSE to consider all evaluative material and develop an IEP with an appropriate program and services in light of her findings (id.).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO failed to rule on all the issues raised in the due process complaint notice and erred by deeming some of the claims abandoned. The parents further allege that the IHO improperly declined to recuse herself and failed to disclose her experience, failed to hold the district to its burden of proof, and prevented the parents from fully developing the hearing record. The parents also contend that the IHO erred in failing to find a denial of a FAPE for all of the procedural and substantive claims alleged in the due process complaint notice for the 2020-21 school year. The parents further allege that the IHO erred in finding the February 2022 and May 2022 IEPs appropriate. As relief, the parents request an independent PT evaluation and compensatory educational services in the banks of hours recommended by the independent evaluators. In addition, the parents attach documents to the request for review for consideration as additional evidence.

In an answer, the district denies the parents' allegations and argues that the IHO's decision should be affirmed in its entirety. The district also attaches documents to its answer for consideration as additional evidence, and objects to the parents' additional evidence.

In a reply, the parents object to the district's additional evidence.[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]).

[5] I will briefly address the parties' requests that I consider additional evidence (specifically, proposed exhibits A-E submitted with the parents' request for review and proposed exhibits 1-2 submitted with the district's answer). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The parents' proposed exhibits A and B were included with the certified hearing record on appeal and, therefore, are duplicative and will not be accepted. The parents' proposed exhibits C and D were offered as evidence during the impartial hearing, but the IHO did not enter them into the hearing record, finding them not relevant (Tr. pp. 9, 338). The parents have not articulated the basis for alleging that the IHO erred in refusing to enter the exhibits into evidence; accordingly, I decline to disturb the IHO's evidentiary ruling. Finally, I decline to consider the remaining documents submitted by both parties as they were available at the time of the impartial hearing and are unnecessary in order to render a decision.

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]).[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

A. IHO Recusal

As a preliminary matter, the parents assert that the assignment of an IHO from OATH, who is an employee of the City of New York presents an inherent conflict of interest and violated applicable law and that the IHO's denial of the parents' recusal motion was erroneous.

Initially, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

[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).

Recently, in response to a significant increase in the number of due process complaint notices filed in the district, an agreement between the New York State Education Department (NYSED), the New York City Department of Education, and OATH, dated December 1, 2021, explained a transition of the handling of special education impartial due process hearings in the district to OATH and provided for a separate special education unit to be staffed by IHOs employed by OATH (see Memorandum of Agreement [Dec. 1, 2021], available at http://www.nysed.gov/common/nysed/files/office-of-administrative-trials-and-hearings-memorandum-of-agreement.pdf). The Mayor of the City of New York issued Executive Order No. 91 on December 27, 2021 to further implement the transfer (Executive Order [de Blasio] No. 91 [Dec. 27, 2021], available at https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-91.pdf).

In their oral application for recusal, the parents argued that "the city in this case is a real party and interest in the mayor controlled both [sic] OATH and the New York City Department of Education" and that there is an "impermissible structural conflict of interest for the IHOs to be employees of the city rather than independent contractors" (Nov. 4, 2022 Tr. p. 5).

In review of the parents' claim and the above referenced authority regarding the transfer of special education due process hearings in New York City to OATH, I find the parents' claim to be a systemic one. An SRO lacks jurisdiction to consider a parent's claims with respect to alleged systemic violations, 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"]). Generally, "systemic violations [are] to be addressed by the courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 W L 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). One systemic challenge brought regarding the change from per diem IHOs to OATH IHOs was unsuccessful (Gronbach et. al v. New York State Educ. Dep't et.al, Index No. 910574-21 [N.Y. Sup. Ct. Alb. Cnty August 22, 2022]), and the attorneys for the parent filed a federal action which appears to remain pending (E.F. v. Adams, 2022 WL 601999, at *5 [S.D.N.Y. Mar. 1, 2022]).

Here, the parents' arguments in favor of recusal included no specific allegations against this particular IHO with respect to her impartiality or qualifications but rather were limited to the systemic issues discussed above. Federal regulations specify that the impartial hearing officer may not be "[a]n employee of the SEA or the LEA that is involved in the education or care of the child" (34 CFR 300.511[c][1][i][A]), and there is no allegation or evidence that the IHO in this matter was an employee of the LEA, much less one that was involved in the education or care of the student. Accordingly, I find no reason for reversal on the basis that the IHO lacked impartiality or qualifications or that she erred in denying the parents' request that she recuse herself from the matter (Nov. 4, 2022 Tr. p. 6).

B. FAPE and Compensatory Education

The district does not appeal from the IHO's determinations that the student was not offered a FAPE for the 2020-21 school year and for a portion of the 2021-22 school year (see IHO Decision at pp. 29-32). Accordingly, the IHO's determinations have become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

Turning to the substance of the parents' appeal, upon careful review, the hearing record reflects that the IHO, in a well-reasoned decision, correctly reached the conclusion that, other than the specified grounds stated for the finding that the district did not offer the student a FAPE for the 2020-21 school year and for a portion of the 2021-22 school year, the remaining aspects of the February 2021 CPSE's recommendations were appropriate (see IHO Decision at pp. 29-30). The IHO also correctly determined that, once the student's February 2022 IEP was fully implemented for the remainder of the 2021-22 school year, the student was offered a FAPE (id. at pp. 30-32). In addition, the IHO correctly determined that the May 2022 IEP offered the student a FAPE for the 10-month 2022-23 school year (see id. at pp. 32-33). The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parents' due process complaint notice, and set forth and applied the proper legal standards to determine whether the district offered the student a FAPE and whether the student was entitled to compensatory educational services (id. at pp. 5-36). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her 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 no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.[7]

Briefly, with respect to the February 2021 IEP, the IHO found that it did not offer the student a FAPE based on the lack of a recommendation for SEIT services (IHO Decision at p. 30), and the parents do not point to any convincing basis for modifying the IHO's findings that the IEP was otherwise appropriate (id. at pp. 29-30). Further, as to the procedural grounds cited by the parents, even if the district failed to meet its burden to address the parents' challenges to the CSE

[7] The parents also allege that the IHO erred in finding no violation of section 504. However, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, 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 does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

process and the provision of required notices, this would not warrant a modification to the IHO's compensatory award (see J.N. v. Jefferson County Bd. of Educ., 12 F.4th 1355, 1366 [11th Cir. 2021] [finding that a right to compensatory education as relief turns on whether a procedural violation resulted in a loss of educational opportunity for the student]; Maine Sch. Admin. Dist. No. 35 v. Mr. R., 321 F.3d 9, 19 [1st Cir. 2003] [recognizing "that compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA"]).

Regarding the February 2022 IEP, as summarized above, the CPSE convened on February 16, 2022 (Parent Ex. B at p. 1). The district received progress reports from the student's OT and speech-language providers prior to the CPSE meeting (Parent Ex. RR at ¶ 74; Dist. Exs. 6; 7). Review of the February 2022 IEP reveals the February 2022 CPSE considered the January 31, 2022 speech-language progress report, which included results of formal speech-language testing, and the February 7, 2022 OT progress report (Parent Ex. B at pp. 4, 5-6; Dist. Exs. 6; 7; see IHO Decision p. 13). The February 2022 CPSE recommended the student receive two individual OT sessions per week for 30 minutes, two individual speech-language therapy sessions per week for 30 minutes, and one group (2:1) speech-language therapy session per week, all in/out of the classroom (Parent Ex. B at p. 15). The CPSE also recommended seven hours of individual SEIT services five days per week for 30-90 minutes per session (id.). Contrary to the parents' contentions and consistent with the IHO's determinations, the hearing record reflects that February 2022 IEP was designed to enable the student to make progress. In particular, the CPSE administrator offered a cogent explanation of the CPSE's recommendation for SEIT services, which related to the student's age, his progress with related services only, as well as his behaviors and need for additional support (Tr. pp. 184-88). The CPSE administrator further explained the committee's related services recommendations for the student, noting the addition of a group session of speech-language therapy for the student to work on communication with peers while keeping individual services to address the student's distractibility, all while taking into account the goals of keeping him in the classroom as much as possible and giving the providers flexibility in the delivery of services (Tr. pp. 188-94). Regarding the ten-month recommendations in the February 2022 IEP, testimony by the CPSE administrator indicated the student did not fit the category for regression or management needs at the CPSE level (Tr. p. 195). With respect to regression, the CPSE administrator testified that it was clear that, in order to qualify for 12-month services, a student had to take more than eight weeks to make up the eight weeks of summer break, or that there needed to be data over time, such as winter break, that showed how long it took the student to gain back what he lost (Tr. pp. 195-97). She stated that she did not think she had "any of that" but, if she did, it did not meet the criteria (Tr. pp. 196-97). Review of the February 7, 2022 OT progress report and the February 2022 IEP reveals that, despite the student's attention and behavior difficulties, he made some educational progress (Parent Ex. B; Dist. Ex.7).

Turning to the May 2022 IEP, the evidence in the hearing record reflects that the CSE convened to develop an IEP for the student's transition to school-aged services for the 2022-23 school year (Dist. Ex. 9 at pp. 1, 26). As summarized above, the May 2022 CSE recommended three periods per week of direct, individual SETSS (one in math and two in ELA), as well as individual counseling services, individual OT, and individual and group speech-language therapy (id. at pp. 20-21, 26). The IHO found that the May 2022 IEP was appropriate and indicated that the student had made significant gains since the implementation of SEIT services and that the student did not have an academic deprivation that required compensatory SEIT instruction as

requested by the parents (IHO Decision at p. 35). Notably, the May 2022 IEP described the student's pre-academic skills as a relative strength (Dist. Ex. 9 at p. 4). The student knew his letters, numbers, shapes, and colors (id.). In addition, and as noted by the IHO, the student's mother reported to the CSE that she was not concerned about the student's pre-academic skills at that time (id.). The parent was concerned about how the student's speech-language challenges, inattention, and difficulty following directions hindered his academic progress (id.).

A review of the entire hearing record reveals no basis for a finding that the IHO erred in her determinations or awarded inadequate relief. Despite the parents' challenge to specific statements in the IHO's analysis of the student's need for compensatory education relating to the purpose of SEIT services, the student's receipt of SEIT services pursuant to pendency, and the nature of the student's deficits, a review of the IHO's decision as a whole reveals that she took into account several factors, weighed the evidence, including the recommendations in the IEEs, and articulated a qualitative basis for her determination that was grounded in the record evidence: that basis being that, academically, the student had already achieved the position he would have had the district not denied him a FAPE (see IHO Decision at pp. 34-35; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).[8] Consistent with the IHO's finding, it is proper to not award compensatory education where there is evidence the student has made progress or the deficiency has otherwise been mitigated (see 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]). In addition, the IHO in this matter fashioned an hour-for-hour award of missed speech-language therapy and OT that was consistent with the compensatory related services proposed by the parents, adjusted for the period of time for and the basis upon which a denial of FAPE was found (IHO Decision at pp. 34-35).

Overall, the IHO relied upon the evidence in the hearing record as well as assessments about the witnesses' credibility to craft equitable relief. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the witnesses.

[8] Review of the IHO's decision does not support the parents' characterization that the IHO denied compensatory education due to the parent's failure to medicate the student (see IHO Decision at pp. 35-36).

VII. Conclusion

Having determined that the IHO correctly determined that the student was offered a FAPE for the remainder of the 2021-22 school year and for the 2022-23 school year, and that the IHO awarded appropriate relief, the necessary inquiry is at an end.

I have considered the parents' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 7, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER