The University of the State of New York

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

No. 25-233

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 City Department of Education

Appearances:
The Law Office of Steven Alizio, PLLC, attorneys for petitioners, by Steven J. Alizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, 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 those portions of a decision of an impartial hearing officer (IHO) which denied their request for compensatory educational services for the 2022-23 and 2023-24 school years and failed to determine whether the student required 12-month extended school year services for their son (student) for the 2024-25 school year. The appeal must be sustained in part. The matter is remanded to the IHO for further administrative proceedings.

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 detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student started receiving speech-language therapy at three years of age, was homeschooled for preschool and kindergarten, continued with homeschooling for first and second grades (due in part to the COVID-19 pandemic) and started attending school in person for the 2022-23 school year

(third grade) with the support of integrated co-teaching (ICT) services and special education teacher support services (SETSS) (Parent Ex. E at pp. 1, 3).[1]

On February 2, 2023, a CSE convened, found that the student continued to be eligible for special education and related services as a student with autism, and developed an IEP that recommended that the student be placed in a 12:1+1 special class with a 1:1 paraprofessional for behavior support (Dist. Ex. 7 at p. 1). [2, 3] Recommended related services consisted of counseling in a group, individual occupational therapy (OT), and individual speech-language therapy (id.). In addition, the CSE recommended parent counseling and training (id.). In May 2023, the student underwent a school-based assistive technology evaluation (Parent Ex. E at p. 2).

On February 13, 2024, a CSE convened, found that the student continued to be eligible for special education as a student with autism, and developed an IEP that recommended a 12:1+1 special class for English language arts, math, and social studies and an 8:1+1 special class for science (Dist. Ex. 1 at p. 25). Recommended related services included one 30-minute session per week of counseling services in a group of two, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two (id. at p. 26).

According to a privately obtained June 2024 neuropsychological evaluation of the student, the parents disagreed with the district's placement of the student in a smaller class setting and believed that the student did better and was "happier to go to school" with the paraprofessional with ICT services (Parent Ex. E at pp. 1, 2). The June 2024 neuropsychological evaluation report stated that the student started exhibiting school resistant behaviors in January and was the target of aggressive behaviors and that he had not attended school since March (id. at pp. 1, 10). Evaluation results found the student's overall level of intellectual functioning within the moderate range of impairment or delay (full scale IQ of 44) (id. at p. 10). Academic assessments found the student's strengths in decoding and spelling (average range) and in word recognition and fluency (low average range) and challenges in language processing and expression, reading comprehension, sentence composition, math calculations and problem solving (id. at pp. 10-11). The parents reported executive functioning challenges in relation to flexibility, initiation, memory, and organization and described the student as generally well-behaved and without significant anxiety (id. at p. 11).

In a letter dated June 4, 2024, the district sought the parents' permission to amend the student's February 2024 IEP, without convening a CSE meeting, with the intention of adding the language "Individual Service, Daily, Full time" to the paraprofessional behavior support and

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

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

[3] The February 2023 IEP was not offered as an exhibit by either party (see Tr. pp. 1-104; Parent Exs. A-BB; Dist. Exs. 1-16).

changing the science special class placement from an 8:1+1 ratio to a 12:1+1 ratio (Parent Ex. W at p. 1; Dist. Ex. 3 at p. 1). The district scheduled the CSE to reconvene on June 20, 2024 (Dist. Ex. 2 at p. 1).[4]

On August 2, 2024, the parents submitted the July 2024 neuropsychological evaluation report to the district for its review and consideration (Parent Exs. E; X).

According to the parent, on or about August 17, 2024, the parents signed an "Enrollment Contract" with the Children's Academy for the 10-month 2024-25 school year (Parent Ex. U; see Tr. pp. 81-82).[5]

On August 21, 2024, the parents submitted a ten-day notice advising the district that they intended to enroll the student in the Children's Academy for the 2024-25 school year and seek district funding for the tuition, unless the district cured multiple concerns raised by the parents with respect to the June 2024 IEP (Parent Exs. C; D).

A. Due Process Complaint Notice

In a due process complaint notice dated October 4, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years by, in pertinent part, failing to assess the student in all areas of his suspected disabilities, failing to offer an appropriate program or placement in light of his social, emotional, behavioral, communication and academic needs, and failing to provide the parents all IEPs for the school years at issue in a timely manner (Parent Ex. A at pp. 1-13). As relief, the parents requested an award of compensatory services "to be determined according to proof;" along with direct funding of compensatory services "to be provided by an independent provider(s) of [p]arents' choosing at a reasonable market rate(s)" (id. at p. 13). The district submitted a due process response generally denying the allegations contained in the due process complaint notice and asserting multiple affirmative defenses (Due Process Response).

In an amended due process complaint notice dated December 3, 2024, the parents asserted an additional claim that the district denied the student a FAPE for the 2024-25 school year by, in pertinent part, failing to assess the student in all areas of his suspected disabilities, failing to offer an appropriate program or placement, and failing to provide the parents with the June 20, 2024 IEP (Parent Ex. B at pp. 7-9). As additional relief, the parents requested a declaration that the student was entitled to 12-month services for the 2024-25 school year, together with round trip, door-to-door special transportation to and from school, and findings that the Children's Academy was an appropriate program to meet the student's needs (id. at p. 9). In addition, the parents requested an order requiring the district to fund the student's tuition at Children's Academy for the 2024-25 school year (id.).

[4] The June 2024 IEP was not offered as an exhibit by either party (see Tr. pp. 1-104; Parent Exs. A-BB; Dist. Exs. 1-16).

[5] The signed contract is undated (see Parent Ex. U).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO from the Office of Administrative Trials and Hearings (OATH). Following a November 25, 2024 prehearing conference and a January 9, 2025 status conference, an impartial hearing convened and concluded on February 24, 2025 (Tr. pp. 1-104).

In a decision dated March 18, 2025, the IHO concluded that the district failed to provide the student a FAPE for the 2022-23, 2023-24, and 2024-25 school years (IHO Decision at p. 3). With respect to the 2022-23 and 2023-24 school years, the IHO concluded that the district failed to meet its burden of proof as it presented no documentary evidence nor any witnesses (id. at p. 6). As to the 2024-25 school year, the IHO concluded that the documentary evidence presented by the district failed to meet its burden of proof in the absence of any witness testimony explaining how the district's program and placement was able to meet the student's educational and behavioral needs (id.).

Utilizing the Burlington/Carter standard, the IHO found that the parents demonstrated that the Children's Academy was an appropriate placement for the student as its program was designed to meet the student's unique needs and enabled the student to make progress (IHO Decision at pp. 8-9). In addition, the IHO concluded that equitable considerations favored the parents because they had directed a 10-day notice to the district voicing their concerns with the appropriateness of the student's IEP and their intention to unilaterally enroll the student in a private school, and they had actively participated in the IEP process (id. at p. 9). As relief, the IHO ordered the district to reimburse the parents for their initial down payment made to the Children's Academy and fund the remaining tuition for the 10-month 2024-25 school year (id. at p. 13).

Further, the IHO denied the parents' request for services for a 12-month 2024-25 school year (IHO Decision at p. 10). Citing State regulation, the IHO identified that the purpose of 12-month services is to prevent "substantial regression" (id.). The IHO noted that "substantial regression" is defined in State regulation as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (id.; 8 NYCRR 200.1[aaa]). The IHO concluded that there was insufficient evidence in the hearing record to demonstrate that the student would require an "inordinate period of review" to maintain the student's level of performance without 12-month services (IHO Decision at p. 10). The IHO found that the testimony provided by the assistant head of the Children's Academy in support of 12-month services was vague and did not quantify how long it would take the student to regain skills were they to be lost over the summer (id.). Similarly, the IHO concluded that the neuropsychological evaluation did not quantify the period in which it would take the student to regain lost skills if the student did not receive 12-month services (id.). Based on the foregoing, the IHO held that the parents "did not meet their burden regarding extended school year services" (id.).

Finally, the IHO rejected the parents' request for at least 500 hours of compensatory tutoring and executive functioning coaching as a remedy for the district's denial of a FAPE to the student during the 2022-23 and 2023-24 school years (IHO Decision at pp. 11-12).

IV. Appeal for State-Level Review

The parents appeal alleging that the IHO erred in not awarding compensatory tutoring and executive functioning coaching as a remedy for the district failing to provide the student a FAPE for the 2022-23 and 2023-24 school years. The parents assert that the IHO improperly shifted the burden of proof regarding compensatory services to the parents. In addition, the parents argue that even if the IHO did not err in rejecting the parents' request for compensatory tutoring and executive functioning coaching, the IHO erred in awarding no compensatory services. Further, the parents argue that the IHO failed to develop the hearing record concerning the student's need for compensatory damages.

The parents also assert that the IHO erred in failing to find that the student was entitled to 12-month services and improperly shifted the burden of proof to the parents. Finally, the parents assert that the IHO failed to review the hearing transcript prior to issuing her decision as evidenced by the fact that the transcript was issued three days after the IHO issued her final determination on March 18, 2025.

In an answer, the district asserts the IHO's denial of the parents' requests for 12-months of services to the student and compensatory services should be upheld.[6] In pertinent part, the district argues that the student's attendance at the Children's Academy during the 2024-25 school year provided an appropriate remedy and the requested compensatory services would be overwhelming to the student given his struggles with attention, staying on task, and his inability to sit for longer than ten minutes to read a story. In addition, the district asserts that recommendations for extended school year services cannot be based on pure speculation or general concerns about potential regression.

The parents submitted a "reply and answer to the cross-appeal."[7]

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

[6] The district references a "cross-appeal" in several instances in its own pleading, attempting to "cross-appeal" from the favorable aspects of the IHO's decision; however, the district was not aggrieved by the IHO's findings that the student is not entitled to 12-month services and not entitled to compensatory services and, for that matter, the district did not allege any error by the IHO in its pleading. The district does not appeal from the IHO's findings that the district was aggrieved by, specifically that it failed to offer a FAPE for the 2022-23, 2023-24, and 2024-25 school years and that the Children's Academy was an appropriate placement for the student; thus, these findings have become final and binding on the parties and will not be further reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the undersigned has treated the pleading as an answer; however, the district is also cautioned to review the practice regulations in Part 279 and should not expect excusal for future failures to comply with the practice regulations in Part 279.

[7] As a cross-appeal by the district is not properly before me, there is no need to consider the parents' "Answer" filed in response; however, the reply has been considered.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 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]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Compensatory Education

The parents assert that the IHO erred in failing to award any compensatory tutoring and executive functioning coaching as a remedy for the district's failure to provide the student a FAPE for the 2022-23 and 2023-24 school years.

[8] 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).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

At the impartial hearing, the parents requested 500 hours of compensatory tutoring and executive functioning coaching as a remedy for the district's denial of a FAPE to the student during the 2022-23 and 2023-24 school years and the student's resultant loss of learning (Tr. pp. 101-102).

Preliminarily, the IHO was concerned that there was little information as to how 500 hours was arrived at by the parents' expert. If little more than a guess, the parents' request for relief could be interpreted to be a request for a default judgment. An outright default judgment awarding compensatory education—or all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close

to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts.

In support of their request for 500 hours of compensatory tutoring, the parents presented as a witness a certified special education teacher with 30 years of experience working with students with diverse needs and abilities (Parent Ex. Z). The witness was employed as an academic coach/educational specialist with an academic tutoring company (id. at ¶ 2). In response to the IHO's question concerning how he arrived at his recommendation of 500 hours of compensatory tutoring, the special education teacher who tutored the student testified that the student's scores on the Wide Range Achievement Test (WRAT-5) were "well below grade level for his age, especially in consideration of the fact that he repeated fourth grade" (Tr. p. 54). Based on testing, review of documents, and his experience in working with students with disabilities, the special education teacher testified that the student required at least 500 hours of one-to-one multisensory compensatory tutoring in order to achieve the progress he would have made had he received appropriate interventions during the 2022-23 and 2023-24 school years (Tr. p. 54; Parent Ex. Z at pp. 2-3).

Notably, the IHO expressed concern with the specific compensatory relief requested by the parents. The IHO found that the special education teacher failed to address how the tutoring company would be able to effectively manage the student's behavioral challenges during the tutoring sessions (IHO Decision at p. 12). Further, the IHO concluded that the hearing record was devoid of information as to how the student would derive education benefit from academic tutoring without behavioral support (id.). Finally, the IHO found that the special education teacher did not specifically explain why at least 500 hours would be necessary to remediate the student's deficits (id.).

Likewise, while the special education teacher for the tutoring company testified that he was a certified special education teacher, the qualifications of the other providers he testified about remain unknown (Parent Ex. Z). As to whether compensatory education, in the form of tutoring, would benefit the student, the assistant head of school and the director of admissions at the Children's Academy testified that the student was still exhibiting difficulty with attending to task at his desk and remaining at his desk during the 2024-25 school year (Tr. p. 70). Moreover, I am mindful that any tutoring is likely to occur outside of the student's daily 9:00 a.m. to 3:00 p.m. school curriculum at the Children's Academy (see Parent Ex. T).

The evidentiary record in this case is especially poor for purposes of ascertaining what, if any, compensatory education relief is warranted. The IHO's determinations regarding the deficiencies in the programming received from the district are largely confined to an absence of evidence for the first two school years at issue and an absence of testimonial evidence for the third school year. While it is not strictly parents' obligation to develop the hearing record to support their request for compensatory relief, there is nevertheless a significant hurdle in determining what,

if any, deprivation of education services occurred, and the appropriate compensatory remedy. This in part arises from the fact that the district failed to put forth any evidence as to the programming recommended to address the student's unique special education needs during the 2022-23 and 2023-24 school years (Tr. p. 42; IHO Decision at p. 6). In fact, the March 2022, February 2023, and June 2024 IEPs, which both allegedly offered substantial special education services, are not a part of the hearing record. A parent does not bear the responsibility for identifying the student's needs (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]).

On the other hand, while some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In cases involving compensatory education as relief, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent, as in this matter, appears to have already unilaterally chosen the provider—i.e., Learning Journey—and is the party in whose custody and control the evidence necessary to establish appropriateness resides. To that end, the parents in this matter had not yet obtained the services from Learning Journey at the time of the impartial hearing, but presented the company's hourly rate as evidence for the IHO to consider when awarding compensatory educational services (Parent Ex. Z).

The single testing measure from the special education teacher for the tutoring company, the WRAT-5, offered a snapshot measure of the student's achievement, but that instrument does not measure the student's rate of learning or the potential for growth (see Parent Exs. F; G). It does not appear from the evidence that he examined any other educational records of the student or progress reports from the 2022-23 or 2023-24 school years, and that assessment tool alone neither accounts for the quality or quantity of prior instruction nor models hypothetical progress going forward (Parent Exs. F; G; Z). However, it does not mean that a more reasoned, fact-based analysis of the parents' compensatory education claim cannot be undertaken.

Notably, despite the limitations of the hearing record and evidentiary proof, the district appears to agree that some amount of compensatory relief is appropriate. In its closing argument before the IHO, the district cites to witness testimony confirming the student's after-school difficulty with attention and staying on task, along with his inability to sit for longer than 30 minutes (Tr. p. 60). Based on those factors, the district suggested compensatory relief consisting of seven 30-minute sessions per week for 46 weeks, totaling 161 hours per year; 322 hours for two years (id.). Accordingly, given the district's acknowledgment that some form of compensatory

relief would be appropriate for the student and a reluctance to penalize the parents for the incomplete record under the circumstances of this case, the matter must be remanded for further proceedings. Upon remand, the record shall be re-opened to require the district to enter the March 2022, February 2023, and June 2024 IEPs into the hearing record as well as any IEP progress reports that were issued as a result of those IEPs. The parties shall present evidence and argument to address the valid concerns the IHO raised in her decision about the parents' requested compensatory relief that went unaddressed by the parties due to the underdeveloped record. The IHO shall issue a decision as to what, if any compensatory education, should be awarded to the student for the 2022-23 and 2023-24 school years.

B. 12-Month Services/Extended School Year (ESY)

The parents also appeal the IHO's denial of their request for 12-month, extended school year services for 2024-25. State regulations provide that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf).

As a threshold matter, the parents correctly assert that the IHO improperly shifted the burden of production as to the need for an extended school year on them. Contrary to the IHO's findings, State regulation places the burden of determining whether or not students are at risk for substantial regression such that they require 12-month services on public school districts, not parents (8 NYCRR 200.16[i][3][v Therefore, the IHO erred in finding that the burden of proof regarding the student's risk of substantial regression was on the parent.

As to proof of substantial regression experienced by the student, the hearing record also requires additional development to determine if the student required an "inordinate period of review" to maintain his level of performance without 12-month services. The pediatric neuropsychologist, who prepared the August 2024 neuropsychological evaluation, testified that he recommended 12-month extended school year services for the student due to discussions with the student's parents regarding breaks and transitions throughout his life and his "fairly… low functioning across many areas" (Tr. p. 47). However, even that assessment aligned with the appropriate standard, which it does not, the neuropsychologist nevertheless stated as a factual matter that he could not remember any examples where the parents relayed specific instances of regression (Tr. pp. 47-48).

Likewise, the director of admissions for the Children's Academy testified that the student required a 12-month extended year services program to prevent significant academic and social regression, stating his educational history and current profile make it "educationally appropriate" for him to be in a 12-month specialized program (Parent Ex. AA at p. 4). Further, he testified that

although the student was enrolled in the private school for the 10-month school year due to his starting date of September 2024, the student's educational history and current educational profile necessitated attendance in a 12-month specialized program "going forward" (id. at pp. 7-8). However, once again, no specific instances of regression were cited to support those opinions.

Similarly, the student's father stated that he noted "considerable regression" with the student in academics and social skills since the student was placed in the 12:1+1 special class and that the student "failed to make progress" during the 2023-24 school year (Tr. pp. 77-78, 81; Parent Ex. BB at p. 3). However, when asked if he raised specific examples of academic regression at the February 2024 IEP meeting, the parent's answers were unresponsive (Tr. pp. 77-81).[9]

As set forth above, the record failed to develop what, if any, specific instances of regression were sustained by the student. Moreover, there was no attempt to quantify how long it would take the student to regain skills that were allegedly lost over the summer.

Based on the foregoing, I find the case must be remanded to further develop the record and to make a determination as to whether the student sustained substantial regression, and if so, whether equitable relief due to a lack of 12-month educational services during 2024-25 school year is warranted.[10]

VII. Conclusion

The matter must be remanded to the IHO for an additional evidentiary proceeding to further develop the hearing record and to determine what, if any, compensatory damages should be awarded to the student for the 2022-23 and 2023-2024 school years and whether the student required 12-month educational services during the 2024-25 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's determination that the student is not entitled to compensatory education for the 2022-23 and 2023-24 school years is vacated; and

IT IS FURTHER ORDERED that the IHO's determination that the student is not entitled to 12-month educational services for the 2024-25 school year is vacated; and

IT IS FURTHER ORDERED that this matter is remanded to the IHO for further proceedings in accordance with this decision; and

[9] Notably, despite the testimony of the student's father as to regression experienced by the student, I am cognizant of the fact that the parents entered a contract with the Children's Academy for only a 10-month 2024-25 school year (Parent Ex. U).

[10] The final school year at issue in this proceeding was the 2024-25 school year at, but tuition reimbursement or funding for the summer 2024 would not be appropriate relief since the parent had not yet unilaterally placed the student. Instead, this issue appears to be related more to the compensatory education relief that the parents are seeking for alleged educational deprivation that occurred while the student was enrolled in the district.

IT IS FURTHER ORDERED that in the event that the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
November 26, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER