The University of the State of New York

The State Education Department
State Review Officer
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No. 21-181

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorney for respondent, by Anne C. Leahey, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for a portion of the 2020-21 school year 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case has been the subject of 10 prior State-level administrative appeals (see Dist. Ex. 10 [representing a copy of the decision in Application of a Student with a Disability, Appeal No. 21-019]; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural

history preceding this case—as well as the student's educational history—is presumed and, as such, will not be repeated herein unless relevant to the disposition of this appeal.

Briefly, however, a CSE convened on August 10, 2020 to conduct the student's annual review and to develop his IEP for the 2020-21 school year (see Dist. Ex. 12 at p. 1). Finding that the student remained eligible for special education as a student with an intellectual disability, the August 2020 CSE recommended the following: a 12-month school year program in a 12:1+1 special class placement with related services, which included two 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, four 90-minute sessions per week of individual special instruction (delivered in the home and community), and two 60-minute sessions per month of parent counseling and training (delivered in the home and school) (id. at pp. 1, 14-16). The CSE also recommended the support of a shared aide during transitions; additional supplementary aids and services, program modifications, and accommodations; assistive technology devices and services (an augmentative communication device, i.e., an iPad at home and at school; access to a computer during classwork; and access to audible books); and supports for school personnel on behalf of the student (id. at pp. 15-16). In addition, the August CSE developed annual goals with corresponding short-term objectives, and recommended strategies to address the student's management needs, a coordinated set of transition activities, measurable postsecondary goals, and adapted physical education (id. at pp. 1, 9-14, 17-19).[1] Finally, the August 2020 IEP specifically identified another public school district as the location within which to implement the student's IEP (id. at pp. 1, 20).[2]

At the conclusion of the August 2020 CSE meeting, the parent disagreed with the recommendations in the August 2020 IEP, and the next day in a due process complaint notice, dated August 11, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Dist. Ex. 10). As a result,

[1] Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who, like the student in this appeal, participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). The New York State Alternate Assessment is administered to students whom the CSE has designated as having severe cognitive disabilities as defined by the Office of Special Education (see "Eligibility Criteria for Participation in the New York Alternate Assessment Criteria – NYSAA," at p. 1, Office of Special Educ. [May 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/eligibility-criteria-for-participation-in-nysaa-advisory-and-attachments.pdf; see 8 NYCRR 100.1[t][2][iv]). To be eligible for the New York State Alternate Assessment, a student must be found to have: "a severe cognitive disability and significant deficits in communication/language and significant deficits in adaptive behavior; and . . . require[] a highly specialized educational program that facilitates the acquisition, application, and transfer of skills across natural environments . . .; and . . . require[] educational support systems, such as assistive technology, personal care services, health/medical services, or behavioral intervention." (id. at pp. 3-6).

[2] At the impartial hearing in this matter, the district's director of pupil personnel services (director) testified that, with respect to the specific public school district identified in the August 2020 IEP as the location within which to implement the student's IEP, she acknowledged that she "never reached out to [the specific public school district] or sent a screening packet" to this public school site because the parent "disagree[d] and refuse[d] to send [the student] to that recommended placement" (Tr. pp. 723-24; see Dist. Ex. 12 at p. 1).

the parties proceeded to an impartial hearing, which resulted in a final decision, dated December 24, 2020 (December 2020 IHO decision) and which was issued by another IHO (IHO 1) (see generally Joint Ex. V). In that decision, IHO 1 determined that the parent's allegations that the student was denied a FAPE "based on the CSE's failure to recommend a general education setting, or utilize goals based on the general education curriculum for [h]igh [s]chool students" were "not supported by [the] evidence" (Joint Ex. V at pp. 8-9). More specifically, IHO 1 determined that the August 2020 CSE included all required members, and the parent meaningfully participated in the development of the August 2020 IEP (id. at p. 9). IHO 1 held that there was no merit to the "[p]arent's allegation that [the] [d]istrict predetermined the student's educational placement for the 20[20]-21 school year, based on: the failure to consider the ability of the [d]istrict [h]igh [s]chool to educat[e] the student, the failure to consider the continuum of services, the failure to consider alternatives for the education [of] the student to attend his home-zoned school and the failure to include CSE required members" (id. at p. 11). IHO 1 found that the parent actively participated in the August 2020 CSE meeting, and the parent's disagreement with the August 2020 CSE's recommendations "d[id] not establish predetermination" (id.). However, IHO 1 found some of the parent's allegations regarding participation at the CSE meeting to be "persuasive," including the district's failure to provide the parent with "data and information" regarding the student's performance on his goals—"other than a graph given to the [p]arent" (id. at p. 12). To remedy this violation, IHO 1 directed the district to provide the parent with "quarterly reports of the student's progress" (id.).

IHO 1 further determined that, based upon the evidence in the hearing record, the recommendation of a "self-contained special education" class was not a denial of a FAPE (Joint Ex. V at p. 9). Relatedly, IHO 1 concluded that the "absence of a recommendation for general education" did not constitute a denial of a FAPE" (id.). Finding that the evaluative information before the August 2020 CSE—as evidence in the hearing record—demonstrated that the student had "significant academic needs" and did not have the skills required for a general education curriculum, IHO 1 rejected the parent's allegation that the district did not implement an "appropriately ambitious" program for the student for the 2020-21 school year (id.). IHO 1 also rejected the parent's allegations that "the [d]istrict failed to develop an appropriate IEP for the 20[20]-21 school year, based on the failure of the [d]istrict to utilize peer-based research for the 20[20]-21 school year, [the] failure to have the general education staff coordinate with the CSE to modify the student's curriculum, and allegations that the CSE Chairperson drafted the IEP" were "without merit" and "not supported by the evidence" (id. at pp. 9-10).

With respect to transition planning, IHO 1 noted that the August 2020 IEP included "goals for transition activities that include[d] instruction, related services, community experience, development of employment and other post-school adult living objectives, acquisition of daily living skills and a functional vocational assessment" (Joint Ex. V at p. 8). However, IHO 1 found the transition goals to be "inadequate" because the student's goals did not "designat[e] that the activities be provided within the Westhampton Beach local community and because a [t]ransitional [c]oordinator was not recommended" (id.).

Next, IHO 1 addressed the parent's arguments related to whether the district recommended "an appropriate placement within the least restrictive environment" (LRE) (Joint Ex. V at p. 10). IHO 1 found that the parent's claims were supported by the evidence in the hearing record "to the extent that there was no offer of placement" (id.). To clarify, IHO 1 specifically noted that although

the "transcript of the [August] 2020 CSE meeting [documented that] there was a discussion of the 12:1:1 class at [a specific public school district] and the inability of the [district] [h]igh [s]chool to offer a 12:1:1 class, . . . , there was no offered placement"—meaning, more specifically, that the district "did not apply for the student's enrollment in the [specific public school's] program and as such, there was no offer of placement for the 2020-2021 school year" (id.). Additionally, IHO 1 determined that subsequent testimony regarding the specifically identified public school district's ability to implement the recommended program could not rehabilitate the district's failure to "offer a placement," as it denied the parent the ability to determine if the IEP could be implemented (id. at pp. 10-11). Consequently, IHO 1 found that the district failed to offer the student a FAPE due to the district's "failure to provide an offer of placement" (id. at p. 11).

Finally, IHO 1 addressed the parent's request for compensatory educational services and concluded that there was "no basis [in the hearing record] upon which to determine an award of compensatory education for the student" (see Joint Ex. V at p. 12). Ultimately, however, IHO 1 ordered the following as relief: within 30 days of the date of the decision, a CSE must "reconvene to recommend a specific placement for the student," the CSE must "review the student's transition goals to include community opportunities within the Westhampton Beach local community that c[ould] provide pre-employment opportunities," and for the CSE to amend the student's IEP to include a transition coordinator "who c[ould] collaborate and cooperate with both the [d]istrict and the [p]arent" (id. at p. 13).

To comply with the directive in the December 2020 IHO decision that required the district to locate a site within which to implement the student's IEP, the evidence in the hearing record demonstrates that the director sent approximately 14 screening letters to various public school districts (out-of-district public schools) and to the Board of Cooperative Educational Services (BOCES), which indicated that the district was "seeking an appropriate placement in a special education class program (12:1:1)" and which further explained that an "appropriate program would focus on functional academics while providing opportunities for mainstreaming and transition activities" (see, e.g., Dist. Ex. 4 at pp. 1-2, 14). The screening letters sent by the district ranged in dates from January 7, 2021 to January 13, 2021 (see generally Dist. Ex. 4). The evidence further reflects that, with the screening letters, the director sent an information packet that included a copy of the student's "last IEP, . . . developed in August of 2020," as well as copies of the student's "last or the most recent psychological evaluation, speech and language evaluation, OT, and PT" (Tr. pp. 640-41).[3]

The evidence in the hearing record reflects that BOCES was the only site to respond that it had "an appropriate placement for [the student] in their 12:1:1 program" (Tr. pp. 261-62, 655-61; see generally Dist. Ex. 5 [documenting responses from all of the out-of-district public school sites,

[3] In or around mid-January 2021, the parent appealed the December 2020 IHO's decision to the Office of State Review (see generally Dist. Ex. 10). As part of that appeal, the parent did not challenge IHO 1's findings that were in his favor and the district did not cross-appeal from IHO 1's determinations that the August 2020 IEP transition goals were inadequate, that the district did not recommend a location or site within which to implement the student's IEP, and that the district did not provide the parent with information regarding the student's progress towards his goals. Therefore, those issues were deemed final and binding upon the parties and were not addressed in the SRO's decision (id. at p. 8 n.4; see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

which indicated that the out-of-district public school sites did not have an appropriate placement or program for the student]). As a result, the director invited the BOCES principal to attend a CSE meeting (see Tr. pp. 262, 655-661; Joint Ex. IV at pp. 1-2, 5-6).

On January 21, 2021, a CSE convened for the purpose of complying with the December 2020 IHO decision (see Joint Ex. IV at pp. 1, 8).[4] At the meeting, the January 2021 CSE recommended the following as the locations or sites within which to implement the student's IEP: a 12:1+1 special class placement in a BOCES facility for a half-day program and a 12:1+1 special class placement in a "Transition Services Program" (TSP) BOCES (TSP BOCES) for a half-day program (Dist. Ex. 2 at p. 13; see Dist. Ex. 2 at p. 19 [noting the "Placement Recommendation" as "BOCES Class in a Public School"]).[5] In addition, the January 2021 CSE amended the student's measurable postsecondary goals in the area of "Transition Needs" to include information about his relative strengths as reported by the parents (in the "Needs" section), and to include information reported by the parents regarding "access to an integrated setting" to prepare the student for his "postsecondary program" (in the "Course of Study" section) (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 12 at p. 10). The January 2021 CSE also noted the following, in part, under "Transition Needs": the student would "benefit from the involvement of a transition coordinator to assist in the development of appropriate postsecondary goals" (in the "Course of Study" section) (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 12 at p. 10).[6] Within the same portion of the January 2021 IEP, the CSE further noted the following as postsecondary goals to be developed with the transition coordinator: "researching and identifying college experience programs," "researching and identifying careers in areas of interest," and "researching, identifying, and participating in

[4] A transcript of the January 2021 CSE meeting was entered into the hearing record evidence (see generally Joint Ex. IV). A review of the transcript reflects that the January 2021 CSE meeting lasted approximately three hours (id. at pp. 1, 215).

[5] At the January 2021 CSE, the BOCES principal described the half-day programs; answered questions about those programs; and explained why, after reviewing the student's "profile" and "packet," she believed it was an appropriate setting for the student (Joint Ex. IV at pp. 159-74). At the impartial hearing, evidence indicated that one of the recommended BOCES was located "down the road" from the district's school; the TSP BOCES was located in another town, approximately "16.9 miles" from the parent's home and "about a 30-minute drive" from the BOCES located near the district's school (Tr. pp. 388, 1962). At the impartial hearing, the director explained that, based upon discussions with the BOCES principal who attended the January 2021 CSE meeting, she understood that the half-day morning program at the BOCES located near the district's school was "typically housed in a public high school," but the "lease ended and then because of COVID, they were not able to contract with anyone else, . . . , or find a site for this program" (Tr. pp. 400-401). The director further explained that "typically that program [was] in an integrated setting," and students had the "ability to be integrated into the school and to have exposure to typical peers"; she also testified that the TSP BOCES program operated in the same manner by allowing students to "typically [] go out into the community, but that [was] limited, again, this year, because of COVID[-19]" (Tr. p. 401). When the director questioned the BOCES principal about how long the program would be housed at the BOCES facility near the district's school, the principal "didn't have an answer at that time" (id.). In addition, the director acknowledged that currently, due to the lease issue and the ongoing COVID-19 pandemic, both the morning and afternoon BOCES programs recommended at the January 2021 CSE meeting were "comprised entirely of disabled students" (Tr. pp. 963-65).

[6] To be clear, the parent "demanded" at the January 2021 CSE meeting that the CSE appoint the individual who then-currently served as the parent trainer to serve as the transition coordinator (Tr. pp. 303-04, 632, 1833-39; see Joint Ex. V at pp. 177-78, 180-89, 193-99). The parent trainer agreed to serve in this role, and presented information concerning the student's transition needs to the CSE (see Joint Ex. V at pp. 195-215).

volunteer opportunities in the local community" (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 12 at p. 10). Next, the January 2021 amended the community experiences portion of the student's coordinated set of transition activities to reflect that the student would "become familiar with locations within his home community and the Westhampton Beach local community" for "both academic and leisure time" and to reflect the services or activities of the transition coordinator within the student's "local community" (compare Dist. Ex. 2 at pp 17-18, with Dist. Ex. 12 at p. 19). Other than these noted changes, the remaining sections of the January 2021 IEP mirrored the information in the student's August 2020 IEP (compare Dist. Ex. 2, with Dist. Ex. 12).

A. Due Process Complaint Notice

By due process complaint notice dated "6/21/21," the parent alleged that the district failed to "abide by the terms of [the December 2020 IHO's] 'order,'" "failed to place the [student] in the '[LRE],'" "failed to adequately review and implement appropriate 'transition goals,'" "failed to facilitate the [] parents as meaningful [CSE] members," improperly engaged in predetermination of the student's "educational placement," "failed to consider the appropriate 'continuum of services' available to educate the [student]," "failed to meaningfully analyze whether its special education resources [were] capable of addressing the unique and individualized educational needs of the [student]," the CSE chairperson "acted unilaterally in regard to the CSE's placement decision," "failed to implement the [student's] [IEP]," "failed to implement a placement recommendation in accord with the [student's] IEP," and "failed to implement an IEP that [was] 'appropriately ambitious'" (Joint Ex. I at pp. 1-2).[7] As relief for the alleged violations, the parent requested an order directing the student's "placement in the LRE, replete with an 'order' to effectuate any necessary accommodations, modification, services and supports, accompanied by a 'judgment' for back-end compensatory education" (id. at p. 2).

B. Events Post-Dating the Due Process Complaint Notice

On January 25, 2021, the district received a commitment letter from BOCES, which indicated that the student had been accepted into the half-day program described at the January 2021 CSE meeting (see Dist. Ex. 6 at pp. 1-2). According to the commitment letter, the student was expected to attend the BOCES facility in a 12:1+1 special class placement located near the district's school in the morning, where he would receive all of his related services; the letter further indicated that the student was also expected to attend the TSP BOCES facility in a 12:1+1+2 special class placement located in another town in the afternoon (id.). The commitment letter also indicated that the "IEP goals would need to be adjusted to include those for the TSP [BOCES] program" (id. at p. 2).

By letter dated January 27, 2021, the director invited the parents to provide available dates to visit the BOCES programs recommended at the January 2021 CSE meeting (see Dist. Ex. 7). In an email dated February 11, 2021, the parent informed the director that although they "accepted the invitation" to visit the BOCES located near the district's school, the parent "w[ould] not be

[7] Although dated "6/2121," the IHO clarified at the impartial hearing that the district received the due process complaint notice on January 21, 2021 (compare Joint Ex. I at p. 2, with Tr. pp. 58-59). It should also be noted that the parent's due process complaint notice did not identify either the school year or the IEP at issue (see generally Joint Ex. I).

doing so for" the TSP BOCES, because—according to the parent—"such location [was] not located within Westhampton Beach, and thus in [sic] odds with the [December 2020 IHO decision]" as well as the "recommendations tendered by our transitional coordinator" (Dist. Ex. 8).

In a decision dated February 19, 2021, an SRO dismissed the parent's appeal of the December 2020 IHO decision based upon the repeated failure of the parent's pleadings to comply with the practice regulations (see Dist. Ex. 10 at pp. 1, 7-10). Notwithstanding this conclusion, the SRO proceeded to address the "general FAPE claims that c[ould] be gleaned from the parent's request for review and which, . . . , largely mirror[ed] allegations previously asserted by the parent in the due process complaint notice" concerning the August 2020 IEP, including predetermination, annual goals, peer-reviewed research, and the student's educational placement in the LRE (id. at pp. 10-23). Upon an independent review of the evidence in the hearing record, the SRO upheld the findings and conclusions of law in the December 2020 IHO decision, noting specifically that the August 2020 CSE's "decision to recommend an out-of-district public school to implement the student's IEP was appropriate" (id. at pp. 10-22). In addition, the SRO found that the August 2020 CSE's recommendations were consistent with LRE principles because the "district did not have the 12:1+1 special class program in place at the district high school at the time of the August 2020 CSE meeting," and therefore, the "student's IEP required the 'other arrangement' of a special class placement at a school other than a school located within the district" (id. at pp. 22-23, citing R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 [5th Cir. 2003] [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]).[8] Having determined that the evidence in the hearing record did not support a finding that the district denied the student a FAPE "in addition to the limited FAPE denial determined by IHO [1]," the SRO addressed whether the relief awarded by IHO 1 was a sufficient remedy and whether, as appealed by the parent, IHO 1 properly denied the parent's request for compensatory educational services (id. at p. 23). On this point, the SRO concluded that the parent's renewed request for compensatory education ignored the relief awarded "attendant to each of the violations [IHO 1] identified" and that the parent failed to offer any "rationale for why the compensatory relief [was] necessary" or "why [IHO 1's] awarded relief [was] insufficient" (id.).[9] Therefore, the SRO found "no basis for departing from [IHO 1's] determination on the issue of relief" (id.).

[8] With respect to LRE, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]).

[9] In the appeal of the December 2020 IHO decision to the SRO, the parent requested "'back end' compensatory education" (Dist. Ex. 10 at p. 23 n.17). However, the only explanation as to the parent's request for compensatory

C. Impartial Hearing Officer Decision

On February 24, 2021, the parties proceeded to an impartial hearing, which concluded on July 14, 2021, after nine days of proceedings (see Tr. pp. 1, 2051).[10, 11] In a decision dated August 13, 2021, the IHO assigned to the case (IHO 2) ultimately concluded after examining the parent's claims and the evidence in the hearing record that the district—via the January 2021 IEP—offered the student a FAPE in the LRE for the 2020-21 school year, and dismissed the parent's due process complaint notice (see IHO Decision at p. 30).

In reaching this conclusion, IHO 2 initially identified the following as issues to be determined at the impartial hearing: whether the district complied with the directives in the December 2020 IHO decision, whether the CSE impermissibly predetermined "multiple decisions" regarding the student's educational "program and placement," and whether the CSE recommended an "appropriately ambitious educational program for the student in the [LRE]" (IHO Decision at p. 4). As part of the factual background, IHO 2 noted that the parties had entered into a pendency agreement in September 2019 and described some of the difficulties encountered in its implementation due to the ongoing COVID-19 pandemic when the parent initiated an administrative proceeding in August 2020 concerning the 2020-21 school year (id. at pp. 7-9, citing Tr. pp. 320, 329, 674; Joint Exs. V, VII; Dist. Exs. 23, 25-26). In addition, IHO 2 briefly summarized the December 2020 IHO decision issued by IHO 1, including the directives set forth therein, and noted that IHO 1's decision had been affirmed in a decision issued on appeal by an SRO in February 2021 (see IHO Decision at pp. 9-10, citing to Joint Ex. V).

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education was in a footnote in the post-hearing brief, which indicated that "'make up' education within the school year [was] likely impossible" and requested "monetary reimbursement" for education to be obtained after the student's graduation (id.).

[10] On February 25, 2021, the director, the district school psychologist, the student's mother, the newly appointed transition coordinator, and the student's educational consultant visited the BOCES located near the district's school; however, when the group went to the TSP BOCES, the student's mother did not participate in that visit (see Tr. pp. 389-98 [describing the visit and observations made at each facility]).

[11] The day after the visits to the BOCES facilities, the newly appointed transition coordinator wrote to the director, in part, about her impressions from the visits (see Parent Ex. VIII at pp. 1-3). With regard to the TSP BOCES, the transition coordinator's primary concern focused on the "considerable distance" from the student's home community and opined that it did not "meet the transition objective of remaining in the local community" (id. at p. 2). She also expressed that, given the student's "well documented difficulties with generalization, there's no guarantee that the exposure [the student] gain[ed] w[ould] translate to sustainable skills closer to home" and advocated for "on-the-job training directly in the community" (id.). In addition, the transition coordinator indicated that "many of the program's graduates advanced to adult day habilitation program, which [was] not in alignment with [the student's] long-term objectives of self[-]determination" (id. at p. 3). Turning to her impressions of the BOCES facility located near the district's school, the transition coordinator characterized it as a "non-starter" "[f]rom a transition point of view" (id.). The transition coordinator noted that the building, although located within the student's home school district, was "in a remote and isolated location, with limited access to village amenities"; the students had a "very immature, elementary feel"; many of the campus "'opportunities' for growth/independence (cafeteria, athletic facilities, model apartment) were closed or off-limits due to Covid"; the program was a "non-integrated setting"; and while the facility used the "same curriculum" the student used during home instruction, she did not "see growth opportunities beyond what [was] currently available at the [district high school]" (id.).

IHO2 found that a CSE convened on January 21, 2021 in response to the directives set forth in the December 2020 IHO decision (see IHO Decision at p. 10). IHO 2 further noted that, during a three-hour meeting, the "each provider of services reported on the student's then-present levels of performance in each area of functioning, as well as his strengths, needs and learning characteristics" (id.). In addition, IHO 2 indicated that although a "full consensus of the committee members could not be reached, the CSE determined that the student did not demonstrate the foundational skills needed to meaningfully participate in learning in a general education environment" (id.). He further indicated that, at the time of the January 2021 CSE meeting, the district had the following settings available along the continuum of special education services: "general education with related services, consultant teacher services, resource room, integrated co-teaching services and a 15:1 special class program" (id.). In determining the appropriate class placement for the student, the January 2021 CSE concluded that, while not able to reach a "full consensus," the student "did not demonstrate the foundational skills needed to meaningfully participate in any of the special education programs available at the [d]istrict" (id., citing Joint Exs. III-IV; Dist. Ex. 2). Instead, the January 2021 CSE found that the student's "needs could be addressed in a 12:1+1 special class program comprised of students with similar academic, social, physical and management needs" (id. at p. 10, citing Joint Exs. III-IV; Dist. Ex. 2).

Next, IHO 2 noted that, prior to the January 2021 CSE meeting, the "CSE canvassed for potential placements in neighboring schools, which resulted in [12] declinations and one approval at BOCES, and the BOCES principal attended and participated in the January 2021 CSE meeting" (IHO Decision at pp. 10-11). IHO 2 found that, based upon the input from the BOCES principal, the January 2021 CSE determined that the BOCES 12:1+1 special class program was "comprised of children with similar profiles (e.g., no non-verbal children, no children with behavior plans) and could address the student's academic, social, physical and management needs while support the achievement of his IEP goals" (id. at p. 11). IHO 2 then summarized the information provided to the January 2021 CSE by the BOCES principal regarding the implementation of this program at "two distinct sites," noting that the BOCES located near the district's school taught "academic skills during whole group instruction" and that the second site in another town—i.e., the TSP BOCES—offered "different programs in employment areas such as technology, retail, and culinary to prepare students for transition from school to post-secondary activities" (id.). Based upon the information presented at that time, the January 2021 CSE recommended that, "for the balance of the 2020/21 school year, the student receive the majority of his instruction in the [] BOCES 12:1+1 special class program, along with 1:1 adapt[ed] physical education and the services of an aide (2:1) for transitions between classes and to and from his bus," in addition to related services (id. at pp. 11-12).[12]

In addition, IHO 2 noted that the January 2021 CSE appointed a transition coordinator and discussed those services (see IHO Decision at p. 12). According to IHO 2, the transition coordinator "recommended measurable postsecondary goals for the student, that she had discussed

[12] IHO 2 also noted that, on January 25, 2021, the district received "written notice" from BOCES that it had accepted the student into "its 12:1+1 special class program," and that although the district "arranged for a tour of both program sites," the "parents elected to tour only" the BOCES site located near the district's school (IHO Decision at p. 12).

with the parents in June 2020, which were incorporated into the January 2021 IEP" (id., citing Joint Exs. III-IV, VII; Dist. Exs. 2, 14-15).

IHO 2 indicated that while the parents "agreed" to the appointment of the transition coordinator, they "opposed the CSE's program and placement recommendations for the student" (IHO Decision at p. 13). IHO 2 further indicated that, at the January 2021 CSE meeting, the parents "advocated for the student's placement in the [d]istrict's 15:1 special class program and general education electives with the support of a 1:1 aide" (id.). However, the January 2021 CSE "rejected" this alternative "because the other students attending [the 15:1 special class] program ha[d] dissimilar academic, social, physical and management needs" (id.). More specifically, IHO 2 explained that the "other students attending the 15:1 special class program possessed low average-to-average intellectual ability, participated in State and local assessments and were working toward a Regents diploma," and comparatively, the student in this case was "intellectually disabled and alternately assessed" (id.).

Finally, IHO 2 noted that, "to discuss with the student's related service providers how they could implement measurable post-secondary goals and transition services," a team meeting took place on February 25, 2021, which included the attendance of both the transition coordinator and the student's educational consultant (id. at pp. 12-13, 13 n.7).

Next, IHO 2 recited the parties' respective positions and turned to his conclusions of law, which included a recitation of the applicable legal standards (see IHO Decision at pp. 13-18). The first issue addressed by IHO 2 was whether the district complied with the directives in the December 2020 IHO decision (id. at pp. 18-19). After explaining that "IHOs d[id] not have jurisdiction to enforce the orders of other IHOs" and setting forth the proper mechanism—together with the applicable legal authority—concerning how to seek enforcement of an IHO's decision, IHO 2 recounted that, at the prehearing conference held on the first day of the impartial hearing, he had advised the parties that he lacked jurisdiction to enforce the December 2020 IHO decision (id. at p. 19). However, according to IHO 2, he also advised the parties at the same time that he "would consider the [d]istrict's level of compliance with [the December 2020 IHO decision] as a component of the applicable FAPE analysis" (id.). On this issue, IHO 2 concluded that the district "fully complied" with the directives in the December 2020 IHO decision, and specifically noted that the January 2021 CSE "reconvened and recommended a specific educational placement for the student," and appointed a transition coordinator who suggested a "transition goal of researching volunteer opportunities in the local community which was inserted into the student's IEP" (id.).

The second issue addressed by IHO 2 was whether the January 2021 CSE impermissibly predetermined the student's educational placement and failed to include the parents as "meaningful CSE members" (IHO Decision at p 19). After reciting the applicable legal standards to analyze the issues of predetermination and parent participation, IHO 2 found that the transcript of the January 2021 CSE meeting "reflect[ed] that the parents actively participated in the decision-making process," the parents "express[ed] their concerns regarding the recommended program and services," and the January 2021 CSE "considered the parents' request for the student's placement in a general education setting or a 15:1 special class program at the [d]istrict's high school" (id. at pp. 19-21). Based on these considerations,, the IHO determined that while the January 2021 "ultimately declined those alternatives because the student did not demonstrate the foundational skills needed to meaningfully participate in those programs and because the other students

attending those programs had dissimilar academic, social, physical and management needs," the parents' disagreement with the proposed "IEP and placement recommendation d[id] not amount to a denial of their meaningful participation in the CSE process" (id at pp. 21-22).

Finally, IHO 2 addressed whether the district "failed to place the student in the LRE"—and more specifically, the parent's assertion that the student's LRE was the district's high school (IHO Decision at pp. 22-30). Similar to the previous two issues, IHO 2 recited the applicable legal standards to analyze an LRE issue, and thereafter presented a detailed account of the January 2021 CSE meeting beginning with the CSE's "discussion of the continuum of programs available" at the district's high school and "whether the student could be satisfactorily educated in a general education class" (id. at pp. 22-25). As noted by IHO 2, the district school psychologist described the following as available at the district high school: "related services only, consultant teacher services, resources room, integrated co-teaching services (for grades 9-11), and a 15:1 special class" (id. at p. 25). IHO 2 also noted that the district's general education teacher at the meeting described the "characteristics of learners in the high school's general education classes," and the director "shared with the other members of the CSE that the curriculum in a [12th] grade general education class require[d] students to read major works of literature, meet stringent writing requirements and answer broad and complex questions" (id.).

IHO 2 further found that the January 2021 CSE then turned to examine the "educational benefits available to the student in a general education class with appropriate supplementary aides [sic] and services" (IHO Decision at p. 25). On that point, IHO 2 noted that, at that time, the student's IEP included recommendations for a number of supplementary aids and services, including "an aide to assist in transition between classes and to and from the bus, checks for understanding, movement breaks, reteaching, and [the] provision of augmentative communication devices" (id.). IHO 2 also noted that the January 2021 CSE "discussed teaching methods used with the student when introducing new concepts," and then IHO 2 set forth information contributed to the CSE's discussion by the student's related service providers (speech-language therapy, OT), his adapted physical education teacher, and his special education teacher (id. at pp. 25-26).

IHO 2 found that the January 2021 CSE then "began discussing the possible placement of the student in a 12:1+1 special class setting to provide the modeling, repetition and re-teaching the student was said to need in order to learn" (IHO Decision at p. 27). The BOCES principal presented information about the specific 12:1+1 special class program offered at BOCES, and IHO 2 noted that, at the conclusion of her presentation, the director "asked whether anyone at the CSE felt that a small class setting was not 'an appropriate placement for [the student] to successfully . . . master his goals'" (id., citing Joint Ex. IV at p. 118). Accordingly, IHO2 determined that, "[o]nly the parents disagreed, . . . , although the student's mother suggested that she might accept a 12:1+1 special class placement if it was available in the [d]istrict" (id. at p. 27, citing Joint Ex. IV at p. 123).

IHO 2 noted, however, that the educational consultant at the January 2021 CSE meeting suggested that the student "could succeed in the [d]istrict's 15:1 special class program but 'would need a one-to-one aide in that classroom to keep him on task and he would need the curriculum modified to his ability" (IHO Decision at p. 27). In a footnote, IHO 2 opined that the educational consultant's "suggestion [was] essentially that the [d]istrict create a parallel 1:1 program for the student to be embedded within the [d]istrict's 15:1 special class program," and that at the impartial

hearing, the newly appointed transition coordinator "endorsed" the educational consultant's suggestion (id. at p. 27 n.10). IHO 2 also noted that, at the impartial hearing, the transition coordinator "testified that the [d]istrict could create a 12:1+1 for the student, even if he were the only enrolled student in such a class"; however, IHO 2 characterized both asserted positions as "tantamount to a recommendation that the [d]istrict create a new class for the student, which the SRO previously held the [d]istrict [was] not required to do" (id. at pp. 27-28, citing Application of a Student with a Disability, Appeal No. 19-121).

In light of the evidence in the hearing record, and "particularly the extensive discussions that took place during the January 2021 CSE meeting," IHO 2 concluded that the "CSE's recommendation that [] BOCES implement the student's IEP was appropriate" (IHO Decision at p. 28). Pointing to rationale in previous State-level decisions about this student, IHO 2 reiterated that although a district "'must provide a continuum of alternative placements that meet the needs of the disabled children that it serve[d],' the Second Circuit has held that 'a school district need not itself operate all of the different educational programs on this continuum of alternative placements" (id., citing T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165 [2d Cir. 2014]). In continuing to cite to T.M., IHO 2 further noted that "'[t]he continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools'" (id. at p. 28, citing T.M., 752 F.3d at 165). IHO 2 concluded that this was "consistent with State law, which allow[ed] school district's to '[c]ontract with other districts for special services or programs'" (id. at p. 28, citing Educ. Law § 4401[2][b]).

Turning to LRE, IHO 2 determined that, when weighing State and federal regulations, "numerous courts have held that, while a school district remain[ed] obligated to consider distance from home as one factor in determining the school in which a student's IEP w[ould] be implemented, this provision d[id] not confer an absolute right or impose a presumption that a student's IEP w[ould] be implemented in the school closest to his or her home or in his or her neighborhood school" (IHO Decision at pp. 28-29, citing 34 CFR 300.116[b][3], [c]; 8 NYCRR 200.1[cc], 200.4[d][4][ii]; White, 343 F.3d 373, 380-82; Lebron, 769 F. Supp. 2d 788, 801 [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"];Letter to Trigg, 50 IDELR 48).[13]

Accordingly, IHO 2 determined that because the evidence in the hearing record demonstrated that the district "did not have a 12:1+1 special class program" at the time of the January 2021 CSE meeting, the implementation of the student's IEP "required the 'other arrangement' of a special class placement at a school other than a school located within the [d]istrict" (id. at pp. 29-30, citing R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that

[13] See R.L., 757 F.3d at 1191 n.10; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 (4th Cir. 2004); McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 (6th Cir. 2003); Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 (1st Cir. 1997); Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 (5th Cir. 1996); Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 (10th Cir. 1996); Poolaw v. Bishop, 67 F.3d 830, 837 (9th Cir. 1995); Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 (10th Cir. 1995); Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 (8th Cir. 1991); Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 (4th Cir. 1991) (holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"); H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 (E.D. Pa. 2012); Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 (S.D.N.Y. 1992).

"it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]; Lebron, 769 F. Supp. 2d at 801; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48). In summary, IHO 2 found that the district provided "sufficient evidence to support a finding that the program recommended in the January 2021 IEP offered the student a FAPE in the student's LRE" (id. at p. 30). Consequently, IHO 2 dismissed the parent's due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that IHO 2 misapplied the principles of LRE and failed to consider evidence that the January 2021 CSE—and more specifically, the CSE chairperson—predetermined the recommendation for a 12:1+1 special class placement, as well as the location within which to implement the January 2021 IEP. In addition, the parent argues that, with respect to the burden of proof, the cross-examination of the district's sole witness, the CSE chairperson—who had not "worked with the [student]"—demonstrated that she "acted in a predetermined and unilateral fashion," which resulted in the district's "failure to facilitate a FAPE with in the LRE" [emphasis in original].[14]

As relief, the parent seeks to overturn IHO 2's decision and for an SRO to "alternatively 'Order' the [student's] placement within his home school district, in any of the formats supported by the record and deemed appropriate by the SRO." The parent also seeks an "award for 'back-end compensatory education'" as a remedy for the failure to provide the student with an "appropriate educational placement for the entirety of the 2020-2021 academic year."

In an answer, the district responds to the parent's allegations and generally argues to uphold IHO 2's decision in its entirety. The district also argues to dismiss the parent's appeal based on the failure to comply with various practice regulations.

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

[14] The parent also asserts that, with respect to the "Pendency & History" set forth in IHO 2's decision, IHO 2 "falsely interpreted the Federal Court's overall treatment regarding how the respondent district ha[d] violated pendency" (Req. for Rev. at p. 10 [emphasis in original], citing IHO Decision at pp. 8-9).

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[15]

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. Preliminary Matters—Compliance with Practice Regulations

The district contends that the parent's request for review should be dismissed as it fails to comply with Part 279 of the State regulations. Specifically, the district asserts that the request for review fails to "clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding"; fails to "indicate what relief should be granted by the [SRO] to the petitioner"; fails to set forth the "specific relief sought in the underlying action or proceeding"; fails to set forth a "clear and concise statement of issues presented for review and grounds for reversal or modification to be advanced, with each issue numbered and set forth separately , and identifying the precise rulings, failures to rule, or refusals to rule presented for review"; and fails to set forth "citations to the record on appeal" (Answer ¶¶ 4, 14, 20, 24, 28-29, 36, citing 8 NYCRR 279.4[a]; 279.8[c][1]-[4]). Similarly, the district contends that the parent's memorandum of law fails to comply with State regulation as it incorporates 52 footnotes in "11-point" font to effectively circumvent the page limitation (Answer ¶¶ 32-33, citing 8 NYCRR 279.8[b]).

With respect to the content of a request for review, State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). In addition, section 279.4(a) provides that the request for review "must conform to the form requirements in section 279.8 of this Part."

[15] 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., 137 S. Ct. at 1000).

In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer

(8 NYCRR 279.8[c][1]-[4]).

The concerns raised by the district with respect to the parent's failure to comply with the practice regulations are not new. Historically, issues with the form and content of pleadings filed with the Office of State Review by the parent have been raised by the district and addressed by the SRO in several prior appeals involving this student, including Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; and Application of a Student with a Disability, Appeal No. 16-040. The parent has been repeatedly cautioned that his failures to comply with the practice regulations could result in dismissal or rejection of his pleadings and, currently, two of the parent's appeals were dismissed in Application of a Student with a Disability, Appeal No. 21-019 and Application of a Student with a Disability, Appeal No. 19-021 for the failure to comply with the practice regulations, as well as on alternative grounds.

Turning to the parent's pleading in this case, as noted above, State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, the parent generally complies with the stated regulations by setting forth issues presented for review by numbering each issue (i.e., "Issue #1—LRE) and using bold text to highlight the specific issue, which distinguishes the issue presented from the argument in support of each issue (see generally Req. for Rev.). However, as noted in previous appeals, while the parent identifies IHO 2's findings from which he disagrees—accomplished here, in part, by quoting portions of IHO 2's decision and directing the SRO to the pages of IHO 2's decision wherein the identified issues are allegedly "encapsulated"—the parent does not grapple with IHO 2's

determinations but instead, reargues the district's alleged errors and violations as a basis for the appeal, as well as proffering his own philosophical analysis of the applicable legal standards, statutes, State and federal regulations, and findings of previous IHO and SRO decisions, that is not adequately tethered to any supporting legal authority and for the most part does not reflect well-settled interpretations of the doctrines and legal standards that are foundational to the legal framework underpinning the determination of IDEA claims (see generally Req. for Rev.). While the parent's immersion in the relevant literature and legal debates concerning special education and inclusion, as well as his longstanding advocacy for the student, are understandable and laudable, the practice regulations require that a pleading must be focused solely on the dispute at hand and identify errors made by the IHO with particularity and sufficient record support. Here, the parent's pleading falls considerably short of those standards.

With respect to the district's assertion that the parent's pleading lacks "citations to the record on appeal, and identification of the relevant page number(s) in the [] hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number," the request for review in this case reflects a nominal improvement on this point when compared to the parent's request for review in Application of a Student with a Disability, Appeal No. 21-019, which failed to include any citations to the evidence in the hearing record, either by citation or through an explanation of how evidence presented during the hearing is relevant to the arguments being set forth on appeal (Answer ¶¶ 28-29, citing 8 NYCRR 279.8[c][3]). Notably, however, while the parent's request for review includes citations to the hearing record, the citations become more and more sparse from beginning to end, some citations do not support the proposition asserted, and some citations are to documents that were not entered into the hearing record as evidence (see, e.g., Req. for Rev. at pp. 8, citing to "J ex. VI: p. 19"; 10, citing to "IHO Lederman Decision, Case #: [], dated 1/26/17 and SRO Krolak Decision, #: 17-079, dated 10/18/17 at 28, 29).

Next, the district's assertion that the parent's extensive use of footnotes in the memorandum of law effectively circumvented the 30-page limit imposed by State regulation is persuasive (see Answer ¶¶ 32-33, citing 8 NYCRR 279.8[b]). State regulation specifically mandates that, for all pleadings and memoranda of law, "[e]xtensive footnotes may not be used to circumvent page limitations" (8 NYCRR 279.8[b]). Upon review, the parent's memorandum of law is 30 pages in length, and, as the district contends, includes 52 footnotes in a smaller font (see generally Parent Mem. of Law). While the term "extensive" is not defined by State regulation, generally speaking the use of 52 footnotes in a document unlimited in its page length may not qualify; however, in light of the 30-page limit for a memorandum of law, 52 footnotes appears to qualify as an extensive use of footnotes that—if incorporated into the document—would clearly exceed the page limitation set forth in State regulation.[16]The district's contentions relative to the form and content

[16] Moreover, to the extent that the parent elaborates or expands upon arguments in support of the issues in the request for review within the memorandum of law, or argues additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2020-21 school year solely within the memorandum of law, the parent—who is an attorney—is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 21-019; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a

of the parent's request for review, when viewed in light of the parent's history of noncompliance, weigh heavily in favor of dismissing the parent's appeal especially where, as here, the parent has been cautioned—based upon the very same contentions asserted by the district in this appeal—about the effect of his continued failure to comply with the practice regulations in five separate appeals initiated by the parent (see Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In each of those appeals, an SRO declined to dismiss the request for review based upon noncompliance, but specifically cautioned the parent that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-021). Consequently, the nominal improvements in the parent's pleadings, coupled with the fact that SROs have dismissed the parent's last two appeals due to his continued non-compliance with the practice regulations and the parent's repeated lack of compliance in numerous other State-level administrative appeals previously initiated by the parent, will also result in a dismissal of the parent's current appeal, with prejudice.

B. IHO 2's Findings

Nevertheless, even assuming for the sake of argument that the parent's failure to comply with the practice regulations did not warrant a dismissal of this appeal, the evidence in the hearing record does not support overturning IHO 2's findings—based on the issues and arguments that may be gleaned from the parent's request for review—that the January 2021 IEP offered the student a FAPE in the LRE and that the January 2021 CSE did not impermissibly predetermine either the recommendation for a 12:1+1 special class placement or to recommend BOCES as the location within which to implement the student's IEP. Instead, an independent review of the evidence in the hearing record demonstrates that IHO 2 carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (see IHO Decision at pp. 1-14). In addition, IHO 2 analyzed the issues raised by the parent concerning the district's compliance with the December 2020 IHO decision, the FAPE and LRE claims related to the January 2021 CSE process and the January 2021 IEP, and the parent's predetermination claims related to the January 2021 CSE process, by relying on the

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cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [holding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

relevant facts and the proper legal standards in order to reach his conclusions of law on these issues (id. at pp. 14-30). The decision also shows that IHO 2 carefully recited and considered the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions (id.).

In this case, a review of the evidence in the hearing record reflects that the January 2021 CSE convened for the purpose of complying with the directives in the December 2020 IHO decision, which required the district to "reconvene [a CSE] to recommend a specific placement for the student" within 30 days of the date of the decision, "review the student's transition goals to include community opportunities within the Westhampton Beach local community that c[ould] provide pre-employment opportunities," and amend the student's IEP to include a transition coordinator "who c[ould] collaborate and cooperate with both the [d]istrict and the [p]arent" (Joint Ex. V at p. 13). Given that the December 2020 IHO decision required the district to reconvene a CSE within 30 days of the date of the decision to recommend a specific location to implement the student's IEP, it was reasonable and necessary for the district to canvass neighboring school districts and educational facilities, such as BOCES, prior to the CSE reconvening so that a specific location could be identified, discussed, and recommended and to be fully compliant with the December 2020 IHO decision. As a result, the director's actions of sending screening letters and information packets to approximately 14 sites before the CSE meeting did not constitute a predetermination of the specific location to implement the student's IEP, because, even if—as occurred here—BOCES was the only location that had a 12:1+1 special class placement and program available at the time of the January 2021 CSE meeting, a BOCES representative (i.e., the principal) attended the CSE meeting to describe the 12:1+1 special class placement and program for academics and transition activities and answer questions, and the parents had the opportunity to further tour these locations after the January 2021 CSE recommended BOCES.

Additionally, the evidence in the hearing record establishes that, per the December 2020 IHO decision, the CSE that was ordered to reconvene in order to comply with the decision was not required by that decision to reconsider the appropriateness of either the 12:1+1 special class placement recommended in the August 2020 IEP, or the recommendation in the August 2020 IEP for the student's IEP to be implemented in another location outside the district because IHO 1 had already found that the 12:1+1 special class placement recommendation and the recommendation to implement the student's IEP in another location outside of the district had offered the student a FAPE in the LRE (see Joint Ex. V at pp. 9, 11). Nonetheless, the January 2021 CSE went beyond the directives in the December 2020 IHO decision by reexamining and discussing the student's then-current needs, as well as the continuum of services, before recommending a 12:1+1 special class placement in a location outside the district (compare Joint Ex. IV, with Joint Ex. V). It also appears that the January 2021 CSE went beyond the directives in the December 2020 IHO decision by appointing a transition coordinator—as the decision only required the CSE to amend the student's IEP to include a transition coordinator "who c[ould] collaborate and cooperate with both the [d]istrict and the [p]arent"—but did not require to CSE to appoint a transition coordinator at that time (Joint Ex. V at p. 13 [emphasis added]).

As a final point, assuming for the sake of argument that the district failed to offer the student a FAPE in the LRE as a result of the January 2021 CSE meeting and the recommendations made at that meeting, the parent—who, on appeal, requests relief that includes ordering the student's placement within his home school district and '"back-end compensatory education'"—

would not be entitled to this relief for the 2020-21 school year. First, the parent's request for an order directing the student's placement in his home school district essentially seeks the prospective placement of the student, which, as a form of relief, is generally disfavored because it has 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"]).

In addition, at this point, the 2020-21 school year at issue is over, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2021-22 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). Accordingly, there is no reason to grant the parent's request for a prospective placement in the student's home school district. Moreover, the evidence in the hearing record established that the student's home school district did not have an appropriate 12:1+1 special class placement available and that the continuum of placements offered in the student's home school district—and discussed at the January 2021 CSE meeting—were not appropriate for the student, given his special education needs (see generally Joint Ex. IV).

With regard to the parent's request for back-end compensatory education, the parent does not describe or clarify what this requested relief consists of in either the request for review or the memorandum of law, nor does the parent point to any evidence in the hearing record to support such an award (see generally Req. for Rev.; Parent Mem. of Law). Therefore, even if the district had failed to offer the student a FAPE in the LRE, the parent could not sustain his burden to establish the student's entitlement to compensatory education.

VII. Conclusion

Based on the foregoing, there is an insufficient basis in the hearing record to depart from IHO 2 's determinations regarding FAPE, the recommendation of BOCES as the student's LRE, or that the student is not entitled to compensatory educational services under the circumstances of this matter.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 24, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER