The University of the State of New York

The State Education Department
State Review Officer
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No. 23-070

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) properly implemented the educational program and related services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2020-21 school year. 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 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 attended a district public school for first grade (2019-20 school year) and then attended a different district public school for both second grade (2020-21 school year) and third grade (2021-22 school year) (see Nov. 15, 2022 Tr. p. 65).[1]

[1] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "June 14, 2022 Tr. p. 1."

For first grade during the 2019-20 school year, the student attended a general education class setting with integrated co-teaching (ICT) services (see Dist. Ex. 1 at p. 1). On November 12, 2019, a CSE convened and developed an IEP for the student with a projected implementation date of November 12, 2019 (November 2019 IEP) (id. at pp. 1, 15). Finding that the student remained eligible for special education as a student with an other health impairment, the November 2019 CSE recommended that the student receive ICT services for English language arts (ELA) (16 periods per week) and for mathematics (5 periods per week) (id. at pp. 1, 10). In addition, the November 2019 CSE recommended one 30-minute session per week of counseling services for the student in a group of three (id. at p. 10). As reflected in the November 2019 IEP, the student was "reading on a level (C), which [wa]s below the grade level standards at th[at] time" and was also below grade level standards in her ability to read sight words (id. at pp. 1-2). In mathematics, the student struggled with "solving word problems when read independently," but she could "solve them when the problem [wa]s read aloud" (id. at p. 2). As reported in the IEP, the parent expressed concern about the student's "academic delays" and requested a reevaluation to determine if "any other services" could support the student's needs (id. at p. 3).

Over the course of two days in December 2019, the student underwent a neuropsychological evaluation (December 2019 neuropsychological evaluation) (see Parent Ex. B at p. 1). Based on the testing results, the evaluator determined that the student met the criteria for diagnoses of a specific learning disorder with impairment in reading and an unspecified anxiety disorder (id. at p. 15).

On March 16, 2020, the former New York State Governor initially ordered every school in the State to be closed for a period of two weeks, beginning no later than March 18, 2020, in response to the COVID-19 pandemic (see 9 NYCRR 8.202.4). This initial executive order closing schools was extended through subsequent executive orders, and by April 16, 2020, the former Governor had ordered school buildings closed through May 15, 2020 (see 9 NYCRR 8.202.18).

On April 22, 2020, a CSE convened and developed an IEP for the student with a projected implementation date of May 20, 2020 (May 2020 IEP) (see Parent Ex. C at pp. 1, 25). Finding the student eligible for special education as a student with a learning disability, the April 2020 CSE recommended that the student receive ICT services for ELA (16 periods per week) and mathematics (5 periods per week), as well as special education teacher support services (SETSS) for ELA (4 periods per week), and related services consisting of two 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session per week of individual counseling services (id. at p. 20).[2] In the IEP, the April 2020 CSE reported the student's testing results from the December 2019 neuropsychological evaluation (id. at p. 2). The CSE also documented that, at that time, the student was reading at a "level (F)," which was "below the grade level standards at th[at] time" but indicated that, overall, the student was reading at an independent level of "F" and at a guided reading level of "G" (id. at p. 3). According to the IEP, the student had been receiving SETSS and would "continue to participate in the SPIRE program," which was described as a "research[] based reading intervention program" that provided the student with

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

"phonological awareness, phonics, spelling, fluency, vocabulary, and comprehension to build her overall reading ability" (id. at p. 5). The IEP also reflected that the student had made "significant gains in her participation with the SPIRE program" (id.). At that time, the parent continued to express her concerns with the student's "social development" and felt that "the need for school counseling [wa]s still present" (id. at p. 7). With respect to the student's counseling services, the IEP indicated that the student had "adjusted nicely to remote learning, however, [the parent] state[d] that [the student] expressed anxiety about returning back to school"; as a result, "it was agreed that individual counseling would be best to address her transition back to school" (id.). The counselor and the parent also agreed that the student would "benefit from the addition of outside therapy to further support her anxiety" (id.).

By executive order dated May 7, 2020, the former Governor ordered school buildings closed for the remainder of the school year (see 9 NYCRR 8.202.28).

Over the course of two days in August 2020, the district completed a speech-language evaluation of the student (August 2020 speech-language evaluation) (see Dist. Ex. 11 at p. 1). The evaluation was conducted remotely and, as reflected in the August 2020 speech-language evaluation report, as "part of the re-evaluation process in response to COVID-19" (id.).[3] Based on the parent interview portion of the assessment, the evaluator noted that the student's "[p]ost COVID-19 academic functioning was observed to decrease in performance and confidence levels" (id. at p. 2). The evaluation report indicated that, "[d]uring the transition to the online learning platform, [the student] required 1:1 parental support to complete weekly reading/writing assignments," and, although the student "participated in a weekly online reading group, [the parent] became increasingly aware [of the student's] heightened anxiety" (id.). The evaluator also noted that the student "missed her [p]re-Covid teacher/peer interaction and the support of her reading partner" (id.). According to the parent, the student's "confidence and decoding went down" and the student "often guessed at words and required visual supports for writing and tasks broken down into smaller steps" (id. [emphasis omitted]). The evaluator indicated that students with "weak phonological skills often defer[red] to guessing at unknown words" and that the ability to "sound out unknown words [wa]s an important requirement for reading" (id.). As part of the evaluation process, the evaluator noted the student's behavior, including that she "exhibited good in-seat behaviors remaining cooperative, putting forth her best effort requiring small breaks, praise and encouragement, and visual stimuli to complete the assessment" and she listened "attentively" (id. at pp. 2-3, 6). The evaluator concluded that the student's testing results warranted speech-language therapy services, and the evaluator included two annual goals targeting the student's needs (id. at p. 6).

When school resumed in September 2020 for the 2020-21 school year, the student began attending her second-grade classroom with ICT services, which, due to the ongoing COVID-19 pandemic, operated on a three-day rotational system where the "students were in class [three] days a week" (IHO Ex. X ¶¶ 4-5). According to the student's then-current regular education teacher in

[3] As noted in the August 2020 speech-language evaluation, the student's portion of the evaluative process took approximately two hours (see Dist. Ex. 11 at p. 1).

the ICT classroom, the student—"[w]hen allowed"—attended school five days per week (id. ¶ 5).[4] The teacher also noted that the special education teacher in the ICT classroom "worked closely in small groups and individually with the IEP students," and "made sure [that the student] was online with her SETSS teacher" (id. ¶ 7). In addition, the special education teacher would "email [the SETSS provider] to confirm the meeting if and why the meeting did not happen" (id.; see Oct. 13, 2022 Tr. pp. 29-30). The regular education teacher indicated that the student "worked with her SETSS teacher in the classroom with headphones on in a quiet place of her choice" (IHO Ex. X ¶ 8). At the impartial hearing, the regular education teacher confirmed during cross-examination that the student received SETSS "exclusively online" (Oct. 13, 2022 Tr. p. 29).

On September 24, 2020, a CSE reconvened to review the student's August 2020 speech-language therapy evaluation and developed an IEP for the student with a projected implementation date of October 8, 2020 (October 2020 IEP) (see Parent Ex. E at pp. 1-2, 16). Finding that the student remained eligible for special education as a student with a learning disability, the CSE modified the student's May 2020 IEP by adding one 30-minute session per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a group of three, and by changing the recommended OT services from two 30-minute individual sessions per week to one 30-minute session per week of individual OT and one 30-minute session per week of OT in a group of two (compare Parent Ex. C at p. 20, with Parent Ex. E at p. 12).[5] Within the IEP, the CSE noted the parent's concerns, which included concerns about the student's "written expression," "reading and writing skills," and that the "considerable amount of reading" required in mathematics impacted her mathematics skills; that she spent a "significant amount of time working with [the student] on her homework"; the student was "anxious due to comparisons with her peers' academic performance"; that she was concerned that the student's "academic growth [needed] to move at a quicker pace"; that "homework time [wa]s stressful" because the student got "concerned when she c[ould not] complete her assignments"; and her concerns about the student's handwriting, such as "difficulty keeping letters and words on the line with proper spacing and sizing of letters and words without assistance of an adult or peer" (id. at pp. 4-6, 17).[6]

The evidence in the hearing record indicates, on or about September 24, 2020, the occupational therapist who would be providing the student's OT services during the 2020-21 school year contacted the parent to schedule services beginning the week of September 28, 2020 (see IHO Ex. IX ¶¶ 5-6). The occupational therapist discussed scheduling one OT session "via teletherapy" per week and one OT session "in person" per week with the parent, and scheduled the

[4] At the impartial hearing, the regular education teacher clarified during cross-examination that, during the 2020-21 school year, the district eventually began to allow students with IEPs to "attend for five days" per week (Oct. 13, 2022 Tr. p. 27).

[5] The occupational therapist who provided OT services to the student during the 2020-21 school year had attended the September 2020 CSE meeting (compare IHO Ex. IX at p. 1, with Parent Ex. E at p. 18). The therapist testified that she recommended a modification of the student's OT services mandate to include a "group session to promote improved socialization skills," and that the student had been "evaluated for OT [services] in March 2020 by the previous therapist" (IHO Ex. IX ¶¶ 12-14).

[6] The district school psychologist who attended the September 2020 CSE meeting testified that she did not "recall [the parent] mentioning any concerns about remote learning" at the meeting (IHO Ex. XIII ¶¶ 4-10).

student's first teletherapy OT session to take place on October 1, 2020 (id. ¶ 6; see Dist. Ex. 19 at pp. 1, 25 [comprising the OT sessions notes from October 1, 2020 through September 23, 2022]).

With respect to speech-language therapy services, the evidence reflects that, during the 2020-21 school year, the student—due to the "rotating [three-day] schedule and the holidays"—could only be seen "in person" once per week (IHO Ex. XI ¶¶ 5-6, 9; see Dist. Ex. 20 at pp. 1-20 [comprising speech-language therapy session notes from October 14, 2020 through June 22, 2021 for the 2020-21 school year; from September 22, 2021 through June 24, 2022 for the 2021-22 school year; and from September 13, 2022 through September 19, 2022 for the 2021-22 school year]). The speech-language provider indicated that, when asked to provide consent for remote services, the parent expressed that "she did not like remote classes" (IHO Ex. XI ¶ 10). In addition, the speech-language provider noted that, when she reached out to the parent for consent for remote services because the student was "missing sessions in person due to [the] rotating schedule," the parent—in an email dated October 29, 2020—informed her that she "only would consent while they were in school 1 [to] 2 days per week" (id.; see Dist. Ex. 21 at p. 7).

In a letter to the parent dated October 27, 2020, the district guidance counselor who would be providing counseling services to the student during the 2020-21 school year summarized a conversation held with the parent on September 29, 2020, which included that the student's mandated counseling sessions would be delivered via a "'Remote Learning Platform" (Parent Ex. F at p. 1; see IHO Ex. XII ¶¶ 1, 3-6; see also Dist. Ex. 18 at pp. 1-7 [comprising counseling sessions notes from March 3, 2020 through June 22, 2020 for a portion of the 2019-20 school year and from September 29, 2020 through June 22, 2021 for the 2020-21 school year]).[7] According to the October 2020 letter, the parent had "agreed to individual remote services," but then later, on or about October 22, 2020, the parent sent an email to the guidance counselor "declining remote services because [it] was too difficult for [the student] to keep up with remote services" and therefore, the parent wanted the counseling services "put on hold for a few months" (Parent Ex. F at p. 2; see Dist. Ex. 21 at pp. 6, 8; IHO Ex. XII ¶ 6).[8]

In or around November 19, 2020, the student's speech-language provider received an email from the parent, which indicated that she did not believe that the "teletherapy slot would work for [the student]" and which further indicated that she would contact the speech-language provider after the holiday (IHO Ex. XI ¶ 11).

[7] The individual who provided the student's counseling services during the 2019-20 school year was not the same individual who provided the student's counseling services during the 2020-21 and 2021-22 school years (see generally Dist. Ex. 18).

[8] As reflected in an entry in the district's Special Education Student Information System (SESIS) events log, the district guidance counselor documented that the parent wanted to put the student's remote counseling services "on hold" because the student had "too many meetings" to join and would "revisit" counseling services "in [a] few months" (Dist. Ex. 21 at p. 8). In another SESIS events log entry dated November 10, 2020, the district guidance counselor documented that the parent discontinued the student's counseling services at that time because it was difficult to get the student (and the student's sibling) "'into the right calls'" while she and her spouse juggled their own "'work calls'" (id. at p. 6).

On or about December 3, 2020, the district guidance counselor telephoned the parent to discuss whether "she wanted to revisit counseling" services for the student (Dist. Ex. 21 at p. 5). At that time, the parent declined counseling services because the guidance counselor could only provide services remotely even though the student would be "returning back to in-person learning [five] days a week" (id.). Based upon a review of the counseling session notes in the hearing record, it appears that the student did not resume counseling services for the remainder of the 2020-21 school year (see Dist. Ex. 18 at pp. 3-7).

According to the evidence in the hearing record, in or around the second week of December 2020, the student returned to "school [five] days a week" (IHO Ex. IX ¶ 10). At that time, the student began to receive her OT services in-person only (id.; see Oct. 13, 2022 Tr. pp. 13-14).

In an email to the student's speech-language provider dated January 7, 2021, the parent indicated that she wanted to place the student's "online services (OT/speech) on hold for now," noting that the student was "having issues adjusting to the online schedule and would like to concentrate on regular school work and SETTS (sic) [un]til [they] were back in school" (Dist. Ex. 21 at p. 5). The parent also indicated that, if the school "remain[ed] closed longer," then the schedule for those services would be discussed (id.). Based upon a review of the OT sessions notes in the hearing record, the student continued to receive OT services for the remainder of the 2020-21 school year (see Dist. Ex. 19 at pp. 5-11). With respect to speech-language therapy, a review of those session notes in the hearing record reflects that the student resumed speech-language therapy services shortly after the January 7, 2021 email and continued to receive speech-language therapy services for the remainder of the 2020-21 school year (see Dist. Ex. 20 at pp. 3-6).

On June 11, 2021, a CSE convened to conduct the student's annual review and to develop an IEP for the student for the 2021-22 school year (June 2021 IEP) (see Dist. Ex. 4 at pp. 1, 22). Finding that the student remained eligible for special education as a student with a learning disability, the June 2021 CSE recommended that the student receive instruction in a general education class setting with ICT services for ELA (15 periods per week), mathematics (5 periods per week), social studies (2 periods per week), and sciences (2 periods per week), as well as SETSS (for ELA) (4 periods per week); and related services consisting of two 30-minute sessions per week of OT in a group of two and two 30-minute sessions per week of speech-language therapy in a group of three (id. at pp. 17-18). As reflected in the IEP, the student began the 2020-21 school year attending school in a hybrid model (in-person at school for a few days and online for a few days), but then switched to attending school in-person "full time" mid-year (id. at p. 2). At that time, it was noted in the IEP that the student was reading on a "Level J," but by June, "second graders should be reading [at] a Level M" (id.).[9] According to the IEP, the student's SETSS focused on a "variety of ELA skills using Lexia Core 5 and different class assignments" (id. at p. 3). The June 2021 CSE documented the parent's concerns, which included continued concerns with the student's "reading comprehension, math, and writing"; the student's difficulty understanding mathematics word problems; encouraging the student to "speak up if she d[id]n't

[9] In the student's May 2020 IEP, it was noted that the student was reading at an independent level of "F" and at a guided reading level of "G" (Parent Ex. C at p. 3).

want to do something"; the detrimental effect of the "lack of movement this year" on the student and her desire for the student to "try dance"; the student's sensitivity to loud noise and concerns related to returning to the cafeteria with all of the students next year; and concerns about the student's executive functioning skills, as the student had "difficulty organizing her homework assignments and her folders [we]re often full as she d[id] not empty them" (id. at pp. 4-5). The parent also reported that, with respect to the student's social development, "she [wa]s better adjusted" since returning to "school five days [per] week" (id. at p. 4).[10]

The hearing record included a copy of the student's report card for second grade during the 2020-21 school year (see Dist. Ex. 15 at pp. 1-2). Overall, in ELA—which included reading, writing, and listening and speaking language—the student received an "N," needing improvement (id. at p. 1). Within the areas comprising ELA, the student also received "MT"—or meeting standards—in the final marking period in 5 out of 13 specific areas, such as "[u]s[ing] letter-sound relationships to figure out new words"; "[w]rit[ing] independently for different tasks, purposes, and audiences (opinion, informative/explanatory, narrative)"; and "[u]s[ing] and understand[ing] a wide range of vocabulary" (id.). In the report card, the teacher comments noted that the student was "[i]n progress toward reading grade level appropriate texts" and that the student made "[e]xcellent progress" in reading (id.). Overall, in mathematics, the student received an "MT," meeting standards, but also received an "N" in areas for "[s]olv[ing] problems with precision and accuracy" and "[s]olv[ing] problems in multiple ways and explain[ing] solutions" (id.). For the remaining areas, such as science, social studies, physical education, visual art, music and academic and personal behaviors, the student consistently received an "MT," or meeting standards (id. at pp. 1-2). It was noted, however, that the student needed improvement in the areas of "[a]sk[ing] for help when needed" and "[p]ersist[ing] through challenges to complete a task by trying different strategies" (id. at p. 2).

Consistent with the student's June 2021 IEP, the student attended third grade during the 2021-22 school year in a general education classroom with ICT services in a district public school. The evidence reflects that the student resumed her OT services, counseling, and speech-language therapy services and attended all of her related services regularly (see, e.g., Dist. Exs. 18 at pp. 7-9; 19 at pp. 12-25; 20 at pp. 7-20).

In a letter to the parent dated December 3, 2021, the district offered the student "Special Education Recovery Services," consisting of 20 hours of "Small Group Instruction," in a group of six students or less, to be delivered between December 11, 2021 and April 2, 2022 (Dist. Ex. 13 at p. 1). As reflected in the letter, the district explained that, consistent with a discussion held on December 2, 2021, "all students w[ould] receive additional supports and programs connected to daily instruction as part of the [district's] Academic Recovery Plan" (id.). According to the letter, the Special Education Recovery Services were "intended to address needs arising from learning

[10] As reflected in an entry in the district's SESIS events log dated June 22, 2021, the parent sent an email to the district indicating that she would like to "continue counseling services when school resume[d] in September for in person sessions" (Dist. Ex. 21 at p. 2). In addition, the entry indicated that counseling services had been mistakenly "omitted from [the] current IEP" by virtue of a "[c]lerical error" (id.). As a result, the parent agreed to allow an amendment to the student's IEP without a meeting and counseling services were included in the student's IEP (id.; see Dist. Ex. 5 at p. 23).

disruption caused by the pandemic" (id.). The letter noted that the district would be in contact "later in the school year to discuss whether further services w[ould] be needed, taking into account your child's progress and services that have been provided from March 2020 on" (id.). The letter also noted that the Special Education Recovery Services did "not replace [the student's] IEP-recommended program and services," but could differ, for example, by the size of the group (id.). In addition, the letter indicated that "[a]ccepting these services d[id] not waive any rights [the parent] or [the student] may have to request additional services, including compensatory services" and reminded the parent that protections existed under the "Procedural Safeguards of the Regulations of the Commissioner of Education" as well as where to obtain a copy of the same (id. at p. 2).

Attendance records in the hearing record reflect that the student began receiving what appeared to be the Special Education Recovery Services on or about December 10, 2021 and that she continued to receive those services on an almost weekly basis through June 10, 2022 (see Dist. Ex. 14 at pp. 1, 21). The attendance records reflect a group of six students (with five student names redacted), identified as grade three, "read/math," and that the "extended session" was approximately 50 minutes in length (id. at pp. 1, 3-4).

A. Due Process Complaint Notice

In a due process complaint notice dated March 10, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) by "failing to implement the [s]tudent's educational program as established in the [s]tudent's last agreed upon [IEP]" (Parent Ex. A at p. 1). In addition, the parent alleged that the district failed to offer the student a FAPE pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) by "unilaterally modifying the [s]tudent's IEP" (id.).[11] More specifically, the parent asserted that, in or around "mid-March 2020," the district "unilaterally, substantially, and materially altered" the student's "'status quo' educational program as it relate[d]" to her pendency rights when the district: "substantially and materially altered the location" for the student's receipt of services from a "school classroom" to the student's home; "substantially and materially altered the delivery of these services" from in-person instruction by a special education teacher or related service provider; and provided the student's services remotely as opposed to the direct instruction required by her IEP and without proper notice to, or consent by, the parent (id. at p. 2). In addition, the parent indicated that the student was "intermittently denied related services completely" from March to July 2020 (id.). As a result of the foregoing, the parent noted that the student "experienced substantial regression in their skills, abilities, and performance" (id.). As a final point, the parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id.).

After noting that the district's federal and State obligations to continue to provide students with a FAPE during the COVID-19 pandemic—while allowing for flexibility during this transition of services—had not been waived or absolved, the parent alleged that the district violated the student's pendency rights and, as a result, she sought "immediate relief" (Parent Ex. A at p. 2).

[11] See 29 U.S.C. § 794(a).

Additionally, the parent requested a "comprehensive independent evaluation" of the student to "determine the need for compensatory services as well as any appropriate changes" to the student's "educational program and placement" to remedy the district's failure to offer the student a FAPE "since mid-March 2020" (id. at p. 3). The parent also requested to convene a CSE upon the completion of the IEE to "review the updated evaluation and make any appropriate changes" to the student's IEP (id. at p. 3).

As relief, the parent requested that the IHO: issue an "interim order" directing the district to "immediately implement" the student's last-agreed upon IEP, dated May 2020, by "allowing the [p]arent to self-cure the unilateral changes in the [s]tudent's status quo educational program and placement, to the best of their abilities, by securing the program and related services" set forth in the May 2020 IEP; issue an "interim order" directing the district to "conduct a comprehensive [IEE]" of the student; issue an order directing the district to reimburse the parents for the "cost of any and all services unilaterally provided" to the student, "as mandated by the [s]tudent's IEP, during the period of time" the district failed to so; and issue an order finding that the district failed to offer the student a FAPE and "determine appropriate compensatory services" as a remedy (id.).

B. Events Post-Dating the Due Process Complaint Notice

On May 24, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (fourth grade) with a projected implementation date of June 10, 2022 (June 2022 IEP) (see Dist. Ex. 6 at pp. 1, 23). Finding that the student remained eligible for special education as a student with a learning disability, the May 2022 CSE recommended that the student receive instruction in a general education class setting with ICT services for ELA (15 periods per week), mathematics (7 periods per week), social studies (2 periods per week), and sciences (2 periods per week), as well as SETSS (for ELA) (3 periods per week); and related services consisting of one 30-minute session per week of counseling services in a group of four, two 30-minute sessions per week of OT in a group of two, and two 30-minute sessions per week of speech-language therapy in a group of three (id. at pp. 1, 18-19). At that time, the CSE documented that the student was reading at a "Level O"—"a middle of the third grade reading level"—and by June, "third graders should be reading on a level P" (id. at p. 3). In addition, the CSE noted that the student required the "most support" with writing, and conversely, that mathematics was the student's "strongest area" (id.). The student was reportedly meeting third grade level standards in mathematics (id.). As reflected in the IEP, the parent expressed how "happy [she was] with the progress [the student] ha[d] made this year in all academic areas," but would like the student to "be on grade level in reading and writing" (id. at p. 4). The CSE also noted that, given the "progress made this year academically," the CSE members "all agreed on lowering [SETSS] to [three] times per week instead of [four] to lower the amount of times per week [the student wa]s pulled from the classroom" (id.). With respect to the student's social development, the parent expressed that she was "happy with the growth [the student] ha[d] made socially this year," and that she was "proud of [the student's] efforts and happy she [wa]s participating often in class and ha[d] made friends" (id. at p. 5). With regard to the student's physical development, the parent expressed that she did not have any concerns, but noted that "handwriting continue[d] to be an area of weakness for [the student]" (id. at p. 6).

C. Impartial Hearing Officer Decision

On June 14, 2022, the parties proceeded to an impartial hearing, and the IHO conducted a prehearing conference (see June 14, 2022 Tr. pp. 1-34). Shortly thereafter, the IHO issued an interim decision, dated June 23, 2022, ordering the district to fund an IEE, consisting of a neuropsychological evaluation of the student (see IHO Ex. VIII at pp. 1, 4).[12] The impartial hearing resumed on July 6, 2022, with the IHO conducting a status conference, and then on September 29, 2022, the parties began the presentation of their respective cases, which concluded on January 11, 2023, after seven total days of proceedings (see July 6, 2022 Tr. pp. 35-51; Sept. 29, 2022 Tr. pp. 1-19; Oct. 13, 2022 Tr. pp. 1-59; Nov. 15, 2022 Tr. pp. 11-137; Dec. 19, 2022 Tr. pp. 1-39; Jan. 11, 2023 Tr. pp. 1-30).[13]

In a decision dated March 13, 2023, the IHO found that the district offered the student a FAPE from March 2020 through April 2021, and "presented ample evidence that the [district] had provided [the s]tudent with the services that were outlined in the May 20, 2020 IEP to the best of their ability" (IHO Decision at p. 9). As a result, the IHO denied the parent's requested relief (id. at pp. 9-10).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the district offered the student a FAPE from March 2020 through April 2021. The parent also argues that, as a result, she is entitled to an award of compensatory educational services and an award of reimbursement for out-of-pocket expenses she incurred to obtain services for the student.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety.

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]).

[12] The neuropsychological IEE took place over two days in November 2022 (November 2022 neuropsychological evaluation) (see Parent Ex. K at p. 1).

[13] The evidence in the hearing record reflects that the student was attending the same district public school for fourth grade during the 2022-23 school year that she had attended for both second and third grades (compare Parent Ex. K at p. 3, with Dist. Exs. 15-16).

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]).[14]

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. Preliminary Matters—IHO Decision

Initially, the parent asserts that the IHO's decision failed to comply with practice regulations because the IHO did not provide any factual or legal basis or rationale for finding that the district offered the student a FAPE. As a result, the parent contends that she is unable to point to a specific error of fact or law made by the IHO in reaching that conclusion. The district asserts that, while "not overly extensive," the IHO's decision was sufficient and does not provide a suitable basis for reversal. Alternatively, the district contends that, even if the IHO's decision did not

[14] 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).

include a sufficient factual or legal basis to support the IHO's conclusion, an SRO's independent review of the IHO's findings, conclusions, and decision should result in the SRO upholding the IHO's decision.

As noted by the parent, State regulation requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO], and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]). Here, and despite the parent's assertions to the contrary, the IHO's decision minimally meets the regulatory criteria. While it is true that the IHO included background information, a procedural history, and a legal framework upon which to base her findings and conclusions of law, the IHO did not engage in any description of the specific facts underlying the parent's claims or grapple with any analysis of the facts to the applicable legal standards in this case (see IHO Decision at pp. 4-8). In addition, the IHO's findings of fact and her legal conclusion that the district offered the student a FAPE consisted of three paragraphs formed by approximately eight sentences, which are conclusory and which are relatively generic and could, therefore, pertain to any case in front of the IHO (id. at p. 9). To be clear, merely listing the witnesses presented at the impartial hearing, including a citation to the documents consisting of their respective direct testimony by affidavit without indicating the substance of that testimony, and accepting their testimony as "credible" does not constitute factual findings or provide a sufficient basis upon which to draw a conclusion (id.). Essentially, the IHO issued a decision concluding that the district offered the student a FAPE without addressing any of the parent's issues raised in the due process complaint notice.

Without analyzing the issues raised in the due process complaint notice, the IHO essentially left the parent without specific findings to appeal in a way that would be consistent with State regulations. Absent such findings, it becomes necessary for an SRO to consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see also Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have made a determination regarding the district's alleged failure to implement the student's IEPs through the delivery of remote instruction, as asserted in the due process complaint notice, in the first instance.

However, in this instance, the hearing record is sufficiently developed to render a decision on the merits of the parent's claims and the matter has already been prolonged. Accordingly, rather than remanding the matter back to the IHO to reissue a decision, the IHO is strongly cautioned to comply with the legal standards applicable when issuing decisions in the future. In particular, both the IDEA—and State regulation—direct that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (see 20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]). Additionally, an IHO "may find that a student did not receive a [FAPE] only if the procedural inadequacies impeded the student's right to a [FAPE], significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parent's child, or caused a deprivation of educational benefits" (8 NYCRR 200.5[j][4][ii]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

300.513[a][2]). Next, as noted above, State regulation requires that the IHO's decision must be based solely on the record of the proceeding before the IHO, and "shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]). The IHO's decision must also "reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

I turn now to the merits of the parties' dispute.

B. Remote Instruction and Implementation of the Student's IEPs

The parent argues that the IHO erred by finding that the district offered the student a FAPE from March 2020 through April 2021. In support of this assertion, the parent argues that the evidence in the hearing record demonstrates that the student's IEPs mandated in-person and in-school instruction and related services, which the district unilaterally changed without notice to or consent by the parent.[15] The parent also contends that, after March 2020, the student did not receive "services or appropriate services" mandated in her IEPs. According to the parent, remote instruction was not appropriate for the student, as she became "completely overwhelmed," and the remote services were inconsistent, confusing due to the use of multiple platforms between and among providers, and chaotic due to late provided links used to access sessions. The parent further asserts that the student's anxiety increased from March 2020 to April 2021, and she expressed concerns at the April 2020 CSE meeting about the student's "struggles from the lack of services, [and] the lack of appropriate services," but was told that this was the "'new normal.'" In addition, the parent contends that the IHO ignored evidence demonstrating that the student had difficulty with remote instruction, as well as evidence demonstrating that the student experienced regression based on the district's failure to provide appropriate services and that the November 2022 neuropsychological evaluation confirmed the student's deficits. The parent also alleges that the inappropriate remote services resulted in a lack of progress toward the student's annual goals and her ability to participate and make progress in the curriculum. As a final point, the parent contends that the IHO failed to address her request in the due process complaint notice for the CSE to convene to review the November 2022 neuropsychological evaluation.

In response, the district asserts that the evidence in the hearing record reveals that, while the student's reading skills remain below grade level, the student continued to make progress from March 2020 through April 2021 even if her progress slowed during the implementation of remote instruction for seven months. In addition, the district contends that, contrary to the parent's contention, the November 2022 neuropsychological evaluation of the student "explicitly rule[d] out the possibility of drawing any relevant comparisons" to the student's performance in the previous December 2019 neuropsychological evaluation and did not support a conclusion that the

[15] At the impartial hearing, when asked whether she had received notice from the district concerning remote services, the parent testified that the district had "asked [her] to sign papers to allow for remote services" (Nov. 15, 2022 Tr. p. 67). Later in her testimony, the parent stated that she did not consent to changes in the receipt of the student's related services due to the COVID-19 pandemic—"[e]xcept for allowing it to be online and remote, right, because we had no choice" (see Nov. 15, 2022 Tr. pp. 71-72). She further testified that she "begged" the district to provide the student with in-person SETSS during the 2020-21 school year, but the district was "not able to provide someone to go to the class to the school, because the schools d[id] not allow non-faculty to be in the school" (Nov. 15, 2022 Tr. p. 72).

student regressed. With respect to the parent's argument that the student did not receive all of her mandated special education program and related services, the district denies the same. Rather, the district argues that the student was offered, and received, Special Education Recovery Services, to make up for any slowed progress during the pandemic, and moreover, that any missed services between March 2020 and April 2021 resulted from the student's non-attendance due to her own refusal to attend or due to the parent not making the student available for her sessions. The district also points out that the student's non-attendance persisted when schools resumed in-person instruction. In addition, the district notes that the parent's remaining arguments are essentially identical to allegations made in several other cases against the district, which relate to school closures and the provision of remote instruction during the COVID-19 pandemic, and which have been dismissed as moot, systemic, or beyond the jurisdiction of both IHOs and SROs.

Initially, the district is correct: the allegations in the parent's due process complaint notice—and now on appeal—are similar to allegations raised by counsel for the parents on behalf of other students in the district, which have been discussed in a number of decisions issued by SROs (see Application of a Student with a Disability, Appeal No. 22-108; Application of a Student with a Disability, Appeal No. 22-016; Application of a Student with a Disability, Appeal No. 21-210; Application of the Dep't of Educ., Appeal No. 21-188; Application of the Dep't of Educ., Appeal No. 21-187). In all of these matters, the parents' allegations surrounded the school building closures that took place as a result of the COVID-19 pandemic. Relevant to such circumstances is the decision of the District Court of the Southern District of New York in J.T. v. de Blasio (500 F. Supp. 3d 137, at 145 [S.D.N.Y. 2020] [indicating that "the switch to remote learning did not require any change to students' IEPs"], aff'd in part, K.M. v. Adams, 2022 WL 4352040 [2d Cir. Aug. 31, 2022]). The Court in J.T. described in detail the March 13, 2020 closure of school buildings in New York City, and found that the actions taken by the district to deliver services to students with disabilities during the building closure through remote delivery to be consistent with federal and State guidance (500 F. Supp. 3d at 181-84).

Here, to the extent that the parent took issue with the executive decision to close school buildings or the district's actions to deliver instruction and services to students with disabilities remotely during the building closure, those allegations are systemic in nature, and no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the former Governor's or district policies affecting all students. Even if I possessed such authority, courts have held that certain summary administrative actions that have the effect of limiting the availability of protections otherwise afforded by law under ordinary circumstances may be justified as part of the government's response to emergency situations (see,

e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 979 [D.N.M. 2020]), so it is far from clear that the parent would prevail with that argument in the appropriate forum anyway.[16]

In addition, although the parent's due process complaint notice included an allegation that "the Student experienced substantial regression in [her] educational skills, abilities, and performance," this assertion is based on such regression being "a result of the modifications of the Student's mandated IEP program and services" (Parent Ex. A at pp. 1-2). As noted above, the only modification to the student's IEP, as of mid-March 2020, that the parent obliquely identified in the due process complaint notice was the subsequent development of the May 2020 IEP and, perhaps, the modification claimed was more specifically identified as the switch from an in-person to a remote program (id. at pp. 1-4).[17]

While, as noted by the District Court in J.T., the United States Department of Education (USDOE) stated unequivocally in its guidance that compliance with IDEA did not preclude any school from offering educational programs through distance instruction (J.T., 500 F. Supp. 3d at 187; see "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]), such guidance merely serves to clarify a district's obligation in the context of an unprecedented public health emergency and does not speak to the actual impact of remote learning on individual students with disabilities. Accordingly, while the pivot to remote learning during the school building closure period cannot be the sole basis for finding a denial of FAPE, federal and State guidance suggests that going forward, a CSE should, in the first instance, address questions of educational benefit, loss of academic skills and potential regression during remote learning when recommending educational programming for subsequent IEPs.

For instance, both the USDOE and the State Education Department's (NYSED's) Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of school buildings resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS

[16] Further, in the due process complaint notice, the parent referenced concepts such as "status quo" and pendency rights (IHO Ex. I at pp. 1-2). The parent has omitted these types of allegations on appeal, and therefore appears to have tacitly acknowledged that district-wide school building closures would not trigger pendency rights. In any event, if the parent attempted to pursue allegations that there was a violation of the student's pendency placement, such allegations would be premature insofar as the student was not entitled to a pendency placement prior to the parent's filing of the due process complaint notice in March 2022 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the former Governor's March 2020 executive order closing school buildings in the State is not the event that would trigger the student's right to a pendency placement under the IDEA, and it was only the parent's filing of a due process complaint notice in March 2022 that gave rise to the student's rights under stay-put.

[17] To be clear, the parent's due process complaint notice does not reference the IEPs developed subsequent to the May 2020 IEP, including the October 2020 IEP, the June 2021 IEP, or the June 2022 IEP (see generally Parent Ex. A).

2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/ compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

It is undisputed that the student was entitled to receive the special education services recommended in her IEPs. Turning first to the November 2019 IEP in place at the time of the school building closures in mid-March 2020, the hearing record reflects that the student was mandated to receive the following special education and related services: ICT services for ELA (16 periods per week) and for mathematics (5 periods per week) and one 30-minute session per week of counseling services for the student in a group of three (see Dist. Ex. 1 at p. 10). Thereafter, beginning on or about May 20, 2020—the projected implementation date of the May 2020 IEP—and continuing as of the start of the 2020-21 school year, the student was mandated to receive the following special education and related services: ICT services for ELA (16 periods per week) and mathematics (5 periods per week), SETSS for ELA (4 periods per week), two 30-minute sessions per week of individual OT, and one 30-minute session per week of individual counseling services (see Parent Ex. C at pp. 1, 20).

After the September 2020 CSE convened, the student's October 2020 IEP—with a projected implementation date of October 8, 2020—mandated the same special education program, consisting of ICT services for ELA (16 periods per week) and mathematics (5 periods per week), and SETSS for ELA (4 periods per week); however, the student's related services were modified to include one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of three, one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group of two, and one 30-minute session per week of individual counseling services (see Parent Ex. E at pp. 11-12). The October 2020 IEP would have remained in place through April 2021 (and through the conclusion of the 2020-21 school year in June 2021), entitling the student to continue to receive the same special education program and related services through April 2021 (id. at p. 1 [projecting the student's annual review to occur on September 24, 2021]).

It is also undisputed that the parent alleged in the due process complaint notice that the student did not receive all of her special education and related services pursuant to her IEPs from March 2020 through April 2021. However, to address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a

Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1; see also Z.Q. v New York City Dep't of Educ., 2022 WL 903003, at *5 [S.D.N.Y. Mar. 28, 2022] [noting that "[t]he 2020 COVID-19 guidance . . . provides that CSEs may coordinate with parents to make [an] individualized determination" about whether a student is entitled to compensatory services]).

In the event that a CSE "decides not to provide compensatory services to a parent and the parent disagrees with that decision," State guidance provides that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. If the parent is of the opinion that the student has regressed, the parent must first bring those concerns to a CSE to engage in educational planning for the student, including a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school building closures and the delivery of instruction and services to the student remotely.

The parent testified at the impartial hearing that the student has "never been on grade level for reading and writing" since kindergarten (Nov. 15, 2022 Tr. p. 72). She also testified that she believed the student regressed "because of the lack of services" during COVID-19, and was "not catching up" (Nov. 15, 2022 Tr. p. 73). The parent based her belief that the student regressed on the fact that the student "consistently ke[pt] getting below grade level for reading levels" and the student's writing was on a "first second grade level" (id.; see Parent Ex. I [handwriting sample]; but see Jan. 11, 2023 Tr. pp. 9-20 [consisting of rebuttal testimony by student's OT provider regarding the handwriting sample admitted into evidence and addressing handwriting in OT]). In addition, the parent testified that, at the April 2020 CSE meeting, she expressed her concerns that the student was not "getting the services that she needed" but that she had been told "[t]his [wa]s the new normal" and "[t]his [wa]s unprecedented times" and that the CSE did not address her concerns (Nov. 15, 2022 Tr. pp. 75-76).

Although the November 2022 neuropsychological evaluation of the student was completed during the impartial hearing, and was submitted into the hearing record as evidence, it does not appear from the hearing record that the November 2022 neuropsychological evaluation report was delivered to the CSE so that the CSE could consider whether the evaluative information supported the parent's position or if compensatory education would be appropriate to make-up for any loss of skill linked to the provision of remote instruction to the student. In any event, the November 2022 neuropsychological evaluation that was conducted during the impartial hearing post-dates the due process complaint notice (i.e., March 2022). Indeed, the due process complaint notice does not include any allegations relating to a CSE's consideration of compensatory education or lack thereof because of responsive measures by the government to mitigate the public health threat from COVID-19. And in this instance, the evidence in the hearing record reflects that the parent had several opportunities following the initiation of remote instruction in March 2020 to raise her concerns at CSE meetings held to develop subsequent IEPs for the student in April 2020, September 2020, June 2021, and May 2022, or at which time the parent could have requested a CSE meeting for the specific purpose of discussing compensatory education for the student's alleged loss of skills resulting from the provision of remote instruction—and the IEPs do not reflect any such concerns reported by the parent (see generally Parent Exs. C; E; Dist. Exs. 1; 4-6).

Additionally, the hearing record contains evidence that the district took steps to remedy loss of skill that the student may have experienced due to a disruption in the student's learning during the pandemic. Specifically, as part of the district's "Academic Recovery Plan," every student in the district was to "receive additional supports and programs connected to daily instruction" (Dist. Ex. 13 at p. 1). In addition, for this student specifically, the district offered 20 hours of Special Education Recovery Services, consisting of what may otherwise be characterized as SETSS in a group of six students (id.).[18] The evidence reveals that the student availed herself of those services from December 2021 through June 2022 (see generally Dist. Ex. 14). Therefore, any CSE now convened for the purposes described above should also consider what impact, if any, that the Special Education Recovery Services may have had on the student's alleged loss of skills.

[18] According to the December 3, 2021 notice offering the student Special Education Recovery Services, the services were discussed at a "meeting" on December 2, 2021 (Dist. Ex. 13 at p. 1).

At this point, the CSE should have reconvened to develop an IEP for the student for the 2023-24 school year (see Dist. Ex. 6 at p. 1 [showing a projected date of annual review of May 24, 2023]), and the parent was required to raise these concerns concerning the student's regression and compensatory education with the CSE in the first instance. As discussed above, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. Accordingly, and notwithstanding that the IHO found that the district offered the student a FAPE in this case, the parties, if they have not already done so, should conduct a review of the student's present levels of academic achievement and functional performance—including the results of the student's most recent November 2022 neuropsychological evaluation—as envisioned by federal and State education authorities and convene a CSE to engage in educational planning for the student, which should include a consideration of whether any further compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely. Once a CSE conducts such a review, if the parent disagrees with the recommendations thereof, she may pursue dispute resolution through one of the mechanisms described above.

VII. Conclusion

In summary, given the allegations in the parent's due process complaint notice, there is insufficient basis in the hearing record to depart from the IHO's determination that the district met its burden to prove that it provided the student a FAPE and that the student is not entitled to relief in the form of compensatory services at this juncture.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 1, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER