



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-088

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 New York City Department of Education

Appearances:

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student received services through the Early Intervention Program (EIP) as a younger child and special education itinerant teacher services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) in kindergarten (Parent Ex. G at pp. 1-2). The student subsequently also received applied behavior analysis (ABA) services and services from a "learning specialist" (id. at p. 1). In April 2021, an impartial hearing commenced regarding the parent's

request for compensatory relief (special education teacher support services [SETSS], OT, and counseling) related to the 2020-21 and 2021-22 school years (Parent Ex. B). In May 2021, the IHO in that matter ordered that the student undergo an independent neuropsychological evaluation (id. at p. 2).

Over three dates in August 2021, a neuropsychologist conducted a neuropsychological evaluation of the student (Parent Ex. G). At that time, the student had previously received a diagnosis of an attention deficit hyperactivity disorder (ADHD), attended a general education parochial school, and had an IESP in place, which provided for five periods per week of SETSS, speech-language therapy, OT, and PT (id. at pp. 1, 5). Teacher reports indicated that the student had difficulty with attention, following directions, and reading comprehension (id. at p. 5). The evaluator concluded that the student had "minimal academic skills in secular areas, and encountere[d] difficulty with religious studies" such that he "require[d] significant amounts of academic support" in the form of 12 periods of SETSS (Yiddish) per week (id. at p. 6).¹ The evaluator also recommended a continuation of the student's speech-language therapy services to address "lexical and semantic abilities, as well as language structure" (id.).²

The student continued to attend a general education parochial school during the 2021-22 school year (eighth grade) (Parent Ex. C at p. 1). The CSE convened on October 14, 2021, to formulate the student's IESP to be implemented beginning October 28, 2021 (id.). Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended that the student receive eight periods per week of SETSS (Yiddish) in a group, two 30-minute sessions per week of speech-language therapy (Yiddish) in a group, one 30-minute session per week of individual speech-language therapy (Yiddish), one 30-minute session per week of individual counseling (Yiddish), and one 30-minute session per week of OT (English) in a group (id. at pp. 1, 14-15).

The parent signed a contract with Succeed Educational Support Services (Succeed) for the delivery of "1:1 Special Education Services" to the student for the 2022-23 school year (Parent Ex. H).³

The IHO in the prior matter determined that the parent sought additional SETSS based on recommendations from the neuropsychological evaluation and related services in "order to make up for services that were supposed to have been provided by the [district] that were not provided" (Parent Ex. B at pp. 2-3). In a decision dated July 22, 2022, the IHO in the prior matter cited to the neuropsychologist's recommendation that the student receive 12 periods of SETSS per week

¹ The neuropsychologist reported that all communication with the student was conducted in Yiddish, and that "[t]ests were translated and modified consistent with language and cultural differences, where applicable" (Parent Ex. G at p. 2).

² In addition to noting the student's ongoing difficulty with attention consistent with his prior diagnosis of ADHD, the neuropsychologist also determined that the student met the criteria for a diagnosis of anxiety disorder, for which he recommended medication administration (Parent Ex. G at pp. 5, 6).

³ The contract was dated September 1, 2022; however, it appears that the parent signed the contract electronically on June 28, 2022 (Parent Ex. H).

and calculated the difference in SETSS periods provided during the school years at issue (seven periods and four periods per week, respectively), resulting in an order for the district to fund 440 hours of bilingual Yiddish SETSS "to make up for the shortfall with regard to what was needed as opposed to what was provided" as well as 30-minute sessions each of bilingual Yiddish counseling and OT to be used within two years from the date of that decision (id. at pp. 5-6, 7).

In a letter sent by email to the district on August 15, 2022, the parent provided notice of his intent to "reject the most recent reduced recommendations" in the October 2021 IESP and place the student at the general education parochial school and provide him "with the recommended services as modified by the recommendations" set forth in the neuropsychological evaluation and seek "reimbursement or direct payment" from the district for the special education program and related services (Parent Ex. E).

During the 2022-23 school year, the student attended a "mainstream" parochial school and the parent and Succeed supervisor stated that, beginning in September 2022, Succeed provided the student with eight hours of 1:1 SETSS per week, two 30-minute sessions of speech-language therapy per week, and one 30-minute session of OT per week (Feb. 22, 2023 Tr. p. 41; Parent Exs. F ¶¶ 10-11; K ¶¶ 4, 11).⁴

In a Succeed report dated December 4, 2022, the SETSS providers indicated that the student was receiving five hours of 1:1 SETSS per week in both push-in and pull-out settings (Parent Ex. I at p. 1). They indicated that the student "demonstrate[d] significant delays in all areas of academics and require[d] specialized instruction" (id.). According to the SETSS providers, the student was "falling behind his peers significantly in all academic areas," as such, they "highly recommended" an increase in the amount of hours of SETSS the student received (id. at p. 6).

The CSE convened on December 5, 2022, to formulate the student's IESP to be implemented beginning December 19, 2022 (Parent Ex. D). The CSE continued to recommend the same SETSS (eight periods per week) and related services programming as per the October 2021 IESP (compare Parent Ex. C at pp. 14-15, with Parent Ex. D at p. 9).

A. Due Process Complaint Notice

In the amended due process complaint notice, dated December 27, 2022, the parent invoked pendency and asserted that the student's stay-put placement should be based on the July 22, 2022 IHO decision in the prior proceeding and consist of 12 periods per week of SETSS (Yiddish), one 30-minute session per week of counseling (Yiddish), and one 30-minute session per week of OT (English) (Parent Ex. A at p. 2).⁵

⁴ 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 proceedings and the page number, such as "Dec. 27, 2022 Tr. p. 1."

⁵ The parent's original due process complaint was dated September 1, 2022 (Sept. 1, 2022 Due Process Compl. Not.).

Turning to the substance of her allegations, the parent contended that the October 2021 and December 2022 IESPs failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 4). Specifically, the parent argued that prior to the October 2021 CSE meeting he "had submitted an evaluation" report that recommended the student receive 12 periods of SETSS; "[p]sychotherapeutic intervention for [the student]; and [p]sychotherapeutic intervention for the parents" (*id.* at p. 2). According to the parent, the CSE "refused to consider" the evaluation recommendations and appeared to have already determined what to recommend for the student, despite the IHO's finding in the prior matter of a denial of a FAPE and award of the relief based on the recommendations from the evaluation (*id.* at pp. 2-3). Additionally, due to difficulties locating SETSS and related services providers from the district and independently, the parent "reserve[d] [his] right to ask for compensatory SETSS and related services," including pendency services, "for any periods not provided" during the 2022-23 school year (*id.* at pp. 3-4).

As relief, the parent requested: a finding that the October 2021 and December 2022 IESPs did not offer a FAPE, "an order that the recommendations in the IESP dated 10/14/21 as modified by the [IHO's finding of fact and decision] dated 7/22/2022 continue for the 2022-23 school year," and that the district "fund a bank of compensatory periods of SETSS and related services for any periods not provided during the current 2022/23 school year, including the services to which [the student] was entitled to under pendency" (*id.* at p. 4).

B. Impartial Hearing Officer Decision

After a prehearing conference on December 27, 2022 the parties continued with the impartial hearing before the Office of Administrative Trials and Hearings (OATH), which concluded on March 10, 2023 after four total days of proceedings (Dec. 27, 2022 Tr. pp. 1-7; Jan. 31, 2023 Tr. pp. 96-102; Feb. 22, 2023 Tr. pp. 1-55; Mar. 10, 2023 Tr. pp. 1-30).⁶ In a decision dated April 12, 2023, the IHO stated that, in addition to the parent's request that the district fund specific services at the provider's prevailing rate for the 2022-23 school year, the parent requested "as compensatory education, a bank of 160 hours of SETSS, a bank of 20 hours of [s]peech[-language] [t]herapy, and 20 hours of [c]ounseling [s]ervices to be utilized over the next two school years" (IHO Decision at p. 2).

Turning to the merits, the IHO determined that "[b]ecause the [d]istrict did not present a case in chief, the [d]istrict did not meet its burden to show that it provided the [s]tudent a FAPE for the 2022-23 school year" (IHO Decision at p. 3). The IHO then found that the parent "presented sufficient testimony to support his contention that the services provided by [Succeed] were appropriate for [the s]tudent" (*id.* at p. 4). In making that finding, the IHO found that Succeed offered most of the services required by the December 2022 IESP, and the district failed to offer any evidence showing that those recommendations were inappropriate (*id.*). As such, the IHO determined that "the fact that the [d]istrict recommended the services on the [s]tudent's IESP undercuts any argument that the services were inappropriate for the [s]tudent" (*id.*). The IHO concluded that "the uncontroverted testimony and evidence established that the services provided

⁶ The transcript from the January 31, 2023 hearing date begins at page 96; according to OATH's senior director, that "pagination [wa]s the result of a clerical error and the transcripts provided are complete," including seven pages in total from the January 31, 2023 proceedings (May 24, 2023 OATH written clarification).

by [Succeed] for the 2022-2023 school [year] were reasonably calculated to enable the [s]tudent to receive educational benefit, make progress, and met his unique needs, and that all the services mandated by the 2022 IESP [we]re appropriate" (id. at pp. 4-5). Further, the IHO determined that equitable considerations "favor the [d]istrict's responsibility for the services mandated by the 2022 IESP" (id. at p. 5).

As for the parent's request for compensatory education based on the July 2022 IHO decision arising from the prior matter, the IHO agreed with the district that the "[p]arent did not establish that the relief requested was appropriate" (IHO Decision at p. 5). Specifically, the IHO found that "[n]o evidence or testimony was brought by the [p]arent to provide a basis to award any compensatory relief" and that the act of the parent's counsel asking the IHO to calculate an award based on a prior hearing officer's order was akin to the parent asking the IHO to "enforce that order," which she did not have the authority to do (id.). Thus, the IHO concluded that "the relief sought by the [p]arent [wa]s not available in this proceeding and [wa]s denied" (id. at p. 6).

Based on the foregoing, the IHO ordered the district to "fund the following services at reasonable market rate": eight periods per week of SETSS in a group; two 30-minute sessions per week of speech-language therapy in a group; one 30-minute session per week of individual speech-language therapy; one 30-minute session per week of OT in a group; and one 30-minute session per week of individual counseling services; all services were to be provided in Yiddish except for OT (English) (IHO Decision at p. 6).

IV. Appeal for State-Level Review

On appeal, the parent identifies "the crux of this case" as the district's failure to implement the recommendations set forth in the August 2021 neuropsychological evaluation report, which he alleges supported his request for "an increase in the mandated [s]ervices." The parent argues that the neuropsychological evaluation shows that the student had difficulty with attention, following directions, and reading comprehension, and included a recommendation for an increase in SETSS to 12 periods per week. According to the parent, despite having access to that recommendation, the district did not provide any explanation for why it did not mandate the recommended increase and appeared to have "disregarded the [neuropsychological evaluation]'s recommendation." Further, the parent argues that the parent and Succeed supervisor's affidavit testimony showed that the student's SETSS "mandate was insufficient." Additionally, the parent asserts that "the [d]istrict presented no documents, witnesses or testimony in defense of its decision to mandate 8 periods of SETSS rather than the 12 recommended by the [neuropsychological evaluation]."

Next, the parent argues that the IHO erred by not ordering an increase in the amount of SETSS as recommended in the neuropsychological evaluation. Specifically, the parent asserts that, because the issue of how many periods of SETSS the student was entitled to was previously litigated, and "given [that] the district did not introduce any new evidence to challenge the analysis of the previous IHO, the only issue remaining was how to compensate [the student]" for the SETSS and related services that the district failed to provide. The parent requested a bank of hours to compensate the student for "the missed services" as set forth in the December 2022 IESP "including the modifications outlined in the [neuropsychological evaluation]." According to the parent, it is not improper for an IHO to "alter" the student's program and issue a bank of compensatory hours when appropriate. The parent argues that the IHO's refusal to modify the

student's program "once and for all" requires the parent to annually file a due process complaint notice, because "the IHO will not permanently modify" the student's IESPs "going forward."

For relief, the parent requests alteration of the student's December 2022 IESP to reflect the neuropsychological evaluation recommendations of 12 periods per week of SETSS, two 30-minutes of speech-language therapy per week in a group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of OT in a group, and one 30-minute session per week of individual counseling. Further, "[g]iven that [the student] did not receive some of these services, [the p]arent is seeking a bank" of 160 hours of SETSS, 20 hours of speech-language therapy, and 20 hours of counseling "corresponding to the missed services."

In an answer, the district responds to the parent's material allegations with admissions and denials and requests that the IHO's decision be upheld in its entirety. The district asserts that the evidence was insufficient to establish that the student required an increase in SETSS from 8 to 12 hours per week. Next, the district argues that the student is not entitled to compensatory education, stating that the parent was "seeking to fill in the gaps in the unilaterally obtained services by seeking compensatory education for the difference between 8 hours of per week of SETSS and 12 hours per week of SETSS for the 2022-23 school year." The district further asserts that "[i]f the [p]arent truly thought that the [s]tudent required 12 hours of SETSS per week, the [p]arent should have obtained those additional services and requested [district] funding instead of now seeking compensatory education for the difference"; claiming that "the [p]arent cannot seek compensatory education after unilaterally obtaining services for the same time period."⁷

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made

⁷ The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent that would trigger the parent's right to file a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

(Educ. Law § 3602-c[2]).⁸ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁹

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

The district has not cross-appealed from the IHO's determinations that the district failed to meet its burden to prove that it offered or provided the student appropriate equitable services under Education Law § 3602-c for the 2022-23 school year and that the services provided by Succeed were appropriate to meet the student's needs, or the IHO's order that the district fund the privately-obtained services including eight periods per week of SETSS (Yiddish) and specific related services. Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

While the district has not challenged the IHO's determination that it failed to meet its burden to prove that it offered or provided the student appropriate equitable services for the 2022-23 school year, it is necessary to further discuss the alleged violations in order to frame the discussion about appropriate relief.

In particular, in the amended due process complaint notice the parent alleged both that the October 2021 and December 2022 IESPs failed to recommend an appropriate level of SETSS to

⁸ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

⁹ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf)). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

meet the student's needs given the recommendations in the August 2021 neuropsychological evaluation and that the district failed to deliver even the level of services recommended on the IESPs (see Parent Ex. A). At the impartial hearing, the district bore the burden of proof on these issues but did not offer any evidence or present any witnesses to defend the CSEs' recommendations or the district's efforts to implement the IESPs (see Feb. 22, 2023 Tr. pp. 7-8, 16-17).

The August 2021 neuropsychological evaluation of the student included a recommendation for 12 periods of SETSS in Yiddish, reasoning that, although at the time of the evaluation the student received SETSS daily, he demonstrated "minimal academic skills" and needed "enhanced individualized instruction in all basic academic skill areas," as well as preteaching, subsequent review and reinforcement of material taught (Parent Ex. G at p. 6). The October 2021 and December 2022 CSEs agreed that the student required an increase in the amount of SETSS to eight periods compared to the five he had been receiving previously (compare Parent Exs. C at p. 14, and D at p. 9, with Parent Ex. G at p. 1). Yet, the district did not offer evidence of the CSEs' rationale for the recommendation for eight periods of SETSS.

A. Compensatory Education

The parent appeals from the IHO's decision denying his request for a bank of compensatory education. The parent seeks compensatory education consisting of 160 hours of SETSS, 20 hours of speech-language therapy, and 20 hours of counseling services.

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

The parent bases his request for compensatory education on a calculation of the difference between what the October 2021 and December 2022 IESPs mandated (eight periods per week of SETSS, three sessions per week of speech-language therapy, two in a group and one individual, one session per week of individual OT, and one session per week of individual counseling) (Parent Exs. C at pp. 14-15; D at p. 9)—with the caveat that the CSEs should have recommended the 12 periods of SETSS recommended in the August 2021 neuropsychological evaluation (Parent Ex. G at p. 6)—and what the student received from Succeed during the 2022-23 school year (see Parent Ex. K ¶ 2). According to the hearing record, Succeed delivered services to the student during the 2022-23 school year consisting of eight hours per week of SETSS, two 30-minute sessions of speech-language therapy, one 30-minute session per week of OT (Parent Ex. K ¶ 2).

As an initial matter regarding the IHO's concern that the request for compensatory education was in essence a request for enforcement of the July 2022 IHO decision from the prior matter, it is true that, generally, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Here, the parent's attorney has on several occasions caused the impression that the relief sought was tied to the IHO's decision in the prior matter. For example, during the impartial hearing, the parent's attorney stated that the parent was "asking for . . . the IHO . . . to implement the [prior IHO decision] . . . which [wa]s based off of the [August 2021 neuropsychological evaluation] . . . with relation to the SETSS services" (Feb. 22, 2023 Tr. p. 20; see Mar. 10, 2023 Tr. p. 22). The parent's attorney also seemed to be under the misimpression that the July 2022 IHO decision from the prior matter changed the student's IESP programming going forward (see, e.g., Feb. 22, 2023 Tr. pp. 25-26, 46; Mar. 10, 2023 Tr. p. 19; Req. for Rev. at p. 2); however a review of the decision reveals that the relief granted included compensatory education to remedy past harm, but did not order prospective amendments to the student's IESP (Parent Ex. B at p. 7).¹⁰ Moreover, the IHO's decision in the prior matter was specific to the 2020-21 and 2021-22 school years (see id. at pp. 2, 5-6). While the prior matter may have also involved the August 2021 IEP, the due process complaint notices underlying the prior IHO's decision are not included in this hearing record, the August 2021 IEP was not specifically mentioned in the prior IHO's decision, and the district has not alleged that the allegations in the present matter are barred by res judicata (see generally id.). The parent may be seeking similar relief in the present matter as that ordered by the IHO in the prior proceeding on similar grounds; however, each school year must be treated separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't

¹⁰ This also calls into question the parent's attorney's statements about the July 2022 IHO decision from the prior matter being the basis for the student's pendency placement (see Feb. 22, 2023 Tr. p. 25, Parent Ex. A at p. 2); however, as the parent does not claim that the student is entitled to any of the services sought pursuant to pendency, I will not further discuss the merits of the parent's statements about pendency.

of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]). Accordingly, notwithstanding the questionable statements of the parent's attorney, a review of the parent's request for relief in the present matter reveals that it is not a request for enforcement of a prior IHO decision.

On appeal, the district's main argument against an award of compensatory education relates to the parent already having unilaterally obtained SETSS as relief. Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]).

The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]). One court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at *5-*6).

Here, putting aside for a moment the propriety of a combined award, the evidence in the hearing record does not support the parent's request for compensatory SETSS in addition to the private services obtained. While the IESPs and the neuropsychological evaluation include recommendations for eight or twelve periods of SETSS per week, respectively, Succeed purportedly delivered eight hours of SETSS per week to the student during the 2022-23 school year (compare Parent Exs. C at p. 14; D at p. 9; G at p. 6, with Parent Ex. K ¶ 2). In addition, while the October 2021 and December 2022 IESPs recommended that the student's SETSS be provided in a group setting (Parent Exs. C at p. 14; D at p. 9), according to the December 2022 SETSS progress note, the student's SETSS were provided individually (Parent Ex. I at p. 1).¹¹ The

¹¹ The neuropsychological evaluation that recommended that the student receive 12 periods of SETSS per week

hearing record is not developed with respect to the duration of a period at the student's parochial school; however, at first glance it appears that the student received SETSS from Succeed at a duration and intensity greater than that recommended by the CSEs, belying the parent's contention that Succeed was simply implementing the CSEs' recommendations or that there was a shortfall of four hours per week compared to the recommendations set forth in the neuropsychological evaluation.¹²

On the other hand, despite testimony that during the 2022-23 school year the student received eight hours per week of SETSS from Succeed, a December 4, 2022 progress report prepared by the student's SETSS providers indicated that the student received "5 hours of 1:1 services" provided in both push-in and pull-out settings at his mainstream nonpublic parochial school (compare Parent Ex. I at p. 1, with Parent Ex. K ¶¶ 11, 12).¹³ However, any ambiguity in the evidence regarding the number of hours of SETSS delivered by Succeed as part of the unilaterally obtained services for which the parent sought district funding is attributable to the parent.

As to the student's progress with the SETSS delivered as part of the unilaterally obtained services, the parent testified about the student's academic difficulties in math, writing, and reading, and indicated that he wanted "more hours" and the "right help" to improve the student's skills (Feb. 22, 2023 Tr. p. 37). According to the parent, the student also struggled with frustration and anger and at times "misbehav[e]" in class (Feb. 22, 2023 Tr. pp. 38-39). However, despite these struggles, the parent also testified that he had obtained the services of "a good provider that really helps my son. And we have achieved success" (Feb. 22, 2023 Tr. p. 41). Additionally, with respect to the services the student was receiving at the time of the hearing, the parent testified that they were helping the student, and that the SETSS was "the reason why [the student was] in the class and he [was] where he [was] up to now" (Feb. 22, 2023 Tr. p. 48).

According to the progress report completed by the student's Succeed providers, "moderate progress ha[d] been made" although the student continued to demonstrate significant delays in all academic areas (Parent Ex. I at p. 1). The SETSS providers reported that the combination of both

did not specify whether that services should be provided on an individual basis or in a group setting (see Parent Ex. G at p. 6).

¹² If a period was 40 minutes long, a recommendation for 12 periods of SETSS per week would amount to 8 hours per week.

¹³ When asked during the hearing how many hours of SETSS had the student been receiving, the parent responded that he believed that the student was receiving "12 to 15 hours a week," and that although in his affidavit he testified that the student received eight hours of SETSS per week, he "th[ought] [the student] g[ot] more" than that (Feb. 22, 2023 Tr. pp. 40-41). When the IHO asked for clarification, the parent responded that he had "used extra hours" and that the parent "went and g[ot] extra hours for [the student], for extra help, because it wasn't enough for [the student]" (Feb. 22, 2023 Tr. p. 43). The IHO next asked the parent if he was "asking for a continuation of the services that [the student] has been receiving, right?," to which the parent responded "[y]es" (id.). The parent then testified that he did not recall how many hours of SETSS the student received (Feb. 22, 2023 Tr. p. 44). The SETSS supervisor from Succeed testified that she believed the parent was requesting an increase in the SETSS that was already being provided, to which the IHO responded that she observed the witness was "asking for eight hours per week of SETSS" to which the SETSS supervisor responded "[r]ight" (Mar. 10, 2023 Tr. pp. 5, 10).

push-in and pull-out services enabled the student "to progress most efficiently," and that "a gamut of methodologies, techniques, and strategies [were] practiced" in order for the student to make progress (id.).

However, after describing the student's academic deficit areas and goals that he was working on, the SETSS providers indicated that "an increase in hours is highly recommended. As [the student] is falling behind his peers significantly in all academic areas, it is requisite that he receives additional support" (Parent Ex. I at pp. 1-6). The SETSS providers further stated that "[w]ithout the necessary increase, deficient skills and goals are not addressed, resulting in continued delays," the student "requires more hours to enable him to be successful in a classroom setting," and that "[a]n increase in hours will hopefully prevent regression, support his academic development and help [the student] meet the academic standards as expected of his peers" (id. at p. 6).

In testimony by affidavit, the SETSS supervisor stated that goals were developed for the student to work on during the 2022-23 school year and were reviewed quarterly, and that the progress report entered into evidence was an accurate representation of what the student's providers were working on with the student over the school year (Parent Ex. K ¶¶ 17, 18). According to the SETSS supervisor, the student's SETSS were typically provided outside of the classroom and consisted of "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 19). The SETSS supervisor further testified that the student's progress was "measured through quarterly assessments, consistent meetings with the providers and support staff, observation of [the student] in the classroom, and daily session notes" (id. ¶ 20).

Additionally, in her affidavit, the SETSS supervisor testified that the student had "already shown signs of progress with his service providers," although the student's "academic and social delays warrant[ed] the need for continued services" (Parent Ex. K ¶ 21). Review of the SETSS supervisor's affidavit does not show that she recommended an increase in the amount of SETSS hours the student received (see generally id.). During the hearing, the IHO referred to the SETSS supervisor's affidavit that indicated that the student had "shown signs of progress" to which the supervisor replied "[r]ight" (Mar. 10, 2023 Tr. pp. 12-13). When asked to provide details about the progress the student exhibited, the SETSS supervisor responded that the student "definitely ha[d] shown progress in reading" although it was "not great, but he definitely ha[d] shown progress and he's actually much, much happier" (Mar. 10, 2023 Tr. p. 13). She went on to describe that the student was previously unhappy, felt out of place, and "like he couldn't do anything, like he didn't understand anything" but now the student felt like "he can do a little bit more" (id.). Acknowledging that the student's skills were "well below," the SETSS supervisor testified that he was "making some kind of progress" in reading and "making progress in math" "all with the providers"; meaning that the student was not making progress in the classroom, "but with the providers, [the student] seem[ed] to be getting those skills slowly" (id.).

Here, under the circumstances presented, the eight hours of individual SETSS unilaterally obtained from Succeed went beyond strictly implementing through a private agency as a form of self-help the eight periods of group SETSS mandated in the IESPs. Instead, the greater duration (eight hours versus eight sessions) and greater intensity (individual versus group sessions) represented relief that targeted the underlying alleged inappropriate recommendations of the October 2021 and December 2022 CSEs. To the extent Succeed delivered less than this, any

ambiguity in the evidence is attributable to the parent in this instance as the party who bore the burden of proof on the appropriateness of the unilaterally-obtained services (see Educ. Law § 4404[1][c]). Further, as described above, the evidence in the hearing record shows that the student made progress with the SETSS delivered by Succeed and, therefore, further relief in the form of compensatory SETSS is not warranted (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [finding even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).¹⁴

Regarding the 20 hours of speech-language therapy, and 20 hours of counseling services sought by the parent as compensatory education, the IESPs had recommended two 30-minute sessions per week of speech-language therapy (Yiddish) in a group, one 30-minute session per week of individual speech-language therapy (Yiddish), and one 30-minute session per week of individual counseling (Yiddish) (Parent Exs. C at pp. 14-15; D at p. 9). The parent did not dispute the appropriateness of these recommendations but alleged only that the district failed to implement them.

As part of the unilateral services, Succeed delivered two 30-minute sessions of speech-language therapy per week (Parent Exs. F ¶¶ 10-11; K ¶ 11). According to the Succeed supervisor, the speech-language therapy services were delivered individually (Mar. 10, 2022 Tr. pp. 11-12). The December 2022 speech-language therapy progress report reflected that the student had improved in the areas of receptive and expressive language, was "better able to answer questions related to stories" with assistance, and showed progress in association skills, sustained focus, and use of longer and grammatically correct sentences (Parent Ex. I at p. 9). The speech-language pathologist who completed the progress report recommended that the student "continue to receive speech and language therapy" (id. at p. 10). There is no explanation in the hearing record regarding why Succeed did not deliver two group and one individual speech-language therapy sessions per week, but, given evidence of the student's progress with the two weekly individual sessions, there is no basis for a finding that additional relief is warranted in the form of compensatory speech-language therapy.

The student did not receive counseling services at the parochial school from Succeed. The December 2022 Succeed program report completed by the student's SETSS providers reflected that the student had shown "some progress" but struggled with social/emotional and behavioral skills (Parent Ex. I at p. 5). The report indicated that the student "lack[ed] maturity, pragmatic skills, and social awareness," demonstrated a low ability to interact with peers, and frequently was worried, nervous, and stressed(id.). In addition, the providers reported that the student lost control easily and was often angry or irritable (id.). The providers opined that the student's social/emotional delays "[we]re significantly hindering his ability to function and achieve in a classroom setting" (id.). Given that the student did not receive counseling services as part of the

¹⁴ The inherent problem with dual awards of district funding for private services obtained by the parent and compensatory education is that any argument that the student needed additional compensatory education for the time period casts doubt on the appropriateness of the unilaterally-obtained services.

unilaterally obtained services delivered by Succeed and given the SETSS providers' report about the student's social/emotional needs during the 2022-23 school year, an award of counseling services is warranted. Accordingly, the district will be ordered to provide the student with a bank of 20 hours of counseling services as compensatory education to be used within two years.

B. Prospective Placement

On appeal, the parent also requests that the student's "program be altered" to reflect the programming provided in the December 2022 IESP but "modified" to mandate 12 periods of SETSS per week.

Generally, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, 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, 2008 WL 4890440, at *16 [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"]).

At the time of the IHO's decision in April 2023, the school year had not yet ended, and the annual review was not due to occur until December 2023 (see Parent Ex. D at p. 1). Nevertheless, the evidence in the hearing record is not sufficiently developed to warrant a prospective amendment to the student's IEP particularly given conflicting information about the amount of SETSS the student received, calling into question the parent's contentions about what he required in order to receive educational benefit. Instead, when the CSE next convenes, it should consider the parent's request for an increase in the mandated sessions of SETSS for the student. If the parent wants the CSE to reconvene prior to the projected annual review date to discuss the student's progress during the 2022-23 school year, he may make such a request (8 NYCRR 200.4[e][4]).

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the parent is not entitled to the compensatory SETSS or speech-language therapy relief; however, an award of compensatory counseling services is warranted.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 12, 2023, is modified by reversing that portion which denied the parent's request for compensatory counseling services; and

IT IS FURTHER ORDERED that the district shall provide the student with a bank of 20 hours of compensatory counseling services which shall expire two years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
 July 10, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER