The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

Nos. 23-147 & 23-159

Applications of a STUDENT WITH A DISABILITY, by his parent, for review of determinations of a hearing officer relating to the provision of educational services by the New York State Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

These proceedings arise under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. With respect to Appeal No. 23-147, petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, relief sought by the parent to remedy respondent's (the district's) failure to offer and provide the student an appropriate educational program and services for the 2022-23 school year. With respect to Appeal No. 23-159, the parent appeals from the decision of an IHO that dismissed her due process complaint notice relating to the 2022-23 school year with prejudice. As appeals Nos. 23-147 and 23-159 involve the same student, the same school year, and overlapping issues, they will be decided together. The appeals must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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 programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482) (Educ. Law § 4402; see 20 U.S.C. § 1414 [d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. During the 2020-21

school year the student was enrolled in public school but was fully remote (Parent Ex. O at p. 1).[1] During the 2021-22 school year the student was homeschooled and did not attend public school (id.). For the 2022-23 school year, the student was enrolled in public school from September 13, 2022 through October 4, 2022 (id.).

The CSE convened on September 30, 2022, to formulate the student's IEP for the 2022-23 school year (see generally 23-147 Dist. Ex. 2). On or about October 4, 2022, the parent removed the student from the public school and began homeschooling the student (Parent Ex. I at p. 1). Shortly thereafter, the parent requested the district convert the student's IEP to an IESP (Parent Exs. G; DD; FF; Dist. Ex. 7). As such, the CSE convened on October 21, 2022 to create an IESP for the student with a projected implementation date of November 4, 2022, noting that the student was parentally placed (Dist. Ex. 4 at pp. 1, 15).

A. February 2023 Due Process Complaint Notice and Impartial Hearing

In a due process complaint notice dated February 28, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, that the district discriminated against the student by preventing him from having equal access to the same academic opportunities as his peers, and that the district failed to adequately investigate an act of bullying that allegedly culminated in the student suffering an assault at the hands of two students under the direction of the students' teacher (see 23-147 Dist. 1 at pp. 2-4). For relief, the parent sought, among other things, expungement of certain educational records, the student's access to learning applications, district completion of a social history, district funding of an independent educational evaluation (IEE), and compensatory education services consisting of district funding of private tutoring services (id. at pp. 2, 4-5).

After a prehearing conference on March 24, 2023, an impartial hearing convened on April 26, 2023 and concluded on May 17, 2023 after three days of proceedings before the Office of Administrative Trials and Hearings (OATH) (Mar. 24, 2023 Tr. pp. 1-33; Apr. 26, 2023 Tr. pp. 1-72; May 2, 2023 Tr. pp. 1-162; May 17, 2023 Tr. pp. 1-80).

B. May 2023 Due Process Complaint Notice and Motion to Dismiss

On May 17, 2023, the parent filed a second due process complaint alleging that the student was receiving his speech-language therapy remotely for the second half of the 2022-23 school year on a district-issued "internet enable[d]" iPad (23-159 Dist. Ex. 2 at p. 2). The parent alleged that the student only received his speech-language therapy services between January 25, 2023 and April 5, 2023 and that his mandated SETSS only began on April 5, 2023 (id.). The parent further asserted that the district terminated the student's internet services intentionally during the first week of April 2023 in order to induce the parent to sign blank vouchers with backlog dates for the

[1] Only the hearing record in Appeal No. 23-147 includes a transcript of the impartial hearing and documents marked and entered as parent exhibits, as district exhibits 3 through 14, and as IHO exhibits IX through XVI; accordingly, all citations to transcripts and these exhibits are to documents that were entered into evidence in the proceedings underlying Appeal No. 23-147. Both hearing records include documents marked and entered as district exhibits 1 and 2 and IHO exhibits I through VIII; citations to these exhibits will be preceded by the associated appeal number.

student's service providers (id.). As relief, the parent requested "pendency for related services speech" and a compensatory award for the SETSS and speech-language therapy sessions that the district failed to provide to the student for the 2022-23 school year at enhanced rates along with the restoration of internet services (id.).

The district filed a motion to dismiss the parent's May 2023 due process complaint notice, alleging that the issues had already been addressed during the impartial hearing held regarding the parent's February 2023 due process complaint notice (23-159 IHO Ex. 1 ¶¶ 4-9, 11). The district argued that the May 2023 due process complaint notice sought the same relief as that sought in the February 2023 due process complaint notice and, therefore, was barred by the doctrine of res judicata (id. ¶¶ 9, 12-25). The district further alleged that the parent was given the opportunity during the impartial hearing held to address the claims in her February 2023 due process complaint notice through cross-examination of a district witness about the internet services allegedly provided by the district (id. ¶ 24). The district also argued that the parent's allegation that the district threatened her and caused her duress was not a compensable cause of action under the IDEA for which an IHO may grant relief (id. ¶¶ 10, 31). Finally, the district argued that, factually, it was untrue that the district provided internet services to the family and that district-provided internet was not mandated by the student's IEP or IESP; therefore, the district asserted that allegations regarding internet services should be dismissed for failure to state a claim for which relief could be granted (id. ¶ 32).

The same IHO who was assigned to preside over the impartial hearing arising from the parent's February 2023 due process complaint notice was assigned to hear the parent's May 2023 due process complaint notice, and, via an email dated June 2, 2023, she instructed the parent to respond to the district's motion to dismiss (23-159 IHO Ex. III at p. 1). The IHO also noted that "[s]ince both sides d[id] not want to consolidate" the matters arising from the parent's February 2023 and May 2023 due process complaint notices, she would "not consolidate them" (id.).

The parent responded to the district's motion to dismiss on June 2, 2023, alleging that there was new evidence to be reviewed that was not discussed during the impartial hearing that took place regarding her February 2023 due process complaint notice and asserting that the student was entitled to compensatory services at enhanced rates (see 23-159 IHO Ex. II).

C. Impartial Hearing Officer Decisions

In a decision dated June 21, 2023, the IHO ruled on the issues raised in the parent's February 2023 due process complaint notice and determined that the district failed to provide the student a FAPE for the 2022-23 school year (23-147 IHO Decision at p. 9).[2] Initially, the IHO found that the bullying allegations did not contribute to the denial of a FAPE as the allegations were unfounded (id. at p. 8). However, the IHO determined that the October 2022 CSE only relied on the information set forth in the September 2022 IEP in order to develop the IESP for the student and, further, that the "[s]tudent was not provided with related services during the 2022-23 school year" (id. at pp. 8-9). As relief, the IHO ordered the district to "provide and fund" 81 hours of compensatory SETSS in English language arts (ELA), 54 hours of compensatory SETSS in math,

[2] I acknowledge that, in a correspondence from the Office of State Review to the parent, the date of the IHO's decision underlying Appeal No. 23-147 was incorrectly referenced as April 6, 2023.

and 36 hours of compensatory speech-language therapy to be provided outside of school hours by a provider of the parent's choosing; to fund the necessary transportation costs to and from the service providers if such services were provided outside of the student's home; to fund a speech-language IEE to be performed by a provider chosen by the parent; and to schedule a CSE meeting within two weeks of receiving the results of the speech-language IEE and locate a non-public school to accommodate the student's unique needs (id. at pp. 11-13).

With respect to the second due process proceeding, in a decision dated June 22, 2023, the IHO sustained the district's motion to dismiss, and dismissed the parent's May 2023 due process complaint notice with prejudice (23-159 IHO Decision at p. 4).

IV. Appeals for State-Level Review

In Appeal No. 23-147, the parent challenges the IHO's June 21, 2023 decision regarding her February 2023 due process complaint notice, citing "[i]nappropriate conduct by IHO" and "[i]rregularities." The parent alleges that the IHO failed to discuss evidence and accepted hearsay evidence presented by the district. The parent requests an order directing that a social history be performed, that the CSE be "audited," and that the district provide make-up SETSS and speech language therapy sessions mandated by the October 2023 IESP at an enhanced rate. In its answer, the district responds to the parent's appeal and argues that the IHO's decision should be upheld in its entirety. In addition, the district asserts that the parent's appeal must be dismissed for failure to comply with practice requirements set forth in State regulations and on the ground that the parent benefitted from the IHO's decision and therefore was not aggrieved by it.[3]

In Appeal No. 23-159, the parent appeals the IHO's June 22, 2023 dismissal of the May 2023 due process complaint notice. The parent argues that the IHO's conduct was inappropriate, denying the parent the opportunity to be heard, and that the IHO failed to address the parent's allegations related to the student's pendency services. The parent requests compensatory education based on the mandates in the October 2022 IESP, which she indicates amounts to 200 hours of SETSS and 96 sessions of speech-language therapy at "enhanced rate[s]." In addition, the parent requests that the matter be remanded to the IHO and that a pendency hearing be held. In an answer, the district responds to the parent's allegations and asserts that the IHO's dismissal should be

[3] After the district served and filed its answer on July 31, 2023, on August 14, 2023, the parent filed a request for review with the Office of State Review dated August 7, 2023, accompanied by a verification notarized on August 9, 2023, that appears to be the parent's attempt to amend the original request for review in Appeal No. 23-147. However, the parent did not seek leave to amend the request for review and it is, in any event, unclear if the proposed amended request for review was served on the district as it was not accompanied by proof of service. In addition, on August 16, 2023, the parent filed a reply with the Office of State Review dated August 7, 2023, accompanied by a verification notarized on August 9, 2023; however, the reply was accompanied by an email "proof of service receipt" that does not reflect a date or the documents that were purportedly served and the reply was not accompanied by an affidavit of service. It is unclear if the reply was served on the district or that it was served within the timeframe permitted by State regulation (i.e., the reply should have been served within three days of the district's service of its answer on July 31, 2023) and the parent did not request an extension of time to serve and file her pleading (see 8 NYCRR 279.6[a]-[b]). In any event, review of the proposed amended request for review, as well as the reply, reveals that all of the parent's material allegations are addressed or that it is unnecessary to address the arguments based on the findings herein.

upheld. In addition, the district similarly argues that the appeal must be dismissed for failure to comply with State practice requirements.[4, 5]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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,

---

[4] After the district served and filed its answer on July 24, 2023, on August 9, 2023, the parent filed a request for review with the Office of State Review dated August 7, 2023, accompanied by a verification notarized on August 9, 2023, that appears to be the parent's attempt to amend the original request for review in Appeal No. 23-159. However, once again, the parent did not seek leave to amend the request for review and it is, in any event, unclear if the proposed amended request for review was served on the district as it was not accompanied by proof of service. In addition, on August 16, 2023, the parent filed a reply with the Office of State Review dated August 7, 2023, accompanied by a verification notarized on August 9, 2023, and additional evidence pertaining to the parties' positions about consolidating the impartial hearings arising from the February 2023 and May 2023 due process complaint notices. On August 17, 2023, the parent submitted more additional evidence, which appears to pertain to her allegations that the district failed to implement the student's services during the pendency of the proceedings. The reply was accompanied by an email "proof of service receipt" that does not reflect a date or the documents that were purportedly served and the reply was not accompanied by an affidavit of service. It is unclear if the reply or additional evidence was served on the district or that the reply was served within the timeframe permitted by State regulation (i.e., the reply should have been served within three days of the district's service of its answer on July 24, 2023) and the parent did not request an extension of time (see 8 NYCRR 279.6[a]-[b]). In any event, review of the proposed amended request for review, as well as the reply, reveals that all of the parent's material allegations are addressed or that it is unnecessary to address the arguments based on the findings herein. Also on August 16, 2023, the parent filed copies of the parent exhibits that had been entered into evidence during the impartial hearing concerning the February 2023 due process complaint notice; as I am deciding the parties disputes in both appeals in this decision, all documents entered into evidence in both hearing records have been considered.

[5] While the district is correct that the parent's requests for review in both matters are not as artfully prepared as the regulations contemplate in terms of their identification of the findings of the IHO to which exceptions are taken and the reasons for which modification is sought (8 NYCRR 279.4[a]; 279.8[c]), the district was able to respond to the parent's claims and as a matter within my discretion, I decline to dismiss them for noncompliance with Part 279.

458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

While 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]), 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 public school 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 (Educ. Law § 3602-c[2]).[7] "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]).[8] 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] Thus, under State law an

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[7] 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]).

[8] For purposes of the dual enrollment statute, "a student in a home instruction program . . . shall be deemed to be a student enrolled in and attending a nonpublic school eligible to receive services pursuant to [Education Law § 3602-c(2)]" (Educ. Law § 3602-c[2-c]).

[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

eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

1. Conduct of the Impartial Hearing

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

In addition, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and

---

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.).

complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

Here, a review of the hearing record underlying Appeal No. 23-147 illustrates that the IHO was fully aware that the parent was appearing pro se and gave much deference to the parent, often overruling the district's objections in order to allow the parent the opportunity to be heard and evidence that she believed to be relevant or helping the parent rephrase a question (Apr. 26, 2023 Tr. p. 31; May 2, 2023 Tr. pp. 8-9, 11-12, 18-20, 27-28, 29, 64-65, 72, 139-41). The IHO verified with the parent that the parent did not want the services of an attorney, even offering the parent the opportunity to have more time to secure an attorney, which the parent declined (Mar. 24, 2023 Tr. pp. 8-9). The hearing record shows that the IHO clearly notified the parent when she was uncertain as to what the parent was arguing or requesting, and gave the parent opportunities to clarify her arguments and requested relief (Mar. 24, 2023 Tr. pp. 9, 10-14, 17-18; Apr. 26, 2023 Tr. pp. 14, 20-21, 29-31, 35-36, 41; May 2, 2023 Tr. pp. 143-146; May 17, 2023 Tr. pp. 20).

The hearing record reflects that the parent is a strenuous and zealous advocate for the student and that sometimes her ardor led her to talk over the IHO, opposing counsel, or witnesses. The record reflects that the parent's habit of repeatedly talking while the IHO or others were talking or testifying exasperated the IHO who was responsible to maintain an orderly proceeding with fairness to both sides and an uncluttered comprehensible record of the proceeding. There were multiple times during the impartial hearing when the IHO muted the parent, thereby preventing her from speaking on the record (May 2, 2023 Tr. pp. 35, 98-99, 125, 136, 137). Usually, these occurrences happened after the IHO issued the parent a warning to stop speaking over the IHO or other witnesses (id.). The record reflects that the IHO gave the parent an opportunity to speak but began encouraging her to move on to new topics once the parent became repetitious (May 2, 2023 Tr. pp. 51-52, 67, 70-71, 112, 129). The IHO made multiple attempts to explain the process to the parent, who informed the IHO that she was familiar with the hearing process and explained that she has participated in five prior hearings (Mar. 24, 2023 Tr. pp. 13-14). Although it is understandable that the pro se parent was frustrated with the hearing process, there is nothing to suggest that the IHO engaged in inappropriate conduct or impermissibly hindered the parent from presenting her case.

The IHO made a concerted effort to help the parent through the hearing process and an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). To the extent the parent disagrees with the IHO's consideration of hearsay testimony, acceptance of district exhibits, placing of limitations on testimony, or finding that an adverse inference was not warranted due to the district's alleged failure to produce documents, the hearing record does not support a finding that the IHO abused her discretion in her management of the hearing process. Further, it is unclear how the evidence the parent sought to present would have led the IHO to a different outcome or how the IHO's allegedly improper consideration of the district's evidence led to an incorrect result, particularly given the IHO's now final and binding determination that the district denied the student a FAPE for the 2022-23 school year. In light of the foregoing, there is no basis to disturb the IHO's decision based upon the manner in which the impartial hearing was conducted.

2. Res Judicata and Scope of the Impartial Hearing

Regarding the IHO's dismissal of the parent's May 2023 due process complaint notice, it is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]). [10]

Here, with respect to the first two factors, the impartial hearing arising from the February 2023 due process complaint notice involved an adjudication on the merits of the parent's claims, and both matters concern the same parties. However, as to the third factor, the parent's February 2023 due process complaint notice raised issues concerning the district's implementation of the student's IEP in terms of the student's access to the general education classroom and the lack of SETSS "as of 2/28/2023," the district's response to bullying allegations, the district's blocking of the student from accessing "learning applications," the appropriateness and sufficiency of evaluative information, and the provision of educational records to the parent (23-147 Appeal No. Ex. 1). The parent's May 2023 due process complaint notice alleged that the district did not implement services in 2023 and disrupted the student's access to internet as of April 2023 (23-159 Dist. Ex 2 at p. 2). Thus, while there may have been overlap in the implementation claims asserted in the due process complaint notices, some of the issues raised in the May 2023 due process complaint notice were not contained in the parent's February 2023 due process complaint, nor could they have been, at least to the extent that the parent's allegations regarding implementation of services included the time period that post-dated the February 2023 due process complaint notice and the alleged disruption in internet services occurred in April 2023.

[10] "In determining whether the same nucleus of facts is at issue," relevant considerations include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011] [internal quotations omitted]; see Dutkevitch v. Pittston Area Sch. Dist., 2013 WL 3863953, at *3 [M.D. Pa July 24, 2013] [identifying relevant considerations including whether the acts complained of and relief demanded were the same, whether the theory of recovery was the same, whether the material facts were the same, and whether the same witnesses and documentation would be required to prove the allegations]; see also Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 42 [D.D.C. 2013] [finding that a parent's claim that a school could not implement a student's IEP arose from the same nucleus of facts as a previously adjudicated claim that the school did not offer groups and minimal distractions]).

With that said, review of the impartial hearing arising from the February 2022 due process complaint notice reveals that, ultimately, the claims raised in the May 2023 due process complaint notice were nevertheless fully adjudicated and, if the matter were remanded, no further relief would be warranted.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).[11]

However, to the extent the parent's May 2023 due process complaint notice raises issues with respect to the issue of implementation of stay-put services during the pendency of the proceedings arising from the February 2022 due process complaint notice, it was appropriate for the parties to address any such allegations within the proceeding from which the student's right to pendency services arose. That is, because pendency operates as an automatic injunction that arises as a result of the filing of a due process complaint notice, it is not necessary for a party to assert or "invoke" the right to pendency in the due process complaint notice under the pendency provision (20 U.S.C. § 1415[j]). In other words, a pendency dispute cannot occur until after a due process complaint has been filed and, consequently, the student's right to the stay-put placement is not waived because a party fails to address it in the due process complaint notice. Instead, it is the district's responsibility upon the parent's filing of a due process complaint notice to implement the "then current educational placement" in accordance with 20 U.S.C. § 1415(j), and the parties should thereafter notify the IHO if there is a dispute over which services constitute that educational placement so that the IHO can ensure that arrangements are made for the submission of any necessary evidence on the issue and the matter is decided while the underling substantive claims then proceed to hearing and are resolved.

Further, in the February 2023 due process complaint notice, the parent sought compensatory education in the form of private tutoring and related services authorizations (RSAs) for speech-language therapy (23-147 Dist. Ex. 1 at p. 2, 4). In the May 2023 due process complaint notice, the parent sought RSAs for make-up speech-language therapy services at an "enhanced rate" to address lapses in services that tool place "PRIOR to 01/25/2023 and AFTER 04/05/2023"

---

[11] When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New Yor City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

(23-159 Dist. Ex. 2). The IHO ordered compensatory education relief to address lapses in the delivery of the student's services for the entirety of the 2022-23 school year (23-147 IHO Decision at p. 9). The parent's challenge to the amount of the IHO's compensatory award is discussed further below; however, the IHO's order was intended to remedy the district's failure to deliver services during the 2022-23 school year, the period of time encompassed by both the February 2023 and May 2023 due process complaint notices (id. at pp. 8-9). Thus, the only outstanding relief sought by the parent in the May 2023 due process complaint notice is the request for provision of internet services.

During the impartial hearing addressing the parent's February 2023 due process complaint notice, the parent brought the lack of internet services to the IHO's attention (see generally Apr. 26, 2023 Tr. pp. 7, 25, 45).[12] The hearing record further reflects that the parent cross-examined the district school psychologist about the provision of internet services for the student (May 2, 2023 Tr. pp. 139, 141, 146). The parent asked the school psychologist if the district "w[ould] provide internet access to my child in order to get access to his remote services?" and the school psychologist replied "My office, no, we wouldn't be responsible for providing internet services. But I can look in to see what the issue was and, and why things were all of a sudden cut off" (May 2, 2023 Tr. at p. 146). The IHO addressed the district psychologist by asking "Would you mind doing that" and the school psychologist replied "Sure. I can, I can ask around and try and do some investigation. That's not a problem" (id.).

Neither the IDEA nor State law explicitly requires a school district provide a family with internet services in a student's home and there is no legal requirement that would compel the district to provide internet access to the family under the circumstances of this case. The CSE did not include a mandate for such in the student's IESP (see Dist. Ex. 4). Therefore, under the circumstances, there is nothing to be gained by remanding this matter. However, as the district school psychologist has expressed a willingness to investigate the issue, and I strongly suggest for the benefit of the student that the district, if it has not already done so, continue its inquiry into whether the district has in the past or would in the future facilitate the student's ability to access the internet in his home through any district programs regarding internet services, or at the very least facilitate other means of assisting the parent in obtaining internet access for the student. If eligible, I also encourage the parent to explore any low-cost or free programs such as the Federal Communication Commission's Affordable Connectivity Program (https://www.affordableconnectivity.gov/).

3. Scope of Review

Next, it is necessary to consider what additional issues are properly before me on appeal. Neither party appeals the IHO's determinations that the bullying allegations did not contribute to

[12] The parent testified the student used an iPad that had been issued to him to access "services that my son had during the pandemic" and that the district also "activated it for [the 2022-23 school] year for snow day purposes" (May 17, 2023 Tr. p. 16). The parent further testified that "[t]he speech provider informed us on April 4th [2023] that she w[ould] no longer be servicing" the student and that, one hour later, "the internet services got cut" and the parent began taking the student to the library to receive his SETSS services online (May 17, 2023 Tr. p. 14). The parent later testified that the student was receiving his SETSS services online at home through her phone (May 17, 2023 Tr. p. 19).

the denial of a FAPE as the allegations were unfounded[13] or that district denied the student a FAPE for the 2022-23 school year; nor do they appeal the IHO's order directing the district to provide and/or fund 135 hours of compensatory SETSS and 36 hours of compensatory speech-language therapy (except to the extent the parent seeks additional compensatory education), transportation costs, a speech-language IEE, and to convene a CSE to review the results of the speech-language IEE and locate a non-public school that can accommodate the student's unique needs. Accordingly, these unappealed findings have become final and binding upon the parties and will not be further discussed on appeal (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Accordingly, the only remaining issues on appeal center around whether the parent is entitled to relief in addition to that awarded by the IHO. In particular, on appeal the parent seeks an order requiring the district to conduct a social history, an order requiring an audit of the CSE, and additional compensatory education.

Regarding the request for an "audit" of the CSE, while I have jurisdiction over the parent's claim regarding the district's provision of a FAPE, I do not possess plenary authority to order an audit of the CSE, particularly absent further articulation of the purpose of such an investigation (see, e.g., Application of a Student with a Disability, Appeal No. 12-006; Application of a Student with a Disability, Appeal No. 11-091). Moreover, even assuming that I had jurisdiction to order relief in this form, there is no evidence in the hearing record that would warrant such an order. Accordingly, no further discussion of this relief sought is necessary.

B. Relief

1. Social History

As for the parent's request for a social history, on October 6, 2022, the parent requested that the district conduct a social history (Parent Ex. FF). The district social worker testified that she received the parent's letter and "assume[d] [the parent] meant a social history update" (May 2, 2023 Tr. p. 112). The social worker indicated that, on October 14, 2023, she "contacted [the parent] to schedule the social history update appointment" (May 2, 2023 Tr. p. 112). The social worker stated that the parent "agreed to meet" on October 18, 2023 and that a social history update was conducted on that date (May 2, 2023 Tr. pp. 112-13). The parent denied that she met with the

[13] The parent did not raise the bullying allegations in her request for review; however, she does raise them in her proposed amended request for review and in her reply; however, as set forth above, the parent did not seek leave to amend the request for review and a petitioner may not raise allegations for the first time in a reply. In any event, review of the IHO's decision shows that she credited the testimony of the public school principal that the district investigated the bullying report and determined it was unfounded (IHO Decision at pp. 6-7). Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, neither the documentary evidence nor the entirety of the hearing record warrants a different conclusion than that reached by the IHO.

social worker on October 18, 2023 (see May 17, 2023 Tr. pp. 42-43).[14] On the same date as the CSE meeting at which the student's IESP was developed (Dist. Ex. 4), the parent wrote the district stating that she no longer requested a social history and that she did not consent to or request any reevaluations of the student (Dist. Ex. 7).[15] The social worker testified that, following her receipt of the letter, she destroyed all of the social history update notes that she had taken while meeting with the parent on October 18, 2022 (May 2, 2023 Tr. p. 113). The social worker confirmed "[t]here is no social history update that was conducted because [the parent] stated in [her] letter that [she] changed [her] mind . . . and no longer w[as] requesting a social history update (id.). The parent contends that she sent the letter on October 21, 2022, revoking her request for the social history because she felt that, if she did not, the student would not receive services (May 17, 2023 Tr. p. 43).

In revoking her request for a social history, the parent indicated that the social history "did not ha[ve] the purpose of reporting the bully[ing] and profiling by [a] teacher" (Dist. Ex. 7). In her due process complaint notice, the parent also referred to the social history as being for the purpose of "reflect[ing] the Bully[ing] reports" and seeking that the reports be "accutate[ly] reported, [and] investigated" and that "corrections [be made] to prevent further violence perpetrated by" staff from the district public school (23-147 Dist. Ex. 1 at p. 2). While the parent would be free to express her concerns during a social history interview about the student's experience with bullying, a social history is not a procedural mechanism used to investigate, report on, or correct reports about a specific bullying incident within the school. Instead the State requirements for school-based policies and procedures on this topic are found in 8 NYCRR 100.2[jj] which implement the Dignity for All Students Act and apply to all students, whether disabled or not. State regulation defines a "social history" as "a report of information gathered and prepared by qualified school district personnel pertaining to the interpersonal, familial and environmental variables which influence a student's general adaptation to school, including but not limited to data on family composition, family history, developmental history of the student, health of the student, family interaction and school adjustment of the student" (8 NYCRR 200.1[tt]).

Given the parent's revocation of her request and consent for the district to conduct a social history, whatever the reasons for the revocation, there is no basis at this juncture to order requiring the district to conduct a social history.[16] It is clear from the parent's appeal that she now wants the

---

[14] The district offered into evidence a visitors log dated October 18, 2022, signed by the parent (Dist. Ex. 14).

[15] The letter was dated October 21, 2023 (Dist. Ex. 7). The social worker opined that she believed the date to be a typographical error, and that the parent was referring to the actual date that the IESP meeting was held which was October 21, 2022 (May 2, 2023 Tr. p. 113).

[16] Federal and State regulations provide that parental consent is not required to conduct a reevaluation if the district can demonstrate that it "made reasonable efforts to obtain such consent," and the student's parent "failed to respond" (34 CFR 300.300[c][2]; see 8 NYCRR 200.5[b][1][i][b]). Federal and State regulations also permit the use of consent override procedures, specifically through due process, if the parent refuses to consent to a reevaluation (34 CFR 300.300[c][1][ii]; 8 NYCRR 200.4[a][8]; 200.5[b][3]). Thus, if the district follows the necessary consent procedures for reevaluation but a parent does not respond, the district may reevaluate a student despite the failure to respond. Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain a parent's written informed consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii], [c][1], [d][5]). As explained in one district court case, "[a]lthough a parent always retains the

district to complete a social history update. If the parent has changed her mind and does want the district to conduct a social history update she should contact the district and request one be performed and the district will oblige. However, the parent is cautioned that she cannot vacillate between contradictory courses of action and blame the district for its reactions.

2. Compensatory Education

In both appeals, the parent argues that the IHO's award of compensatory education should have been based off of the service recommendations within the October 2022 IESP, rather than the September 2022 IEP upon which the IHO relied to calculate the award (see IHO Decision at pp. 11-12, 13).

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] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 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"]).

During the impartial hearing concerning the February 2023 due process complaint notice, there was some confusion over which educational plan the parent agreed with or wanted to be controlling for the purposes of calculating compensatory education relief: the September 2022 IEP

---

right to withhold consent for further evaluations, after consent is withheld, the school district cannot be held liable for denying a FAPE" (V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). However, in some circumstances, a district may seek to override a parent's lack of consent to evaluate a student, but such consent override procedures are permissive, not mandatory (see id.).

or the October 2022 IESP.[17] Under the September 2022 IEP the student was mandated to receive three 45-minute sessions per week of SETSS in ELA, two 45-minute sessions per week of SETSS in math, and two 30-minute sessions per week of speech-language therapy, which, when relied upon by the IHO for purposes of calculating relief to remedy lapses in delivery of services over a 36 week school year, resulted in an award of 135 hours of compensatory SETSS with 81 hours in ELA and 54 hours in math and 36 hours of compensatory speech-language therapy (IHO Decision at p 11; see Dist. Ex. 2 at pp. 14-15). In contrast, pursuant to the October 2022 IESP, the student was mandated to receive eight periods of SETSS per week and three 30-minute sessions of speech-language therapy per week (Dist. Ex. 4 at p. 13). Assuming that a period was 45-minutes, over a 36-week school year, the mandates of the October 2022 IESP could have—generally speaking if the student had received no services for the entirety of the school year—supported a quantitative award of 216 hours of SETSS and 54 hours of compensatory speech-language therapy.

The parent testified that, after the student transitioned to homeschooling, the district "did not provide anything until January 25, 2023, and that was speech," which was provided three times per week between January 25, 2023 through April 5, 2023, and that SETSS was "initiated on . . . April 4, 2023" and provided for two hours per day (May 17, 2023 Tr. pp. 12, 15, 22, 76). Thus, the student received some services which would quantitatively warrant a smaller award then the total computation of services based on the entire school year that the parent argues the student is entitled to, and, therefore, even relying on the October 2022 IESP, the amount of compensatory education supported by the evidence is not far from the totals ultimately awarded by the IHO.

The IHO's rationale for utilizing the September 2022 IEP to calculate the compensatory education award is rather sparse in the decision. The IHO noted that "the [p]arent also ha[d] a responsibility to identify the specific remedy [she was] seeking so that the IHO c[ould] craft an appropriate remedy for the [district's] failure to provide the [s]tudent with a FAPE for the year at issue" and stated that "the [p]arent has not identified the number of hours [she was] seeking regarding the compensatory services" (IHO Decision at pp. 10-11). The IHO also specifically noted in her decision that the district "provided several emails that documented their inability to provide related services to [s]tudent" but that the parent "prevented [the district] from implementing services by refusing to cooperate with [the district] since [s]tudent was enrolled in Public School" (id. at p. 7).

---

[17] On April 26, 2023, the IHO asked the parent whether she was "in agreement with . . . all the recommendations from the IEP of September 30th," to which the parent replied "Yes" (Apr. 26, 2023 Tr. p. 28). The IHO conveyed to the district her understanding that the parent was seeking compensatory services based on the mandates set forth in the September 2022 IEP (Apr. 26, 2023 Tr. p. 36). While trying to establish which plan was the last agreed upon IEP/IESP, the IHO asked the parent whether the September 2022 IEP was "the IEP that was in effect that [she] agree[d] to" to which the parent replies "[n]o" and that she "had request[ed] [a] reconvene" (Apr. 26, 2023 Tr. p. 41). The IHO mentioned that the October 2022 IESP mandated more weekly sessions of SETSS and speech-language therapy and asked if the parented wanted "SETSS eight times per week," the parent answered "[y]es" (Apr. 26, 2023 Tr. p. 44). The IHO clarified that the parent wanted to use the IESP from October 2022 in calculating compensatory services for the student's SETSS and speech-language therapy (Apr. 26, 2023 Tr. p. 45). Later, the IHO asked the parent if she believed that "the September 30th IEP was appropriate" and the parent replied "[n]o, it was not appropriate" and that "[i]t ha[d] several problems" (May 17, 2023). The IHO then inquired whether the parent felt "the October IEP [was] also not appropriate" to which the parent responded "[n]o" (May 17, 2023 Tr. p. 67).

What the IHO was likely alluding to was that the parent's actions in preventing the delivery of the student's services, if considered unreasonable, could be factored into an award of compensatory education and warrant a reduction or denial of an award on equitable grounds.

In a tuition reimbursement case, equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). As such, it may be similarly appropriate to consider the conduct of both parties in fashioning equitable compensatory education relief (see Reid 401 F.3d at 524; Puyallup Sch. Dist., 31 F.3d at 1496-97; Application of a Student with a Disability, Appeal No. 19-120; Application of a Student with a Disability, Appeal No. 18-002).

The evidence in the hearing record shows that the district notified the parent via an email dated December 15, 2022 that it may have located a SETSS provider for the student and would be contacting her to set up a schedule to provide the student with his SETSS, and that it continued its efforts to locate a provider to deliver speech-language therapy services in the student's home (Dist. Ex. 11). The parent responded to the district's email on December 19, 2022 stating that she would not schedule any provider to deliver SETSS until after the district located a provider to deliver speech-language therapy services to the student (Dist. Ex. 12).

Regarding the delay in the initiation of services, the district school psychologist testified that the district had attempted "numerous times through numerous e-mails" to "try[] to coordinate the scheduling of the service pursuant to [the student's] IESP" (May 2, 2023 Tr. p. 133). The district psychologist further testified that the district "tried to put . . . the SETSS in place numerous times," and that the district created a formal resolution that the parent never signed, "but acting in good faith," the district did still follow "the enhanced rate process" in order to secure EBL

Coaching who could deliver the student's services at an enhanced rate (May 2, 2023 Tr. p. 134).[18] With respect to speech-language therapy, the school psychologist testified that the district was "able to secure an agency" (id.). The school psychologist opined that "it seem[ed] like [the parent had] been the one that ha[d] been preventing services for [the student,] not CSE" (id.). When the IHO asked the district psychologist to clarify his last statement, he responded that the parent "didn't sign the agreement, . . . she[] ha[d] issues with the [related services authorizations (RSAs)] being provided," an issue with the provision of "consent to the agency," and the "back and forth with the mom wanting the speech to happen before the SETSS" (id.).[19] The school psychologist indicated that the student "could have probably had services for months, to be honest" (id.).

In contrast, the parent testified that she had "been bullied" in that the district "want[ed] [her] to sign documents, a blank check[] for them to cash them out to handle an award to their own people while [the student] ha[d] not [been] receiving services" (May 17, 2023 Tr. pp. 47-48). She testified that she did not sign any vouchers for services (May 17, 2023 Tr. p. 48). The parent further explained that the district kept telling her that she had "to sign for the voucher for remote sessions when we don't have access to the internet," which was another reason she would not sign (May 17, 2023 Tr. p. 76).

Regarding the parent's admitted refusal to sign the vouchers the district provided to her in order to arrange for independent contractors to deliver services, the IHO advised the parent that

---

[18] The parent informed the district that she wanted EBL Coaching to deliver the SETSS (Parent Ex. JJ at p. 3), and during the impartial hearing, the parent testified that she found the agency herself, that as a result the student started receiving services in April 2023, and that, according to her understanding, the district was paying for the services (May 17, 2023 Tr. pp. 17-18).

[19] A June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarified that it was permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district had supervisory control. According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html; see http://www.p12.nysed.gov/resources/contractsforinstruction). Moreover, caselaw also supports a finding that it is permissible for the district to offer parents vouchers to obtain related services in response to a recognized shortage of service providers (see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]).

"this speaks to your cooperation, if the [district's] asking you to sign vouchers so they can issue the services, . . . you have to cooperate and you have to make an effort to work with them" (May 17, 2023 Tr. p. 76). The IHO stated that, while the district had a burden to provide the student mandated services, "the parents ha[d] a burden too to cooperate with the [d]istrict, to not be an . . . obstacle in the [d]istrict's way of providing services" and that the IHO had "to weigh out whether [the parent] cooperated with the [d]istrict" (May 17, 2023 Tr. pp. 72-73).

Although the IHO did not explicitly cite equitable grounds in her decision as the rationale for her calculation of compensatory education, a review of the hearing record shows that, in addition to a reduction in the award for the services already delivered to the student, the parent's actions were unreasonable enough to warrant a reduction of an award from the total amount of services requested by the parent (based on the October 2022 IESP) to the amount calculated by the IHO (based on the September 2022 IEP) on equitable grounds, and in particular taking into account the parent's refusal to sign vouchers and cooperate with the district efforts to schedule the student's SETSS. Therefore, the IHO's award of a bank of compensatory SETSS and speech-language therapy will not be disturbed.

VII. Conclusion

Based on the foregoing, and taking into account the final and binding determinations of the IHO and the limited issues remaining, no additional relief is warranted in this matter and the IHO's equitable award of compensatory SETSS and related services will not be disturbed.

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

THE APPEAL IN NO. 23-147 IS DISMISSED.

THE APPEAL IN NO. 23-159 IS DISMISSED.

Dated: **Albany, New York**
August 30, 2023

____
JUSTYN P. BATES
STATE REVIEW OFFICER