The University of the State of New York

The State Education Department
State Review Officer
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No. 24-073

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:
The Law Office of Elisa Hyman, P.C., attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which determined that respondent (the district) failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years but did not fully award the relief the parent requested due to an alleged inadvertent omission in the IHO's ordering clauses. The district cross-appeals from that portion of the IHO's decision that awarded the parent a prospective placement for her son. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant

to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

Review of the student's educational history shows that the student was reported to have first been found eligible for special education and related services as a student with a learning

disability in December 2015, when he was in first grade (see Parent Exs. A at p. 4; B at p. 6).[1] The student participated in a February 2018 independent neuropsychological evaluation and received diagnoses that included attention deficit hyperactivity disorder (ADHD), combined presentation; generalized anxiety disorder; specific learning disorder with impairments in reading, written expression, and mathematics; developmental coordination disorder; and acute stress disorder (Parent Ex. E. at p. 21). Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) in February 2018 determined the student's full scale IQ to be 102, falling in the average range (id. at p. 14). The neuropsychologist reported that the student showed "above average word knowledge, visual reasoning and analogical math reasoning" (id. at p. 27). In contrast, the student's "academic fluency, math and writing skills [were] at [a] very low level with reading skills at [a] low average level" (id. at pp. 26-27). Due to the extent and nature of the student's demonstrated emotional, executive functioning, attention and academic delays, the neuropsychologist opined that an "educational day treatment center or nonpublic school setting" would be appropriate for the student (id. at p. 27).

The student has been the subject of a prior administrative hearing, where that presiding IHO determined in a decision dated April 16, 2020 that the district had denied the student a FAPE for the 2015-16, 2016-17, 2017-18 and 2018-19 school years (see Parent Ex. B). That IHO summarized in his decision the student's educational history and CSE recommendations for the school years that were then at issue, including CSE recommendations for placement in a State-approved nonpublic school that the CSE was unable to secure for the student so he remained in a public school program (id. at pp. 5-11). As relief for the denial of a FAPE for multiple school years, the prior IHO ordered the district to provide the student with ten hours per week of 1:1 special education teacher support services (SETSS) until such time that the district could secure a State-approved nonpublic school placement for the student and also awarded the student compensatory educational services (id. at pp. 16-24).

The CSE convened on May 28, 2021 to develop an IEP for the student's seventh grade (2021-22) 12-month school year (Dist. Ex. 1). The May 2021 CSE recommended a 12:1+1 special class placement in a district nonspecialized school for the 12-month school year with two 30-minute sessions per week of group occupational therapy (OT), two 30-minute sessions per week of group speech-language therapy, one 30-minute session per week of individual counseling, and one 30-minute session per week of group counseling (id. at pp. 18-20). The CSE reconvened on November 12, 2021 to add five times per week of direct and group SETSS to the student's IEP (see Dist. Ex. 3 at pp. 26, 34). The projected date of implementation of the IEP was December 13, 2021, with a projected annual review date of November 12, 2022 (id. at p. 1).

On or about July 1, 2022, the parent filed a 20-page, unpaginated due process complaint notice consisting of more than 170 enumerated allegations, with many of the paragraphs not consecutively numbered and some repeating the same numbers previously cited (Parent Ex. A).

[1] The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal concerning the 2021-22 and 2022-23 school years (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The hearing record indicates a history of the CSE changing the student's educational classification. The CSE changed the student's initial classification of learning disability in December 2015, to other health impairment in January 2017, to emotional disturbance in May 2017, to other health impairment in September 2017, and to learning disability in October 2018 (see generally Parent Exs. A at p. 4; B at p. 6).

The parent asserted that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years based on numerous procedural and substantive allegations (id.). The parent proposed 15 paragraphs of requested relief that included a determination of pendency, a finding that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, an award of compensatory education and services, and a determination that the student's programming should consist of specified services at an "appropriate private school placement" (id. at pp. 18-20).

The parties proceeded to an impartial hearing. A prehearing conference was held on August 3, 2022, followed by 15 status conferences and hearing dates to discuss among other things, pendency, the parties' attempts to resolve the matter, clarification of the parent's requested relief, the parent's request to amend the due process complaint notice, and the parties' submission of evidence and scheduling of witness testimony (Tr. pp. 1-446). The IHO issued an interim order of pendency dated October 22, 2022 that determined the prior IHO's decision dated April 16, 2020 formed the basis of the student's pendency placement that consisted of the district providing the student with 10 hours per week of 1:1 SETSS in school until such time that a State-approved nonpublic school placement could be found for the student (Interim IHO Decision; see Parent Ex. B).

During the impartial hearing, the CSE reconvened on November 7, 2022, and recommended for the remainder of the student's 2022-23 (eighth grade) 12-month school year, and though summer 2023, a 12:1+1 special class placement in a district nonspecialized school with the same related services and SETSS that were set forth in his prior November 2021 IEP (Dist. Ex. 6 at pp. 19-20).[2] For the student's ninth grade school year, beginning in September 2023, the November 2022 CSE recommended a 15:1 program in a community school with related services (id. at p. 20).

On or about January 3, 2023, the parent amended the July 1, 2022 due process complaint notice to add a request that the district fund an independent neuropsychological evaluation of the student (Parent Ex. C at p. 19).[3] The district consented to the parent's request, and an independent neuropsychological evaluation of the student was conducted in May and June 2023 (see Tr. p. 199; Parent Ex. J). The neuropsychologist who conducted the May and June 2023 evaluation testified at the impartial hearing about the student's functioning levels and his recommendations for the student, including his opinion that the student should be placed in a small, specialized nonpublic school (Tr. pp. 334-69). Furthermore, during the hearing, the district conceded that it could not

[2] The November 2022 IEP appears to contain some typographical errors as a 12:1 staffing ratio is listed in parts on the IEP, when the hearing record otherwise indicates that a 12:1+1 staffing ratio was recommended (compare Dist. Ex. 6 at p. 20 with Dist. Ex. 6 at pp. 9, 25 and Dist. Ex. 7 at p. 1). The November 2022 IEP also reflected that the student's OT sessions were to be 40 minutes in length in contrast with the November 2021 IEP which reflected that the student's OT sessions were 30 minutes in length (compare Dist. Ex. 6 at p. 20, with Dist. Ex. 3 at p. 26).

[3] As raised by the IHO during the March 2, 2023 and March 31, 2023 hearing dates, the parent's January 3, 2023 amended due process complaint notice continued to be unpaginated and did not contain consecutively numbered paragraphs (see Tr. pp. 73-76, 96). The parent's attorney corrected the erratic numbering of the paragraphs by filing a second amended due process complaint notice dated April 10, 2023 (Parent Ex. M).

meet its burden to demonstrate that it provided the student with a FAPE for the 2021-22 and 2022-23 school years (see Tr. pp. 197, 201, 237-38).

In a decision dated January 23, 2024, the IHO found that as conceded by the district, it failed to provide the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at p. 6). As relief, the IHO ordered the district to convene a CSE and defer the matter to the district's Central Based Support Team (CBST) for a nonpublic school placement consistent with the recommendations of the neuropsychologist who conducted the May and June 2023 evaluation (id. at pp. 6-7, 9). The IHO declined the parent's request for 1:1 SETSS in addition to the nonpublic school placement, finding that the evidence did not support the student's need for 1:1 SETSS in addition to a nonpublic school placement (id. at p. 8). However, the IHO concluded that "SETSS are ordered on an interim basis while the search for an appropriate placement is underway" (id.).[4] The IHO further awarded the student compensatory education relief in the form of a bank of 920 hours of 1:1 SETSS minus the number of hours the student received during the 2021-22 and 2022-23 school years pursuant to pendency and his IEP mandates, and ordered the district to calculate the number of hours of OT, speech-language therapy and counseling that were mandated by the CSE but not provided to the student or alternatively provide the student with authorizations for a bank of 39 30-minute sessions of compensatory OT, 39 30-minute sessions of compensatory counseling and 34 30-minute sessions of compensatory speech-language therapy (id. at pp. 8-11).

IV. Appeal for State-Level Review

The parent appeals only insofar as the relief ordered by the IHO did not include the provision for interim 1:1 SETSS until such time that the nonpublic school placement was secured. The parent noted that the IHO determined and wrote in the body of her decision that such relief would be ordered, but failed to include such interim 1:1 SETSS in the ordering clauses set forth on pages 10-11 of her decision. The parent characterizes the IHO's omission of interim 1:1 SETSS in her ordering clauses as "inadvertent," and states that the IHO acknowledged her oversight but could not correct it because doing so would be in contravention of State regulations. The parent offers additional evidence with the request for review to corroborate her arguments on appeal and requests that an SRO accept and consider such additional evidence (SRO Exs. A-C).[5] As relief,

[4] There is no corresponding ordering clause in the IHO decision for an award of SETSS on an interim basis until such time that a nonpublic school placement is found (see IHO Decision at pp. 10-11).

[5] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the additional evidence includes the parent's January 3, 2023 amended due process complaint notice that is already in evidence as Parent Ex. C, and email communications ranging in date from November 2023 to January 2024 from other cases the parent's counsel represented and was advised in those cases by district and state officials that a hearing officer cannot amend a decision to make substantive changes (SRO Exs. A-C). I decline to accept the parent's additional evidence because none of it is necessary to render a decision in this case. There is no need to submit an exhibit that is already in the hearing record and it is well-settled that an IHO lacks the authority to retain jurisdiction and materially alter a final decision (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability,

the parent requests that an SRO correct the IHO's inadvertent omission and amend the order to include 10 hours of 1:1 SETSS until such time that the student is placed in a nonpublic school.

In an answer and cross-appeal, the district contends that the IHO erred in ordering prospective relief. Although the district does not contest the parent's allegation that the IHO "inadvertently omitted" from the decision an order for 10 hours of 1:1 SETSS on an interim basis, the district asserts that the IHO erred in ordering the district to defer the matter to the CBST for a nonpublic school placement for the student and provide 1:1 SETSS on an interim basis. The district argues that these directives amount to prospective relief that circumvent the statutory processes which require the CSE to review current information, assess the student's needs, and develop an IEP for the student. The district requests that an SRO dismiss the parent's appeal and annul the IHO's directives ordering prospective relief in the form of ten hours of 1:1 SETSS and the student's placement in a nonpublic school.

The parent submits an answer to the cross-appeal and reply, where the parent asserts that the IHO had the authority to award prospective relief. However, the parent asserts new information that the student is "now attending a small private school placement" for the remainder of the 2023-24 school year and "his placement for the 2023-2024 school year will likely be the subject of a new due process proceeding" (Answer to Cross Appeal and Reply ¶ 10). The parent further asserts that the IHO erred in ordering that the matter be deferred to the district's CBST because none of the nonpublic schools that the CBST is authorized to place students at meet the neuropsychologist's recommendations. The parent seeks dismissal of the district's cross-appeal and that an SRO modify the IHO's award to strike the deferral to the CBST.

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

Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

The district does not appeal from the IHO's finding that it denied the student a FAPE for the 2021-22 and 2022-23 school years nor the IHO's award of compensatory education services in the form of 1:1 SETSS, OT, speech-language therapy, and counseling. Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The parties' dispute on appeal centers around whether it was proper for the IHO to award prospective relief for the district's denial of a FAPE to the student for the 2021-22 and 2022-23 school years. In resolving the appeal, it is necessary to point out that the parent presented new information in her answer to the cross appeal and reply that she unilaterally placed the student at "a small, private school placement" for the remainder of the 2023-24 school year (Answer to Cross Appeal and Reply ¶ 10). The parent further alleges that she will likely pursue a new due process proceeding concerning the 2023-24 school year. The parent also contends that "deferral to CBST violates the IDEA and is unnecessary" (id. at ¶ 9). Given these new representations by the parent that she has elected to unilaterally place the student in a nonpublic school, there is now agreement between the parties that the IHO's directive for the district to defer the matter to the CBST for a nonpublic school placement is no longer necessary.

Moreover, this case illustrates the perils of awarding prospective relief for a subsequent school year. While prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is sought by the parents, such relief could be treated as an election of remedies by the parents, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 20-123; Application

[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).

of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at *5 [S.D.N.Y. Mar. 29, 2024]).

Additionally, as raised by the district, 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 v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]). This is exactly the instance here as the school years at issue— 2021-22 and 2022-23—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the remainder of the 2023-24 school year (see Eley, 2012 WL 3656471 at *11).[7] Additionally, as previously noted, the parent represented in her answer to the cross appeal and reply that she elected to unilaterally place the student in a small, nonpublic school for the remainder of the 2023-24 school year and will likely commence a new due process hearing where she will have the opportunity to fully develop the record and present objective evidence before an IHO that the unilateral placement she chose is an appropriate placement for the student under the IDEA. To direct the district to defer the matter to the CBST for a nonpublic school placement in May 2024 when the 2023-24 school year is nearly over and the parent has elected to unilaterally place the student in a nonpublic school would just add further complexity and confusion. For all these reasons, I decline to award prospective relief and will modify the IHO's orders accordingly.

Lastly, given my determination that this matter is not one of the rare instances where prospective relief is warranted, I decline to amend the IHO's orders to award interim 1:1 SETSS services as requested by the parent in her appeal. I note that the IHO included SETSS services in

[7] Here, the November 2022 IEP reflects an implementation date of November 7, 2022 and a projected annual review date of November 7, 2023 (Dist. Ex. 6 at p. 1). The hearing record does not contain an IEP developed for the remainder of the 2023-24 school year nor does it indicate the date the parent unilaterally placed the student in a nonpublic school.

the award of compensatory educational services to remedy the denial of a FAPE (see IHO Decision at pp. 10-11). The IHO also determined that the evidence did not support a finding that the student requires ten hours of after school 1:1 SETSS in addition to a nonpublic school placement (id. at p. 8). Given the parent's representation that the student has now been unilaterally placed in a nonpublic school, it is unnecessary to award prospective relief consisting of interim 1:1 SETSS services.

VII. Conclusion

The IHO's determinations that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years and award of compensatory education services are final and binding on the parties. However, the IHO erred in ordering prospective relief consisting of placement in a nonpublic school and interim 1:1 SETSS services.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 23, 2024, is modified by annulling those portions which ordered a deferral to the CBST for the student's placement in a nonpublic school and awarded 10 hours of 1:1 SETSS on an interim basis.

Dated: **Albany, New York**
May 9, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER