The University of the State of New York

The State Education Department
State Review Officer
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No. 24-099

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, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Christian Kinsella, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which partially denied her request to be reimbursed for certain costs associated with her son's educational placements for the 2019-20, 2021-22, and 2022-23 school years and which denied her request for compensatory educational services. Respondent (the district) cross-appeals from the IHO's direction that the district fund costs associated with an educational consultant. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student presents with average cognitive skills; however, he has a long history of disruptive, aggressive, and oppositional behaviors and has been hospitalized on numerous occasions due to mental health concerns (Parent Exs. D at p. 2; E at pp. 11-14; GG at p. 2; MMM at p. 10). He has received the following diagnoses among others: post-traumatic stress disorder (PTSD); disruptive mood dysregulation disorder (DMDD); attention deficit hyperactivity disorder – combined presentation

(ADHD); and reactive attachment disorder (RAD); he also has a history of specific learning disorders with impairment in reading, writing, and math (Parent Exs. D at p. 2; E at p. 11, 30-32).

The student has been the subject of prior administrative proceedings involving the 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, and 2020-21 school years (see Parent Exs. B; T). In each proceeding, the IHOs respectively determined that the district failed to offer or conceded that it did not offer the student a free appropriate public education (FAPE) for each school year (Parent Exs. B at p. 25; T at p. 8).

As it relates to this matter, the student began attending Fusion Academy (Fusion), on or around September 4, 2019, for the 2019-20 school year (see Parent Ex. L). Fusion is a non-public school that uses a 1:1 teaching model (Parent Ex. L at p. 23). The student also received tutoring services from Lindamood-Bell to address his reading difficulties; however the parent testified the student could not continue with Lindamood-Bell after a behavioral incident, then in March 2020 when schools closed due to the COVID-19 pandemic, the student's program at Fusion was switched to remote (Parent Ex. I at p. 2; see Tr. pp. 471-73, 479).[1] During this period of remote instruction, due to the student's maladaptive behaviors, he was hospitalized and did not attend class at Fusion from May 11, 2020 to May 26, 2020 and from June 2, 2020 to the end of the 2019-20 school year (Parent Ex. L at pp. 18-21; see MMM at p. 11). On July 7, 2020, the student began attending KidsPeace, an out-of-state residential program (Parent Exs. B at p. 9; F at p. 2; P at p. 1).

The parents sent a letter to the district on July 24, 2020, requesting an IEP and placement for the student (Parent Ex. R). On August 25, 2020, the parents sent a notice to the district that alleged the district failed to offer the student a FAPE for the 2020-21 school year by failing to develop an IEP for the student (Parent Ex. F). The parent sought funding for KidsPeace and a plan for transitioning the student back to the district following his time at KidsPeace (id. at pp. 9-10).

The CSE convened on August 28, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Parent Ex. N). To address the student's educational needs, the August 2020 CSE recommended placement in a 12:1+1 special class at a residential nonpublic school with related services of individual counseling once a week for thirty minutes and speech-language therapy in a group of three, twice a week for thirty minutes (Parent Ex. N at p. 15). The August 2020 CSE also recommended individual home instruction "pending [a non-public school] placement" five times per week for two hours a day (id.). The CSE recommended that the student's case be deferred to the district's central based support team (CBST) to locate a residential nonpublic school placement (id.).

The student remained at KidsPeace for the 2020-21 school year until the end of March 2021 when the parent determined that KidsPeace was no longer meeting the student's needs (see Tr. pp. 502-06). The parent retained an educational consultant who located Kaizen Academy (Kaizen), an out-of-state residential program that specialized in working with a specific population of students and was willing to work with the student (Tr. pp. 506, 513-14; see Parent Exs. O; MMM at p. 10). The parent contracted with a professional intervention and transportation services

[1] The parent used compensatory education hours awarded in one of the prior administrative proceedings to arrange for such services (see Parent Exs. A; R at p. 1; T at pp. 8-9).

company, on March 23, 2021, to transport the student from KidsPeace to Kaizen on or before March 30, 2021 (Parent Ex. DDD at pp. 1-6).[2]

The CSE convened on April 28, 2021 to formulate the student's IEP for the 2021-22 school year (see Dist. Ex. 4 at p. 2).[3] According to an assurance checklist document dated May 4, 2021, all mandated members of the CSE participated in the student's annual review and all components of the IEP were completed (Dist. Ex. 4 at p. 2). The assurance checklist also indicated that the CSE believed a residential setting was appropriate for the student (id.).

Following a behavioral incident at Kaizen, the student returned home on October 7, 2021 (Tr. pp. 517-18; Parent Exs. MMM at p. 10; SSS at p. 18). The student began receiving applied behavior analysis (ABA) services at his house from two ABA specialized therapists, and also attended a district program in a specialized school with a 1:1 paraprofessional (Dist. Ex. 6 at p. 38; see Tr. pp. 512, 516-22; 1155-56). Approximately three weeks after attending the district program, the student was hospitalized and remained in the hospital until the parents enrolled the student at Stetson School (Stetson), an out-of-state residential treatment center, which he began attending on December 7, 2021 (Tr. pp. 520-24, 1168; Parent Ex. MMM at p. 3; Dist. Ex. 6 at p. 38).

On May 20, 2022, the CSE convened to formulate the student's IEP for the 2022-23 school year (see generally Parent Ex. D). The May 2022 CSE recommended 12-month services in an 8:1+1 special class in a State-approved nonpublic residential school placement with related services in counseling (Parent Ex. D at pp. 20-21). The May 2022 CSE also recommended an interim placement in a district school pending the availability of the nonpublic residential school, with the interim placement consisting of placement in an 8:1+1 special class with the additional support of a full-time paraprofessional, daily (id.). The May 2022 CSE also recommended parent counseling and training and special transportation (id. at pp. 20, 27-28).

A. Amended Due Process Complaint Notice

By an amended due process complaint notice dated June 16, 2022, the parents alleged the district failed to provide the student with a FAPE for the 2019-20, 2021-22, and 2022-23 school years (see generally Parent Ex. A).[4]

[2] In a separate matter, the parent filed a due process complaint notice on August 25, 2020 that alleged the district failed to provide the student with a FAPE for the 2019-20 and 2020-21 school years (see Parent Ex. B). The parents withdrew their claims for the 2019-20 school year and the IHO issued a decision on May 2, 2021 regarding the 2020-21 school year finding the district denied the student a FAPE (Parent Ex. B at p. 25). The IHO ordered the district to fund the cost of the student's attendance at Kaizen, including transportation costs and school placement consultant fees, for the entire 2020-21 school year in addition to awarding a bank of compensatory education (id. at pp. 37-40).

[3] A copy of the April 2021 IEP was not included in the hearing record (see Parent Exs. A-TTT; Dist. Exs. 1-7; IHO Exs. I-II).

[4] The parent originally filed her due process complaint notice on July 2, 2021 (see Due Process Compl. Not.). During a February 17, 2022 status conference, the parent's attorney indicated she needed to file an amended due process complaint notice because the student was expelled from Kaizen and was now attending Stetson and the July 2, 2021 due process complaint notice did not contain relief for Stetson (Tr. p. 19).

For the 2019-20 school year, the parents alleged the district failed to create an IEP or offer the student a placement (Parent Ex. A ¶ 3). With respect to the 2021-22 and 2022-23 school years, the parents alleged the district failed to conduct timely, thorough, and appropriate evaluations; appropriately identify and address the student's disabilities and needs; develop timely and substantively and procedurally valid IEPs; offer him timely and appropriate special education services, supports, accommodations, and placements; and employ appropriate IEP-development and placement procedures (id. ¶¶ 4, 133). The parents also alleged that for the 2021-22 and 2022-23 school years the CSE recommended a residential placement, but that the district had been unable to effectuate that placement (id. ¶ 5). The parents also asserted that the district violated Section 504 of the Rehabilitation Act (section 504) (id. ¶¶ 1, 6, 139-154). As for pendency, the parents alleged that the student's pendency placement should be at Stetson (id. ¶ 120). The parents also indicated that they were funding Stetson using a prior compensatory education award (id. ¶ 28).

For relief, the parents requested an order: finding that the district failed to provide the student with an educational placement and FAPE for the 2019-20, 2021-22 and 2022-23 school years; directing the district to fund the student's tuition at Stetson "until such time as it is no longer appropriate for the student" or, if Stetson does not keep the student for the entire 2022-23 school year, fund an alternative program and placement; directing the district to fund Fusion including transportation costs; directing the district to reimburse the parents for any expense concerning the student's special or general education during the school years at issue; and awarding compensatory education at the rate of eight hours per day for each day of the 2019-20, 2021-22 and 2022-23 extended school years that the district did not provide a FAPE to the student (Parent Ex. A at ¶ 156). The parents requested that the compensatory education award could be used for 1:1: instruction, behavior therapy and support, counseling, psychological services, medical services, related services, transition services or tuition or funding at an alternative program, at the discretion of the parents, depending on the student's individual needs (id.).

B. Impartial Hearing and Subsequent Events

An impartial hearing convened on January 18, 2022 and concluded on July 7, 2023 after approximately 18 months during which the parties appeared for 26 days of proceedings, inclusive of pre-hearing conferences, status conferences and a pendency hearing (Tr. pp. 1-1205).

On September 21, 2022, the district executed a pendency implementation form agreeing that the student's pendency program was based on a May 2, 2021 IHO decision in a prior proceeding regarding the 2020-21 school year (Sept. 21, 2022 Pendency Implementation Form; see Parent Ex. B). The district further agreed to fund the student's tuition costs at "Stetson or [o]ther [p]rogram in [a]ccordance with [the May 2, 2021 prior unappealed IHO decision]" (Sept. 21, 2022 Pendency Implementation Form).

Around September 21, 2022, following an incident involving a teacher at Stetson, the student was remanded to a juvenile detention center in Massachusetts (Parent Ex. NNN at p. 36; see Tr. pp. 55, 189-90). At the September 22, 2022 status conference, the parent's attorney indicated the student was released without bail but under the condition that if he had another negative interaction with Stetson staff his release might be revoked and he might be remanded without bail (Tr. pp. 55; see Tr. p. 64). During the October 27, 2022 status conference, the parents'

attorney explained that following a further incident involving the student being verbally aggressive with staff at Stetson, he was expelled and reincarcerated (Tr. pp. 64-65; see Tr. pp. 79-80).

At the November 30, 2022 status conference, the parent's attorney indicated the student was still in juvenile detention and the parent retained a consultant to help her find a new treatment program to avoid ongoing incarceration (Tr. pp. 134-35). According to counsel for the parent, the consultant found another out-of-State program identified as the J. Flowers Health Institute (Flowers) (id.). The parent's attorney further indicated that the parent could not afford the program at Flowers and requested an interim order from the IHO directing the district to fund the cost of the student's program at Flowers until another program could be located (Tr. pp. 135-39). The district representative stated that the pendency order was written in such a way to allow a change in placement and believed the district would be willing to fund Flowers under pendency (Tr. p. 140). The district representative confirmed at the next status conference, held on December 12, 2022, that the pendency order would cover Flowers (Tr. p. 154).

The IHO held a pendency hearing on December 20, 2022, where the district representative indicated she did not object to the parents' request for an order placing the student at Flowers as pendency for the duration of this matter (Tr. p. 249). On January 5, 2023, the IHO issued an interim order directing the district to immediately fund the student's placement at Flowers as pendency "until the student [wa]s stabilized and [wa]s able to gain admission to another appropriate residential setting"; immediately make the initial advance payment to Flowers for the first month; and to make advance payments to Flowers at least 15 business days prior to the last day on which the prior time period's payment would expire (IHO Ex. II at p. 7). The IHO also ordered the district to fund the student's transportation services to and from Flowers and any other setting/institution in which the student was placed, as well as any home visits required by the program (id.). The IHO also ordered the district to reimburse the parent for up to five round-trip visits to the student per year (id. at p. 8). As an alternative, the IHO ordered that if the student was unable to maintain a placement at Flowers, the district would be required to "fund the student's tuition at another residential setting" and reimburse the parents for both transportation for the student and visits by the parents up to five times in one year until all issues raised in the parents' due process complaint were resolved by final order (id.). The parent signed an acknowledgement of financial responsibility and financial agreement with Flowers on January 19, 2023 (see Parent Ex. Y). The parent then signed a transportation agreement on February 1, 2023 for the student's transportation from juvenile detention in Massachusetts to Flowers prior to February 2, 2023 (Parent Ex. V). The student attended Flowers beginning February 3, 2023 (Parent Exs. AA; MMM-OOO).

During the April 6, 2023 hearing the parent's attorney indicated that the student was hospitalized for several days but had since returned to Flowers after he had "concerning" episodes that "involved property destruction and threats" (Tr. p. 560). At that hearing date, the parent testified that Flowers would not be able to keep the student for the length of time it would take her to find another program and she had not yet heard from the district as to any recommendations for residential placement or as to what would be next for the student (Tr. p. 609).During the next hearing date, on April 17, 2023, the parent testified that the student was readmitted to the hospital and that he could not return to Flowers because he required a higher level of care and Flowers felt it could not keep the student safe in its program (Tr. p. 859). After some testimony as to the student's hospitalization and a discussion as to what would happen next for the student, the IHO

scheduled a hearing for the next day for further discussion (Tr. pp. 869-79). The following day, April 18, 2023, the parent's attorney indicated that the parent's insurance was no longer covering the student's hospitalization and requested that the district pay for the student's stay at the hospital under pendency until a new program could be located (Tr. p. 886). The district's representative indicated that it would not agree to fund the student's hospital stay under pendency and further asserted that the IHO's January 2023 interim order specifically indicated that Flowers would return any payment made by the district for any day the student was not at Flowers (Tr. p. 888; see IHO Ex. II pp. 7).

During the next scheduled hearing, on May 18, 2023, the parent's attorney indicated the parent found a new residential facility willing to accept the student, identified as Family First Adolescent Services (Family First), and further indicated the student was then-currently being transported to Florida (Tr. pp. 909-11). The parents' attorney also indicated that the parent secured a temporary restraining order (TRO) in federal district court directing the district to fund Family First under pendency (Tr. p. 911).

According to the assistant director of admissions of Family First, the student was admitted on May 18, 2023, the student then had an incident on May 22, 2023—the description of which was similar to incidents the student had exhibited at prior facilities, the student was then discharged on May 23, 2023 and transported to New York for stabilization (Parent Ex. TTT).

During the May 25, 2023 hearing the parent's attorney indicated that when the student retuned to New York, he was admitted to Bellevue Hospital and would remain there until June 1, 2023 (Tr. p. 948).

During the June 7, 2023 impartial hearing, a member of the district CBST testified that the Judge Rotenberg Education Center (JRC), a State-approved out-of-state residential facility, may have an opening for the student (Tr. p. 968-69). The JRC sent the parent an acceptance letter dated June 21, 2023 indicating what was required prior to the student being admitted (Parent Ex. VV). At the June 23, 2023 hearing date, the district representative clarified that there was a potential placement at the JRC at the end of July 2023 (Tr. p. 1089). On the last hearing date, July 7, 2023, the parent testified that she paid a deposit at JRC but there was not yet a start date for the student (Tr. p. 1187).[5]

In a decision dated February 9, 2024, the IHO determined that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2021-22, and 2022-23 school years; that all the residential and day programs the parent secured during the school years at issue in this matter were reasonably calculated to provide the student with an educational benefit; and that equitable considerations weighed in favor of the parent's requested relief (IHO Decision at pp. 18-19, 21-22).

In assessing the relief requested by the parent, the IHO determined that the district was required to fund any unpaid portion of the student's tuition at Fusion, reimbursement for fees paid by the parent for transporting the student during the 2021-22 and 2022-23 school years, and

[5] According to the parent's memorandum of law filed with her request for review, the student began attending JRC in the summer 2023 (Parent Memo. of Law at p. 19).

reimbursement for fees paid by the parent to an educational consultant for help investigating and procuring a residential placement for the student (IHO Decision at p. 19). Regarding the parent's reimbursement request for the cost of the damage caused by the student when he attended Flowers during the 2022-23 school year, the IHO determined the relief provided to the parent for the district's failure to provide a placement did not extend to damages caused by the student (id. at p. 20). Regarding the parent's reimbursement request for the cost of the student's Texas hospital stay not covered by insurance, the IHO denied the request, finding the district's failure to provide a placement did not extend to the student's hospitalization costs, including ancillary costs for visiting the student during that time period (id.). However, the IHO granted the parent's request for reimbursement for costs associated with visiting the student at his out-of-state residential placements, including the cost of lodging, travel, and meals (id. at p. 21).

Regarding the parents' request for compensatory education, the IHO determined that to award compensatory relief in addition to the awarded funding/reimbursement for the tuition associated with placement/programs the student attended during the school years at issue, in addition to travel expenses, consulting service fees, travel, lodging and meal fees also awarded to the parent would amount to duplicative relief (id. at p. 21).

In summary, as relief the IHO ordered the district to (1) reimburse the parent for fees paid to a private agency for transportation of the student during the 2021-22 and 2022-23 school years; (2) directly fund and/or reimburse the parent for all outstanding payments to Stetson while the student was enrolled at Stetson; (3) reimburse the parent for the costs of the educational consulting services in the amount of $6,000; (4) directly fund and/or reimburse the parent all outstanding payments to Fusion during the 2019-2020 school year; and (5) reimburse the parent for lodging, travel, and meal expenses incurred for visits made to the student's residential programs during the 2021-2022 and 2022-2023 school years (IHO Decision at pp. 22). The IHO also indicated that the January 5, 2023 interim order was incorporated as far as directing the district to fund all outstanding fees and costs associated with Flowers incurred during the pendency of this proceeding (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer with cross-appeal, and the parent's answer thereto is also presumed and, therefore, the specific allegations and arguments will not be repeated here.[6] The following issues presented on appeal must be resolved in order to render a decision in this matter:

[6] To the extent the parent asserts that the IHO failed to address her section 504 claims (Req. for Rev. ¶¶19-22), an SRO lacks jurisdiction to consider a party's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL

1. Whether the IHO erred by denying compensatory education as relief for the district's denial of FAPE during the 2019-20, 2021-22, and 2022-23 school years;

2. Whether the IHO erred in denying reimbursement for property damage caused by the student while attending Flowers;

3. Whether the IHO erred in denying reimbursement for the student's out-of-state hospitalization that occurred while the student was attending Flowers; and

4. Whether the IHO erred in awarding reimbursement to the parent for consultant fees that accrued during the 2021-22 and 2022-23 school years.

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, 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

8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parents' claims as they relate to section 504, and accordingly such claims will not be further addressed.

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]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

[7] 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).

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

The district does not cross-appeal from the IHO's determinations that it failed to provide the student a FAPE for the 2019-20, 2021-22, and 2022-23 school years, that the residential and day programs selected by the parent during the schools years at issue were appropriate, or that equitable considerations weighed in favor of the parent. Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Compensatory Education

Turning to the parties' arguments regarding compensatory education, the parent generally asserts that the IHO failed to hold the district to its burden on compensatory education and erred by not awarding any compensatory education for the district's denial of FAPE for the school years at issue. More specifically, the parent requests a bank of compensatory services consistent with a prior IHO's award of five hours per day of 1:1 compensatory education for each of the days the district did not implement the student's IEP, which the student could then use for 1:1 instruction, tutoring, behavior therapy, transition services, executive functioning support, counseling, parent counseling and/or training, and transportation and which could also be converted to tuition and/or funding for a program at the parent's election (see generally Parent Ex. B). The district argues in its answer with cross-appeal that the IHO did not improperly shift the burden of proof to the parent and that the IHO's determination regarding compensatory education should be upheld.[8]

[8] Under State law in this jurisdiction, the burden of proof has been placed 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]). Accordingly, if compensatory education is a remedy sought, the district must be given notice that it should describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d

In addressing the IHO's decision denying compensatory education, it must be noted that the IHO determined an award of compensatory education would be duplicative of the other relief awarded (IHO Decision at p. 21). However, as noted above, the student went through periods where he was out of school, where he was hospitalized, where he was placed in juvenile detention, and where he was placed in various residential facilities. Accordingly, rather than grouping all of the relief together as the IHO did, I will address each school year, and period of time, at issue separately below.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation

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440, 457 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).In this instance, the district argued that compensatory education should not be awarded or, in the alternative, "that a more qualitative approach be used in the sense of where the student should be" (see Tr. pp. 434-35; Dist. Ex. 7 at pp. 2-3, 7-9). Although the district has conceded that it has denied the student a FAPE for three school years, the district has not made an argument as to what an appropriate compensatory remedy would be for its denial of a FAPE to the student. Nevertheless, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process was egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, it is worth noting that an order accepting the total of the compensatory education relief requested by the parent, including the monetization thereof, could potentially amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).

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"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

1. 2019-20 School Year

For the 2019-20 school year, the IHO ordered the district to directly fund and/or reimburse all outstanding payments to Fusion (IHO Decision at p. 22). The parent alleges that due to the district's failure to develop an IEP for the student she was forced to use a prior award of compensatory education to fund services provided by Fusion, which was not supposed to "supplant [the student's] FAPE entitlement" and the IHO's awarded relief failed to consider that the services the student received from Fusion were funded by the compensatory education award awarded in the prior proceeding regarding the 2014-15 through 2018-19 school years (Req. for Rev. ¶ 6; see Parent Ex. T).

It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

However, here the parent is not seeking enforcement of a prior order but relief for the district's failure to develop and implement an IEP for the student during the 2019-20 school year. The district did not cross-appeal from the IHO's finding that the district denied the student a FAPE nor did it contend that the services paid for by the district at Fusion during the 2019-20 school year were not funded through the student's bank of compensatory education. The parent is correct that the IHO erred in failing to award compensatory education for the 2019-20 school year. Compensatory education services are awarded to remedy a past violation, rather than to offer the

student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [quotations omitted]).

A review of the hearing record reveals that the district did not create an IEP for the student for the 2019-20 school year but rather, the district in an email dated July 9, 2019, requested information from the parent regarding "each vendor" who would be providing services in accordance with the prior June 2019 IHO decision (Parent Ex. BB at pp. 1-2; see Parent Ex. T). In an email to the district, dated July 13, 2019, the parent's attorney indicated that the parent was going to use "some of the [awarded compensatory education] hours at Fusion" (Parent Ex. BB at p. 3, 4). The student's mother testified that the district agreed to directly pay Fusion using the bank of compensatory education hours because it was not providing an alternative placement during the 2019-20 school year (Tr. p. 1162). Though the parents indicated a private provider was going to deliver compensatory education services to the student during the 2019-20 school year as was awarded by the prior June 2019 IHO decision (i.e. Fusion), this action did not negate the district's responsibility to offer the student a FAPE for the then-upcoming 2019-20 school year (see Educ. Law § 4402; 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). In fact, the hearing record does not include any documentation showing any planning for the student's education for the 2019-20 school year.

Accordingly, given the underlying FAPE violation—the failure to develop and implement an IEP for the student during the 2019-20 school year—and the request for relief to remedy the same, the IHO erred by failing to award compensatory education for the 2019-20 school year.

The parent requests an award of 1825 hours of compensatory education to remedy the district's failure to implement an IEP for the 2019-20 school year, computed based on five hours per day of 1:1 instruction over the course of 365 days for the year (Req. for Rev. at p. 10).[9] However, there is no explanation as to how such an award would place the student into the position he would have been in, if not for the denial of FAPE. For example, although the district did not develop or implement an IEP for the student for the 2019-20 school year, the student did receive instruction from Fusion for most of the school year, except for the period after the start of the COVID-19 pandemic when remote instruction was problematic for the student, then the end of the school year when some behavioral incidents led to the student being hospitalized (see Tr. pp. 470-80, 656, 1160-61; Parent Ex. L).

Accordingly, in review of the hearing record, a proper compensatory education award to put the student in the place the student would have been in if not for the denial of FAPE requires that the district return to the parent the compensatory education used during the 2019-20 school year to make up an educational program for the student. The district is ordered to return to the

[9] As of the 2019-20 school year, the student was not residentially placed, and the hearing record does not indicate that the student required special education every day of the year. Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, and a 12-month school year from June through July would generally consist of 42 weeks. This is based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six-week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]).

student, the compensatory education the parent used to fund the student's attendance at Fusion during the 2019-20 school year, in accordance with the attendance document (Parent Ex. L).

2. 2021-22 School Year

As noted above, the 2020-21 school year was the subject of a separate proceeding and during that school year, the student attended another out-of-State residential facility, KidsPeace, and the parent, as part of the prior proceeding, sought placement of the student at Kaizen (Parent Ex. B).

Turning to the 2021-22 school year, the parent again requests 1825 hours of compensatory education, computed as 365 days times five hours per day of 1:1 instruction, less any day the district funded a residential placement for the student under pendency.

According to the pendency implementation form signed by a district representative on September 21, 2022, the district agreed that the student's pendency program was based on the May 2, 2021 prior unappealed IHO decision and agreed to fund the student's tuition costs at Stetson "or [o]ther [p]rogram in [a]ccordance with [the prior unappealed May 2, 2021 IHO decision]" retroactive to the date the parent filed her original due process complaint notice in this matter on July 7, 2021 (Sept. 21, 2022 Pendency Implementation Form). Notably, the prior unappealed May 2021 IHO decision allowed the parent to convert the awarded hours of compensatory education into tuition funding for a school or program if the student had to be moved from Kaizen on an emergency basis or the student was able to move to a less restrictive setting and the district had not arranged for an appropriate setting (Parent Ex. B at pp. 36-37). The prior unappealed May 2021 IHO decision also stipulated that the parent could "select a combination of remedies… (i.e. use some of the days to fund Kaizen and some of the days to create a compensatory fund)" (id. at p. 37).

According to the hearing record, the student began the 2021-22 school year at Kaizen, but following a behavioral incident the student was expelled in September 2021 (Tr. pp. 516-18; Parent Ex. A at p. 3). As a result of the incident the student was taken to the emergency room and subsequently hospitalized (Tr. pp. 517-18). On or around October 12, 2021 the student returned home (see Parent Ex. DDD at pp. 10-13). The parent testified that once the student was discharged from Kaizen, the parent and district were unable to find another program, so the student worked with a behavior interventionist in the home and attended a district program with a 1:1 paraprofessional for about three weeks (Tr. pp. 519-21).[10] The parent then enrolled the student at

[10] It is unclear from the hearing record if such placement in the district program was appropriate for the student given the severe maladaptive behaviors he was presenting with at that time (see generally Tr. pp. 521-22). The parent testified that the student struggled at the district program even with the 1:1 paraprofessional and opined that he did not make progress because he was primarily focusing his energy on not becoming dysregulated at school (Tr. pp. 521-22). Given that the district has not presented an argument that its interim, in district, placement was appropriate for the student coupled with the fact that the April 2021 CSE recommended the student be placed in a residential facility and the student was taken to a psychiatric facility where he stayed for approximately two months shortly after returning to the district program, one can deduce that the district program with a 1:1 paraprofessional was not appropriate for the student for the brief period he was in attendance (see Tr. pp. 519-22; Dist. Ex. 4).

the Stetson School, where he attended from December 7, 2021 until the end of the 2021-22 school year (Parent Ex. MMM at p. 3; Dist. Ex. 6 at pp. 36, 38; see Tr. pp. 1155-56). Stetson was paid by the district as part of the student's pendency program pursuant to the September 2021 pendency implementation form (Sept. 21, 2022 Pendency Implementation Form; see generally Parent Ex. SSS).

Based on the above, the only discernible period of time during the 2021-22 school year that the student was not provided any educational instruction, or an appropriate educational program was from October 12, 2021 to December 7, 2021 (see generally Tr. p. 522; Parent Ex. DDD at pp. 10-13). The remaining portion of the 2021-22 school year the student remained at Stetson and the parents have not alleged that the student had missed any educational instruction or services that would necessitate an award for compensatory education to place the student in a position he would have been in if the district had implemented the student's April 2021 IEP (see Req. for Rev; Parent Mem. of Law). Thus, I agree with the parent's argument that even though the undersigned is not inclined to grant the parent's full requested compensatory relief for the 2021-22 school year, at a minimum, the student should be awarded relief for the FAPE deprivation from October 12, 2021 (when the student was removed from the hospital and transported home to New York) to December 7, 2021 (when the student began attending Stetson), approximately 2 months (see Parent Memo. of Law at p. 23).

As such, the request for compensatory education is supported by the hearing record but only for the period of time from October 12, 2021 to December 7, 2021. The district shall be ordered to provide the student with compensatory education consisting of five hours per day of 1:1 instruction for the 57 days the student was without an appropriate school program, amounting to a total of 285 hours of 1:1 instruction.

3. 2022-23 School Year

Turning now to the 2022-23 school year, the parent requests "a flexible bank" of compensatory education calculated at five hours per day that could be "used for 1:1 services or converted into tuition" (Req. for Rev. ¶ 16). According to the parent, the IHO erred by failing to award compensatory education during the periods of time the student was either incarcerated or in a hospital (Parent Memo. of Law at p. 23).

As described above, the student began the 2022-23 school year at Stetson but, following an incident that occurred at the school, was subsequently arrested on or around September 21, 2022 and remanded to a juvenile detention center in Massachusetts with the Department of Youth Services(Parent Ex. NNN at p. 36; see Tr. pp. 55, 189-90). According to the hearing record, the student was released back to Stetson but was unable to control his behavior which led to his expulsion from Stetson and reincarceration at the juvenile detention center (Tr. pp. 64-65, 79-80, 191-92; see Tr. pp. 79-80). There is no evidence in the hearing record that the student received any educational services while in the custody of the Massachusetts Department of Youth Services. The student remained in the custody of the Massachusetts Department of Youth Services until

February 2, 2023, when the student was transported to Flowers (Parent Ex. V; see Tr. p. 1166; IHO Ex. 7).

On April 6, 2023, the student was hospitalized after an event at Flowers where the student became dysregulated (see Tr. pp. 603-05). The parent testified that the student reported that he attended school three times per week while he was hospitalized (Tr. p. 861). Additionally, the student's therapists from Flowers provided therapy four or five times per week in the hospital (Tr. p. 864). After he was released from the hospital in Texas, the student attended Family First for three days before returning to New York to be admitted for another hospitalization on or about May 23, 2023, where the student remained until approximately July 7, 2023 (Tr. pp. 1134-36; Parent Ex TTT; see generally Tr. pp. 1134-36, 1146-47). The parent testified that the hospital provided "schooling in accordance [with] the law" and that she believed the student attended school from 9:00 a.m. to 2:00 p.m., that he participated in "some level of schooling," and also received therapy (Tr. pp. 1136-37, 1195-96). However, it is unclear from the hearing record exactly what academic instruction or therapy was being provided to the student and if the student benefitted from it.

Accordingly, the undersigned finds that the IHO erred in denying compensatory education for the entire 2022-23 school year and that the student is entitled to some compensatory education relief for the periods of the school year when the student was not in a residential facility, when the district remained responsible for the student's educational planning, and when the hearing record does not show that the student received special education. For the time period the student was remanded to the juvenile detention center, the district should not be held accountable for providing educational services to the student. The student was incarcerated in an out-of-state juvenile detention center and although the parent requests compensatory education for that period of time, the parent does not cite to any relevant statutes or legal precedents indicating that the district was responsible for the student's education while the student was remanded to the custody of an out-of-state juvenile detention center; nor does the parent explain how the district or the State Education Department would be able to make any administrative decisions regarding the education of the student under those circumstances (see "Special Education Responsibilities for Students Incarcerated in County Correctional Facilities," at p. 2, VESID Mem. [Oct. 2010], available at https://www.nysed.gov/sites/default/files/programs/special-education/students-incarcerated-in-county-correctional-facilities.pdf [in New York the district where a county correctional facility is located has the responsibility for providing a FAPE to a student with a disability who has an IEP from another State and is incarcerated in a county correctional facility in this State]).

Similarly for the period of time that the student was hospitalized in Texas from April 6, 2023 to May 18, 2023, the student was out of the district's reach and in the care of a hospital in another State. Accordingly, without some explanation as to how the district or the State Education Department would be able to make any administrative decisions regarding the education of the student while he was being taken care of in an out-of-State medical facility, the district should not be required to provide compensatory education. However, for the period of time the student was hospitalized in New York from May 23, 2023 until June 30, 2023, the district was responsible for providing the student with special education and in this instance, the district did not present evidence to show it met any of its obligations. Accordingly, due to the lack of information regarding the academic instruction actually provided to the student, an award of compensatory education is appropriate and the district is directed to provide the student with 195 hours of 1:1

instruction (computed at 5 hours per day for each of the days of instruction missed, 39 days, as requested by the parent) as compensatory education.

Regarding the parent's request to be able to convert the compensatory education award into tuition payment for another program if the student is no longer eligible to remain in his current residential program, the undersigned finds that such an award would constitute prospective relief and could potentially have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). (see generally Mr. & Mrs. A New York City Dep't of Educ., 769 F. Supp. 2d 403, 429-30 [S.D.N.Y. 2011]). Accordingly, such request is denied. Nevertheless, the parties are free to come to such an arrangement on their own.

B. Relief

The remaining claims before me are the parent's request for additional reimbursement of $15,200 for the student's hospital stay in Texas and $8,015.54 for the damage the student caused to Flowers during his episode of dysregulation and the district's cross-appeal of the IHO's award of consultant fees. The parent argues that if the district located a residential facility to implement the student's IEP, the student would not have ended up in Texas, would not have caused damage to Flower's property, and would not have ended up in the hospital and thus they are entitled to reimbursement either as pendency or as partial compensatory education. However, such argument must fail.

According to the parent, the student was hospitalized from the beginning of April until the middle of May and for "the first few weeks" the student's hospital stay was covered by the parent's private health insurance but for the month of May the parent "paid a private rate" (Tr. p. 1132). The parent testified that the student was admitted to the hospital after a "series of events" which led to the student becoming destructive (Tr. pp. 603-05).

Generally, the IDEA does not cover medical services unless such services are for diagnostic or evaluative purposes (20 U.S.C. § 1401[26]; 34 CFR 300.34[a]; see Wenger 979 F. Supp. at 150 [ruling that a student's IEP was appropriate even though it did not provide him with services to address his extensive medical needs]). In addition, the definition of related services includes "medical services," which are defined by State regulation as "evaluative and diagnostic services provided by a licensed physician . . . to determine whether a student has a medically related disability which may result in the student' s need for special education and related services" (8 NYCRR 200.1[ee]). Here, the parent has not provided evidence that the costs associated with the student's stay at the hospital in Texas were for educational purposes or directly related to the student's educational needs. There is evidence that Flowers provided the student with educational services while the student was at the hospital and that Flowers was not going to bill to parent for those particular services (Tr. pp. 864-65). Likewise, Flower's national director of clinical outreach

testified that the fee Flower's charged for the student's program did not cover medical expenses and that if Flowers determined the student's "medical condition" warranted him going to the hospital for a service, such as an MRI, it would be charged through the student's medical insurance and it would be considered an extra fee (Tr. p. 233). As such, the hearing record does not support finding that the student's hospital stay was anything other than a medical service and there is no indication that it falls within the definition of medical services for which school district's may be responsible as here is no indication it was an evaluative or diagnostic service to determine whether a student has a medically related disability. Accordingly, the IHO was correct to deny reimbursement for the student's hospital stay and the parent's argument cannot avail her of this type of relief under the IDEA.

Regarding the $8,015.54 for property damages the student caused at Flowers, it has been established that if a student with a disability needs a residential program to receive special education and related services, the district must provide that program, including non-medical care and room and board, at no cost to the student's parents (34 CFR 300.104). However, courts have determined that when a residential placement is recommended in response to medical, social or emotional problems that are segregable from the learning process "the school district is not obligated to bear the total cost of the placement" and instead, the school district must cover the cost of special education and related services, but need not fund medical treatment or other non-educational expenses (King v. Pine Plains Cent. Sch. Dist., 918 F. Supp. 772, 778 [S.D.N.Y. 1996] [citing Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 693 [3d Cir. 1981] [stating "the residential placement is a response to medical, social or emotional problems that are segregable from the learning process"]). Here, there is no indication that the costs associated with the damage caused by the student's dysregulation episodes were educational expenses that should be covered by the district. In particular, there is little evidence regarding the episode or the damages other than an invoice from Flowers (Parent Ex. JJJ; see Tr. pp. 1180-81, 1194). Moreover, the parents signed an acknowledgement of financial responsibility and financial agreement with Flowers when they enrolled the student, which stated the admission fee did not include "[i]ncidentals" such as damages to the student's lodging (Parent Ex. Z at p. 2). The student's placement at Flowers was made pursuant to a preliminary injunction issued on January 26, 2023 by a district court judge; accordingly, if the parent has any objection as to how that order was implemented, the parent may seek enforcement through district court. However, under the circumstances present here, the IHO was correct in her determination that the district's failure to implement the student's IEP for the 2022-23 school year did not extend to the district incurring the cost for damages caused by the student at Flowers (see IHO Decision at p. 20).

Turning now to the district's cross-appeal, the district alleges that the IHO erred by awarding the cost of the educational consultant fees arguing such award amounts to compensatory monetary damages which would not be an available remedy under the IDEA. The IHO determined that given the student's disability and "breath of behaviors that he exhibits when he becomes dysregulated" it was reasonable for the parent to seek assistance from an educational consultant given the district's failure to locate a residential placement for the student (IHO Decision at pp. 19-20). In this instance, I agree with the IHO's decision to grant reimbursement of the educational consultant fees.

The parent testified that she hired an educational consultant for $5,000 and the educational consultant and her team located Kaizen (Tr. pp. 1167-68). The parent further testified that once

the student was expelled from Kaizen, the educational consultant applied to about fifty programs but ultimately had no options for the student at that time (Tr. p. 1168).[11] The parent testified that she found a new educational consultant to assist in finding the student a new residential placement for the student and she paid the consultant about $5,000 to $6,000 (id.; see Parent Exs. W, X). The parent clarified that she paid the educational consultant $3,000 for the first placement she located which was Flowers and $2,500 for the second placement she located, which was Family First (Tr. p. 1170). In this instance, although the district objects to payment for the educational consultant, the district does not indicate that an educational consultant was not necessary to find a placement for the student or that finding a placement for the student was not difficult. As discussed above, at no time during the 2021-22 or 2022-23 school years did the district locate a residential placement to implement the student's educational program and it was not until after the school years at issue had passed that the district located one placement willing to accept the student. Given the district's continuing failure to locate a residential placement, and the evidence in the hearing record showing the difficulty involved in finding a placement for the student, I agree with the IHO that it was reasonable for the parents to hire educational consultants who had more knowledge and resources to locate programs for the student. Moreover, courts have granted educational consultant fees in the past (see Connors v. Mills, 34 F. Supp. 2d 795, 808 [N.D.N.Y. 1998] [holding an educational consultant may recoup all fees incurred in advising the parent regrading educational problems, the evaluation thereof, and the proper educational placement for the student]).

VII. Conclusion

Having determined that the IHO erred in the analysis of compensatory relief, the parents' request for additional relief is granted in part. The IHO's decision is modified to reflect that the parents are entitled to compensatory education and the district is ordered to fund a bank of compensatory education in the form of hour-for-hour compensatory education in accordance with the Fusion attendance document for the 2019-20 school year and a bank of 480 hours of 1:1 instruction. Additionally, having determined that the IHO did not erred in granting reimbursement for the parents' educational consultant, the district's cross-appeal is denied.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision dated February 9, 2024 is modified by reversing that portion which denied the parent's request for compensatory education in full; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall, using district employees, provide the student with a bank of compensatory services in the

[11] The consultant fee for finding Kaizen was awarded to the parent as part of a prior proceeding concerning the 2020-21 school year (Parent Ex. B).

form of hour-for-hour compensatory education calculated in accordance with the Fusion attendance document for the 2019-20 school year; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall, using district employees, provide the student with a bank of compensatory services for the student in the form of 480 hours of compensatory 1:1 instruction; and

IT IS FURTHER ORDERED that the compensatory education services awarded herein shall expire three years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
May 28, 2024

STEVEN KROLAK
STATE REVIEW OFFICER