The University of the State of New York

The State Education Department
State Review Officer
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No. 24-311

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 denied in part her request for compensatory education services to remedy respondent's (the district's) failure to offer her son an appropriate educational program for the 2022-23 and 2023-24 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

During the 2022-23 school year, the student was in the eighth grade, attending an 8:1+1 special class in a district specialized school and receiving counseling services (IHO Ex. II at pp. 1, 5). On January 31, 2023, a CSE convened for the student's annual review, found the student eligible for special education as a student with autism, and developed an IEP with a projected implementation date of February 2, 2023 (id. at p. 1).[1] The January 2023 CSE recommended the student attend a 12-month program in a district specialized school and receive integrated co-

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

teaching (ICT) services five periods per week each for math, English language arts (ELA), social studies, and sciences, along with four periods per week of indirect special education teacher support services (SETSS) (two periods for math and two periods for ELA) provided as part of a district inclusion program (id. at pp. 16-17, 20). The CSE also recommended that the student receive related services of one 30-minute session per week of individual counseling and one 30-minute session per week of counseling in a group of three and the parent receive group and individual parent counseling and training at least twice per year for each (id.). The January 2023 CSE also recommended special transportation services and accommodations consisting of transportation from the closest safe curb location to school, "adult supervision – 1:1 paraprofessional", and limited travel time (id. at pp. 19-20).

On December 4, 2023, the CSE convened for the student's annual review and, finding the student remained eligible for special education as a student with autism, developed an IEP with a projected implementation date of December 18, 2023 recommending the same 12-month educational program and special transportation services and accommodations as recommended in the student's January 2023 IEP with the addition to a full time daily "group service" paraprofessional (compare IHO Ex. II at pp. 1, 16-17, 19-20, with IHO Ex. III at pp. 1, 11-13, 18).[2] According to the IEP, for the 2022-23 school year, the student did well, which had prompted the recommendation for the inclusion program for the 2023-24 school year (IHO Ex. III at p. 4). At that point in the 2023-24 school year, the IEP noted that the student had missed eight days of instruction due to the lack of a transportation paraprofessional (id. at pp. 4, 14). As a result, the December 2023 CSE also recommended compensatory services consisting of eight 45-minute sessions of direct SETSS in math and eight 45-minute sessions of direct SETSS in ELA (id. at p. 14).

On January 19, 2024, the CSE reconvened and recommended the same program as the December 2023 CSE except for the removal of limited travel time from the student's IEP (compare IHO Ex. III at pp. 11-14, 18, with, IHO Ex. IV at pp. 13-16, 20).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated April 4, 2024, the parent alleged that she believed the student's needs were not being met in his "[i]nclusion program" due to him being left unsupervised in the classroom and on the school bus (see IHO Ex. I). The parent also claimed that the student was being bullied on the bus, that the school building was not safe for him, and that the district was not addressing his social and pragmatic skills (id.). As relief, the parent requested the student be given "proper services as per his IEP ([a] class paraprofessional with him)," for an applied behavior analysis (ABA) provider to be with him in school, and for the student to be placed

[2] The December 2023 CSE recommended that the student attend a district non-specialized school (IHO Ex. III at p. 18).

[3] The pro se parent introduced one exhibit into evidence, a copy of the student's January 2024 IEP; however, the copy was not clear or understandable thus the district provided another copy which was admitted into evidence as an IHO exhibit (Tr. pp. 37-46; compare Parent Ex. A, with IHO Ex. IV). For purposes of this decision, only the IHO exhibit will be referenced.

in a "private school that [could] address his diagnosis and where he [could] feel[] included and accepted" (id.).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). After a prehearing conference on May 14, 2024, an impartial hearing convened and concluded on June 7, 2024; the parent proceeded pro se for the impartial hearing (see Tr. pp. 1-82).[4] During the prehearing conference, the parent clarified her claim was that the district was not consistently making a paraprofessional available to the student during the school day or for transportation despite the mandate for a paraprofessional in the student's IEP (Tr. pp. 3-9). The parent also claimed that the district was trying to remove paraprofessional services from the student's IEP (id.).

The parent introduced one document into evidence (Tr. pp. 37-46; see Parent Ex. A). The district did not introduce any evidence and neither party called any witnesses to testify (Tr. pp. 45-46). The district cross-examined the parent regarding the relief she was seeking, to which the parent responded: "I just want [the student] to be safe wherever he goes," "I want him to learn in an environment where he doesn't get in crisis due to the way other people treat him" (Tr. p. 48). The parent further clarified that she wanted the district to provide supervision of the student "wherever he goes" and ABA, or, if ABA could not be provided in the district school, that the student be placed in a nonpublic school (Tr. pp. 48-49). The district representative asked the parent if she was disputing that the January 2024 IEP was improper to which the parent responded "[the IEP was] not inappropriate because I know [the student could] learn in th[at] setting, but the program [wa]s not structured to work for [the student]" (Tr. p. 49). The parent also stated that her concern was she did not believe the student was receiving the services listed in his IEPs consistently (Tr. pp. 52-53). The IHO asked why the parent believed the student was not getting his services to which the parent responded that she asked the student "if the teacher that [was] supposed to be there with him [wa]s with him at all the classes, and [the student told her] no" (Tr. p. 53). The parent also testified she never received parent counseling and training as recommended in the IEPs (id.). The district representative also asked the parent, if the district provided the student with all the services recommended in his IEP, would that be sufficient for the parent; the parent responded yes (Tr. p. 58). Both parties provided closing statements (Tr. pp. 73-77).

In a decision dated July 2, 2024, the IHO found that the district did not meet its burden to demonstrate it provided a free appropriate public education (FAPE) to the student during the 2022-23 and 2023-24 school years (IHO Decision at p. 3). The IHO determined that the district did not contest the parent's allegation that it failed to provide the student with consistent SETSS, counseling services, and transportation paraprofessional services, or provide the parent with parent counseling and training (id. at p. 8). Further, the IHO determined the district did not defend against the parent's claims that the student's IEP was inappropriate or that additional services, such as ABA services, were necessary to ensure the student was making meaningful educational progress (id. at pp. 8-9).

[4] A representative for the district did not appear for the prehearing conference (see Tr. pp. 1-24).

As relief, the IHO ordered the district to fund: 232.5 hours of compensatory tutoring services with a licensed provider of the parent's choosing; a private 1:1 transportation paraprofessional for the student from a provider of the parent's choosing at the provider's customary rate; an independent ABA assessment with a licensed provider of the parent's choosing at the provider's customary rate; and two weekly sessions of independent 1:1 SETSS in both ELA and math with a licensed provider of the parent's choosing (IHO Decision at pp. 11-12). The IHO also ordered the district to schedule a CSE meeting within 45 days of receipt of the independent ABA assessment to incorporate any recommendations for ABA services called for by the assessment into the student's IEP and to fund the ABA services and make payment within 30 days of the submission of invoices or other documentation to the Implementation Unit; to provide the student with group counseling services as recommended in the student's "current IEP, to be implemented in advance of the 2024-2025 school year"; to provide the parent with parent counseling and training, as recommended for in student's current IEP, to be implemented in advance of the upcoming 2024-25 school year; to amend the student's IEP to provide the student with a 1:1 behavioral support, to be implemented in advance of the upcoming 2024-25 school year; and to contact the parent "within 10 business days of the receipt of this order to assist [the p]arent with the implementation" of the decision and the orders contain therein (id.).

IV. Appeal for State-Level Review

The parent appeals pro se. The parent disagrees with the IHO's compensatory award of 232.5 "ABA hours" arguing the student requires an additional 30 hours per week of 1:1 ABA services for a total of 4,680 hours for the three year denial of FAPE (2020-21, 2022-23 and 2023-24 school years). As relief, the parent requests an award of services from a 1:1 paraprofessional/behavior therapist trained in ABA evidence based-practice under the supervision of a board certified behavior analyst (BCBA) by the private agency chosen by the parent who could also provide the parent training hours, enrollment of the student in a nonpublic school that specializes in ABA or related methodologies, 4,680 hours of 1:1 ABA services, 188 hours of compensatory parent counseling and training, and a 1:1 transportation paraprofessional/behavior therapist trained in ABA and under the supervision of a BCBA. In support of her relief request, the parent submits as additional evidence to be considered on appeal, a copy of a functional behavior assessment (FBA) and behavior intervention plan (BIP) dated July 10, 2024.[5]

In an answer, the district argues the IHO's awarded relief was appropriate and should be affirmed. The district also asserts that the parent confirmed during the impartial hearing that the matter involved two school years, 2022-23 and 2023-24 and that any claims relating to the 2020-21 school year were waived by the parent. The district further asserts the IHO already awarded the relief the parent seeks; the district asserts that the IHO's awards of 1:1 paraprofessional services

[5] The parent also alleges that the district did not reach out 10-days after the IHO decision as ordered (see IHO Decision at p. 12). However, 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]). Accordingly, to the extent that the parent's underlying claims relate to enforcement of the IHO's decision, such claims are outside the jurisdiction of this administrative process.

allow the parent to select providers trained in ABA methodology. The district also claims that the parent approved of the district providing certain services and that, therefore, the IHO properly ordered the district to provide the parent with parent counseling and training services as opposed to a private provider. Regarding the parent's request for the student to be placed in a nonpublic school, the district argues the parent stated during the impartial hearing that she would be pleased if the district provided the services as recommended in the student's IEP, and that the IHO's order allowed for additional services to be added to the IEP once the ABA assessment was completed. Regarding the parent's request for 4,680 hours of 1:1 ABA services and 188 hours of parent counseling and training, the district argues the parent never made a specific request for such awards during the impartial hearing and there is no basis in the hearing record to support such awards. The district also argues the July 2024 FBA and BIP submitted by the parent as additional evidence on appeal should not be considered as it was not before the IHO, and that the results and recommendations have already been ordered to be considered by the CSE.

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 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).

[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).

VI. Discussion

Initially, neither party appeals from the following IHO decisions and orders: (1) that the district denied the student a FAPE for the 2022-23 and 2023-24 school years; (2) that an award of compensatory education services was appropriate; (3) that the district must provide the student a 1:1 transportation paraprofessional with a provider of the parent's choosing; (4) that the district must pay for an independent ABA assessment with a provider of the parent's choosing; (5) that the district must fund independent 1:1 SETSS twice per week in both math and ELA with a provider of the parent's choosing; (6) that the CSE must convene within 45-days of receipt of the independent ABA assessment and for the CSE to incorporate any recommendations for ABA services called for in the ABA assessment; (7) that the district must fund ABA services for the student during the 2024-25 school year; (8) that the district must provide the student with group counseling services, as called for in his current IEP, to be implemented in advance of the upcoming 2024-25 school year; (9) that the district must provide the parent with parent counseling and training, as called for in the student's current IEP, to be implemented in advance of the upcoming 2024-25 school year; and (10) that the CSE must recommend a 1:1 behavior paraprofessional on the student's IEP for the 2024-25 school year. Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal except as they relate to the hours of compensatory education awarded which the parent is challenging (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. Preliminary Matters

1. Additional Evidence

The parent submits as additional evidence to be considered on appeal an FBA and BIP dated July 10, 2024 (see SRO Ex. A).[7] A review of the documents shows that the parent bases her request on appeal for further relief on the FBA evaluator's recommendations (compare Req. for Rev. at pp. 2-3, with SRO Ex. A at pp. 16-18). The district argues that no additional relief should be awarded based on the July 2024 FBA and BIP because they were not before the IHO for consideration and because the IHO already ordered the CSE to consider the recommendations of the assessment when it reconvenes (see IHO Decision at pp. 11-12).

Generally, documentary evidence not presented at an impartial hearing may be 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]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; 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]).

[7] For purposes of this decision, the July 2024 FBA and BIP will be referred to and cited as "SRO exhibit A".

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Here, it would not be appropriate to consider the July 2024 FBA and BIP on appeal. It is unclear if the July 2024 FBA and BIP constituted the ABA assessment awarded by the IHO (see IHO Decision at p. 11). However, because the July 2024 FBA and BIP were conducted and developed from July 5, 2024 to July 8, 2024, three days after the IHO's decision was dated, it appears more likely that the FBA and BIP were scheduled to be conducted prior to the IHO's decision (see SRO Ex. A). As correctly argued by the district, the July 2024 FBA and BIP were not before the IHO to be considered and there is no indication that the parent requested that the IHO order district funding of an independent FBA and BIP to inform the hearing record,[8] or that the parent otherwise notified the IHO that such an assessment was scheduled—if that was the case at the time of the hearing—so that the IHO could consider whether an adjournment of the hearing would be appropriate so that the FBA and BIP could be presented as evidence. Under these circumstances, I decline to exercise my discretion to accept the July 2024 FBA and BIP as additional evidence and, in any event, they are not necessary given my ultimate decision below.

2. Scope of the Impartial Hearing and Review

Before addressing the merits, a determination must be made regarding what relief and school years were raised by the parent for consideration by the IHO.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its

[8] It is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the district is correct that during the impartial hearing the parent limited her claims to the 2022-23 and 2023-24 school years and waived any claims relating to the 2021-22 school year. The parent in her due process complaint notice did not indicate which school years she alleged the district denied the student a FAPE (see IHO Ex I). During the impartial hearing, the IHO specifically asked the parent "[do] you have concerns about things that happened this school year" (2023-24 school year) "and last school year" (2022-23 school year); the parent responded "[y]eah, but remember the past is the past," noting that she could not "go back and . . . fix this problem that was done in the past" so instead she was "focusing more on what's happening now" (Tr. pp. 70-72). Moreover, all of the questions asked by both the IHO and the district representative to the parent were related to the 2022-23 or 2023-24 school years, reflecting their understanding regarding the scope of the impartial hearing (see Tr. pp. 45-55, 57-62, 64, 66-68).[9] As such, the IHO did not err in limiting his determinations to the 2022-23 and 2023-24 school years. For that matter, the parent has not appealed the IHO's FAPE determination specific to 2022-23 and 2023-24 school year, which as noted above is now final and binding on the parties. I therefore decline to address the parent's belated request for relief pertaining to the 2021-22 school year.

With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]). Further, as noted above, only a party aggrieved by the decision of an IHO may appeal (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]).

Here, a comparison of the award ordered by the IHO with the remedy proposed by the parent in her request for review, shows that the IHO has already awarded most of the relief that

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

the parent requested and awarded further equitable relief based on the information before him (compare Parent Ex. I, with IHO Decision at pp. 11-12). In her due process complaint notice, the parent requested that the district implement the student's IEP, that the student receive support from an ABA provider in school, and that the district place the student in a nonpublic school (IHO Ex. I). The IHO ordered the district to implement the student's IEP and to fund ABA services for the student for the 2024-25 school year (see IHO Decision at pp. 11-12). Further, during the impartial hearing, the IHO allowed the parent to articulate her position on why she believed the district was not providing or offering the student a FAPE and generally agreed with her arguments (see generally Tr. pp. 1-82; IHO Decision).

The district argues that the parent's request for 188 hours of compensatory parent counseling and training was not made before the IHO and thus should not be considered on appeal. Here, the parent did not allege that the district failed to implement parent counseling and training or request compensatory parent counseling and training as relief in her due process complaint notice (IHO Ex. I). The district also did not open the door to parent counseling and training issues during the impartial hearing; rather it was the IHO who, through questioning the parent, elicited the parent's testimony that she was not receiving parent counseling and training (see Tr. pp. 52-53, 61). The district does not appeal the IHO's order for the district to deliver parent counseling and training, so such relief shall not be disturbed. However, as the parent did not seek compensatory parent counseling and training, I decline to consider such a request made for the first time on appeal.

With regard to classroom paraprofessional services, the IHO ordered the CSE to amend the student's IEP to include a 1:1 behavior paraprofessional to be implemented in advance of the 2024-25 school year and further ordered the district to fund a private 1:1 transportation paraprofessional from a provider of the parent's choosing (IHO Decision at p. 12). On appeal, the parent requests, based on the July 2024 FBA and BIP recommendations, that the behavior paraprofessional for school and transportation be trained in ABA; however, in light of the IHO's award for the IEP amendment for paraprofessional services, district funding for private transportation paraprofessional services, district funding of ABA services for the student for the 2024-25 school year, and for the CSE to adopt all recommendations from an ABA assessment, no further relief is warranted.

The district also argues that the parent's request for the student to be placed in a nonpublic school was waived during the impartial hearing and that the IHO's order already allows for the CSE to consider a nonpublic school placement. Here, the parent in her due process complaint notice requested a private school placement for the student but then testified during the impartial hearing that she would be satisfied with the student's placement in a district public school if the district implemented the student's IEP (Tr. pp. 57-58; IHO Ex. I). As no particular nonpublic school was requested by the parent and the parent expressed an interest in continuing the student's public school placement so long as the IEP services were delivered, I find that the IHO did not err in declining to order the district to recommend a nonpublic school for the student.

Moreover, as the district points out, an award of prospective IEP amendments, including for example a requirement that the district recommended a nonpublic school, 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"]). This is particularly so when the challenged school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also 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 year]).

Here, when the CSE next convenes (if it has not already), it will have new information about the student and directives from the IHO to take into account. Therefore, at this juncture, there is no basis to require the CSE to recommend a nonpublic school placement.

B. Relief - Compensatory Education

Turning now to the crux of the parent's appeal, the parent argues that the IHO should have awarded 30 hours per week of 1:1 ABA services for three school years, totaling 4,680 hours of compensatory 1:1 ABA service hours. After a review of the hearing record, there is no evidence to support the parent's argument.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first

place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, although the parent did not specifically seek compensatory education, the IHO awarded 232.5 hours of "compensatory tutoring services with the licensed provider of [the p]arent's choosing, at the provider's customary rate" for the 30 days of school the student missed during the 2023-24 school year. There is nothing in the hearing record to suggest the student required more than the amount awarded by the IHO. The parent testified she was not able to recall the days the student was absent during the two school years at issue; however, according to the attendance records, the student missed 30 days of school during the 2023-24 school year (IHO Decision at p. 10; Tr. p. 69; IHO Ex.VI). The IHO in his decision noted:

> [w]hile there [wa]s no way to confirm that all of these absences were because the [district] failed to provide [the s]tudent with the paraprofessional services he needed to access education, [the p]arent's testimony show[ed] that some of these are, which constitute[d] a genuine deprivation of [the s]tudent's access to academic instruction and a denial of his right to a FAPE.

(IHO Decision at p. 10).

On appeal, although the parent summarily states that the IHO should have awarded more compensatory education, she does not point to any evidence in the hearing record upon which the IHO could have relied to base such an award. To the contrary, review of the IHO's decision shows that he took into account the underlying allegations of a denial of a FAPE, which related to implementation failures—particularly as to the classroom and transportation paraprofessionals—that caused the student to be unable to attend school and bullying (see IHO Ex. I). Given these allegations, the IHO crafted relief by looking at the student's attendance records (see IHO Ex. VI). The parent does not provide a cogent argument that the IHO erred in this regard.

Based on the foregoing, the IHO's award for 232.5 hours of compensatory tutoring services is appropriate and supported by the hearing record.

VII. Conclusion

In summary, the hearing record supports the IHO's decisions and there is no reason to disturb his ultimate findings. I have considered the parties' remaining contentions and find them unnecessary to address given my findings above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 23, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER