The University of the State of New York

The State Education Department
State Review Officer
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No. 24-325

Application of a STUDENT WITH A DISABILITY, by his parents, 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 Ezra Zonana, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the full costs of their son's private services delivered by Perspective Applied Behavioral Analysis, PLLC (Perspective ABA) for the 2024-25 school year and to fund compensatory education at enhanced rates. The district cross-appeals the amount of compensatory education awarded to the parent by the IHO. 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 in detail. Briefly, the student received diagnoses of autism, attention deficit hyperactivity disorder (ADHD), , hearing loss, developmental delay, language delay, and intellectual disability (Parent Ex. H at pp. 20-21). At the times applicable to this proceeding, the student was nonverbal and used a communication device, wore bilateral hearing aids, and used hearing assistive technology during all academic periods (Parent Ex. R at p. 1). He also exhibited behavioral difficulties that necessitated a functional behavioral assessment (FBA) and a behavior intervention plan (BIP) and received the support of a one-to-one paraprofessional for behavior (see Parent Exs. B; F; N; Q; S; U; T).

There are four school years at issue in this matter: 2021-22, 2022-23, 2023-24 and 2024-25. Regarding the 2021-22 school year, the CSE convened on February 11, 2021 and developed an IEP for the student with an implementation date of March 8, 2021 (Parent Ex. S). The February 2021 CSE recommended that the student attend a 12-month special education program consisting of placement in a 6:1+1 special class in a district specialized school and three periods per week of adapted physical education (id. at pp. 26-27, 29, 32). The February 2021 CSE also recommended the following related services: four 30-minute sessions per week of individual occupational therapy (OT); two 30-minute sessions per week of individual physical therapy (PT); five 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual hearing education services in the student's classroom; and, beginning on July 2, 2021, an additional three 30-minute sessions per week of individual hearing education services in a separate location (id. at p. 27). The February 2021 CSE also recommended three 50-minute sessions of group parent counseling and training per year (id.). The February 2021 CSE further recommended supplementary services which included a full-time individual paraprofessional for behavior support, and assistive technology that included a dynamic display speech generating device (SGD) for school and home and individual hearing assistive technology, as well as supports for school personnel identified as hearing education services (id. at p.28).

During the 2021-22 school year the district conducted a reevaluation of the student at the request of the parents that included a classroom observation and psychoeducational evaluation (Dist. Exs. 11, 12).

On May 19, 2022, the CSE convened to review the results of the student's reevaluation and develop an IEP for the student with an implementation date of May 20, 2022 (Dist. Exs. 6; 7). [1] The May 2022 CSE recommended a 12-month special education program consisting of placement in a 6:1+1 special class in a district specialized school (Parent Ex. Q at pp. 28, 35). The May 2022 CSE recommended the following related services: one 30-minute session per week of individual OT in the student's classroom; three 30-minute sessions per week of individual OT in the therapy room; two 30-minute sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of group speech language therapy (id. at pp. 28-29). In addition, the CSE recommended that the student receive two 30-minute sessions per week of individual hearing education services in the student's special education classroom and three 30-minute sessions per week of individual hearing services in a separate location beginning on May 20, 2022 and concluding on August 12, 2022; and, beginning on September 7, 2022, the CSE recommended that the student receive one 30-minute session per week of individual hearing education services in the student's classroom, and two 30-minute sessions per week of individual hearing education services in a separate location (id. at pp. 28-29). The May 2022 CSE also recommended three 50-minute sessions per year of parent counseling and training (id. at p. 28). The May 2022 CSE additionally recommended supplementary aids and services which included: full-time individual paraprofessional services for behavior support and, beginning on November 21, 2022, three 60-minute sessions per week of individual direct SETSS to be provided to the student outside of school hours; and, two 60-minute sessions per week of

[1] The May 2022 IEP also referenced a March 29, 2022 audiological report (Dist. Ex. 6 at p. 6).

indirect SETSS at school (id. at p. 29). The May 2022 CSE further recommended assistive technology which included a dynamic display SGD for school and home, and hearing assistive technology, along with supports for school personnel consisting of hearing education services (id. at p. 30).

On May 5, 2023, the CSE convened for the student's annual review and to develop an IEP for the student with an implementation date of May 22, 2023 (see Parent Ex. N; Dist. Ex. 5). The May 2023 CSE recommended a 12-month special education program consisting of placement in a 6:1+1 special class in a district specialized school, and three periods of adapted physical education per week (Parent Ex. N at pp. 26, 28, 33). The May 2023 CSE recommended related services that included: one 30-minute session per week of individual hearing education services in the student's special education classroom; two 30-minute sessions per week of individual hearing education services in a separate location; three 30-minute sessions per week of individual OT in a separate location; one 30-minute session per week of individual OT in the student's classroom; two 30-minue sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of group speech-language therapy; along with three 50-minute sessions per year of group parent counseling and training (id. at pp. 26-27). The May 2023 CSE also recommended supplementary aids and services that included full-time individual paraprofessional services for behavior support, three 30-minute sessions per week of direct individual SETSS after school, and two 30-minute sessions per week of indirect SETSS at school (id. at p. 27). The May 5, 2023 CSE additionally recommended assistive technology that included a dynamic display SGD at school and at home and hearing assistive technology, along with supports for school personnel consisting of hearing education services (id. at pp. 27-28).

On November 14, 2023, the CSE reconvened to amend the student's May 2023 IEP to include: five 60-minute sessions per week of direct individual SETSS outside of school hours; two 60-minute sessions per week of indirect SETSS in school; and, three 60-minute sessions per week of direct SETSS in school (Dist. Ex. 4 at p. 31). Following the November 2023 CSE reconvene, the parents emailed the public school documenting their disagreements with the November 2023 IEP's representations of: the student's academic, developmental, and functional needs as well as the student's social developmental needs, specifically noting that they did not agree with the representation in the IEP that they were pleased with the student's progress, and further asserting that the student's educational and social development needs were not being met (Parent Ex. E at p. 2). The parents also expressed that they did not agree with the tone used in the November 2023 IEP to record some of the parents' comments (id.). The parents further informed the district that they felt the student was not being provided with appropriate compensatory services to make up for time lost due to the Covid pandemic and asserted the district failed to include the student's SETSS providers in CSE meetings(id. at pp. 2-3).

On April 16, 2024, the CSE convened to develop an IEP for the student with an implementation date of May 6, 2024 (Dist. Ex. 1). The April 2024 CSE recommended a 12-month special education program consisting of placement in a 6:1+1 special class in a district specialized school, and three periods per week of adapted physical education (Dist. Ex. 1 at pp. 25-26, 33). The April 2024 CSE recommended related services which included: one 30-minute session per week of individual hearing education services outside of the classroom; two 30-minute sessions

per week of individual hearing education services in the classroom; two 30-minute sessions per week of individual OT in the classroom; two 30-minute sessions per week of individual OT in a separate location; two 30-minute sessions per week of individual PT in a separate location; four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of group speech-language therapy; and, three 50-minute sessions per year of group parent counseling and training (id. at p. 26). The April 2024 CSE also recommended supplementary aids and services, including full-time individual paraprofessional services for behavior support; five 60-minute sessions per week of direct individual SETSS outside of school; two 60-minute sessions per week of indirect individual SETSS in school; and three 60-minute sessions per week of direct SETSS in school (id. at p. 27). The April 2024 CSE further recommended assistive technology which included an individual dynamic display SGD and hearing assistive technology, along with supports for school personnel consisting of hearing education services (id. at pp. 27-28).

The student attended the public school sites assigned by the district for the school years at issue, and began attending the SEED program prior to the May 2023 CSE, but the student's participation in the SEED program was discontinued by the May 2023 CSE and the April 2024 CSE (Dist. Exs. 1 at p. 29; 4 at p. 33; 9 at p. 3; 10 at p. 5).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated March 28, 2024, the parents, through their advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, 2023-24, and 2024-25 school years (see Parent Ex. A). As a presenting problem, the parents asserted that the student's IEP was not reflective of his current needs and circumstances, the student was untestable due to his untreated maladaptive behaviors, and the district did not identify a qualified provider to implement the recommended SETSS (id. at pp. 9-10). According to the parents, the student's lack of progress and "now substantial regression" was due to the CSE's failures to recommend an appropriate ABA program for the student to remedy his maladaptive behaviors (id. at p. 10). The parents further contended that the CSE failed to properly assess the student's need for compensatory services due to either school closures or the provision of remote and hybrid learning during the COVID-19 pandemic (id.). The parents reiterated that the student required a behavioral program consisting of ABA both in the school and home settings in order to make progress (id.).

As relief, the parents requested 10 hours per week of SETSS for the 2023-24 and 2024-25 school years at an enhanced rate, two hours per month of parent counseling and training by a board certified behavioral analyst (BCBA) for the 2023-24 and 2024-25 school years; 200 hours of compensatory SETSS to address regression the student experienced due to the district's failure to implement SETSS; 630 hours of compensatory ABA services to be delivered by a BCBA at a "market rate" for the CSE's failure to develop a reasonably calculated IEP for the 2021-22 and 2022-23 school years; reimbursement for 12 hours of SETSS arranged for by the parents between

[2] The SEED program was offered as a compensatory service "to address the lost skills and/or lack of expected progress due to the periods of remote and blended learning beginning in March 2020" (Dist. Ex. 4 at p. 33).

July 5, 2023 and September 18, 2023, and an order that "requires the CSE to reconvene to conform the IEP to the order" (Parent Ex. A at pp. 10-12).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 22, 2024 and concluded on June 3, 2024 after two days of proceedings (Tr. pp. 1-142). In a decision dated July 10, 2024, the IHO found that the parents alleged that the district failed to deliver services to the student for the 2021-22, 2022-23, and 2023-24 school years and that the district "failed to present evidence to counter such allegations, thus failing to meet its burden of production and persuasion" (IHO Decision at p. 7). The IHO then found that the parent agreed, in part, with the appropriateness of the student's IEP and wanted the recommended services, particularly SETSS, implemented (id. at p. 8). In review of the submitted evidence, the IHO found that the April 2024 IEP was appropriate for the student, the district failed to implement the IEP, and the parents met their burden of proving that the SETSS providers they unilaterally obtained were appropriate for the student as they implemented the student's recommended educational program (id. at pp. 8-11). The IHO then addressed the district's arguments as to equitable considerations, specifically as to the rate for SETSS, and held that the 2023 American Institutes for Research (AIR) report submitted by the district was flawed and the district's cited rates and categories were not helpful in calculating the rates charged for SETSS services in the district (id. at p. 13). The IHO determined that the district failed to offer the student a FAPE and that equitable considerations favored the parents (id.). Overall, the IHO awarded a bank of compensatory ABA therapy, parent counseling and training to be provided by a BCBA, and SETSS to expire within four years of the date of the order (id. at p. 14). The IHO indicated that the compensatory services were to be calculated for the 2021-22, 2022-23, and 2023-24 school years for any services identified in the order that were not provided to the student during that period, but also awarded a set amount of compensatory SETSS (200 hours) and compensatory ABA services (630 hours) (id. at pp. 14-15). The IHO declined to order prospective relief for the 2024-25 school year (id. at p. 14). In addition, the IHO ordered the district to reimburse the parents for the payments made out of pocket for SETSS delivered during the 2023-24 school year (id. at p. 15). Finally, the IHO ordered the district to reconvene the CSE (id.).

IV. Appeal for State-Level Review

The parents appeal, through their advocate, alleging that the IHO erred in committing numerous procedural errors during the course of the hearing and in dismissing their claims for the 2024-25 school year. According to the parents, there was nothing in the hearing record to show that the district would cure its failure to implement services during the 2023-24 school year by the start of the 2024-25 school year. The remainder of the parents arguments center around implementation of the student's pendency services and the rates paid to the student's providers. The district submits an answer and cross-appeal; as its cross-appeal, the district argues that the IHO did not provide a rationale as to the amounts of compensatory education awarded and that the case should be remanded to the IHO to provide such an explanation. The parents submit an answer to the cross-appeal asserting that a remand of this matter would cause unnecessary delay.

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]).[3]

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 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).

[3] 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

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years, nor have the parties appealed the IHO's finding that the "program, services, and direct service provider [were] appropriate for the student" or the IHO's finding that the parents "met their burden as to the appropriateness of [Perspective ABA]" therefore, those determinations have become final and binding on the parties and will not be reviewed on appeal (IHO Decision at pp. 8, 11) (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 issues raised by the parties, the IHO awarded the parents' requested compensatory education as follows: ten hours per week of enhanced rate SETSS for the 12-month 2023-24 school year;[4] two hours per month of parent counseling and training for the 12-month 2023-24 school year to be provided by a BCBA "at reasonable market rate as determined by [the district's] implementation unit"; 200 hours of SETSS to be delivered by an ABA trained provider "at fair market rate as determined by [the district's] implementation unit"; and 630 hours of ABA therapy to be delivered by a BCBA "at fair market rate as determined by [the district's] implementation unit" (IHO Decision at pp. 14-15). The parents requested that the SETSS be provided for the student's 2023-24 and 2024-25 school year at "an enhanced provider rate of $200 per hour" (IHO Decision at p. 8; Tr. at p. 136). The parents further requested the exact same amount of hours that were awarded by the IHO as compensatory education, and requested that the hours be paid "at market rate" (Tr. pp. 97-98, 137).[5]

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125 [2d Cir. [2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & 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 E. Lyme, 790 F.3d at 456; 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

[4] Although this was not specifically listed as compensatory education in the IHO's decision, because the decision was not issued until after the end of the 2023-24 school year and because the IHO specifically ordered the district to "fund or reimburse these services for the 12-month 2023-2024 school year," the 2023-24 school year award is included as part of the discussion of compensatory relief (IHO Decision at pp. 14-15).

[5] In the parents' representative's closing argument, the parents' representative requested that the "200 hours of compensatory SETSS [be] delivered by a provider trained in applied behavioral analysis at market rate" and that the "630 hours of compensatory ABA therapy delivered by a board-certified behavioral analyst at market rate for the CSE's failures to develop a reasonably calculated IEP to manage and to treat [the student's] aggressive behaviors for the '21/'22 and '22/'23 school years" (Tr. p. 137).

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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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"]).

Review of the IHO's decisions shows that the IHO adopted the amount of services requested from the relief requested by the parent (compare IHO Decision at pp. 14-15, with Parent Ex. A at pp. 10-12). Although the IHO's decision did not provide a specific explanation as to the rationale behind the compensatory relief awarded, the parents did provide an explanation as to the basis for the requested compensatory education and how it was computed (Parent Ex. A at pp. 10-12).

The IHO was by no means required to merely adopt the relief proposed by the parents. An outright default judgment awarding compensatory education 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 is 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]).[6] 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, if the sum and total of the compensatory

[6] Authority specific to the issue of a parents' request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

education relief requested by the parent was ordered, including the monetization thereof, it 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."]).

However, where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding an appropriate compensatory education remedy.[7] Rather, the district was required under the due process procedures set forth in New York State law to address its burdens by describing 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 E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).

During the impartial hearing, the district had the opportunity to present evidence that the amounts of compensatory education sought by the parents was inappropriate, but the district elected not to challenge the requested compensatory education (see Tr. pp. 97-142). The district did not call any witnesses, waived the opportunity to present an opening statement and used its closing statement solely to address FAPE (Tr. pp. 94-95, 127). Additionally, in its cross-appeal, the district requests a remand of the amount of compensatory education awarded to the IHO; however, the district still has not presented any argument as to what an appropriate compensatory award would consist of for this student. As such, the district's cross-appeal is denied and the IHO's awards of compensatory education are affirmed.

Remaining at issue are the parents' appeal of the IHO's dismissal of claims for the 2024-25 school year as prospective, and the parents' appeal of those portions of the IHO's decision that ordered funding for parent training and counseling, compensatory SETSS, and compensatory ABA therapy to be funded "at reasonable market rate as determined by [district's] Implementation Unit" and "at fair market rate as determined by [district's] Implementation Unit," and that the IHO

[7] It has been previously noted that an award of a bank of compensatory education in the form of payment for future therapies that are unilaterally selected by the parents would result in parents successfully circumventing their burden of proof for privately obtained services (see e.g., Application of a Student with a Disability, Appeal No. 24-205). With that consideration in mind, SROs have indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Accordingly, although the circumstances in this matter fit those where parents sought relief in the form of compensatory education to be provided by parentally-selected private special education services, and, in most cases, the district, as the party responsible to implement special education services in the first place, should be directed to carry out the remedial relief ordered by an administrative hearing officer, the district has not raised this contention on appeal and I decline to address it further on that basis.

committed procedural errors (IHO Decision at pp. 14-15; Req. for Rev. at pp. 10-15). I shall first address the parents' requested relief regarding the 2024-25 school year.

B. 2024-25 School Year

The parents seek an order directing the district to implement the student's April 2024 IEP for the 2024-25 school year with SETSS, ABA services, and BCBA services to be funded at enhanced rates. Notably, the parents filed their due process complaint notice in March 2024 and the last day of the impartial hearing was June 3, 2024 (see Tr. pp. 63-142; Parent Ex. A). Both dates precede the commencement of the 2024-25 school year, accordingly, at the time of the hearing the district was not yet obligated to implement the student's educational program for the 2024-25 school year. The IHO was correct to note that the parents' requested relief for the 2024-25 school year was prospective and that, as of the conclusion of the impartial hearing, there was no evidence that the district violated its legal obligations for the 2024-25 school year (IHO Decision at p. 14).

The parents assert that the IHO should have ordered the district to deliver services pursuant to the April 2024 IEP at enhanced rates for the 2024-25 school year because "nothing in the record suggests that the [district]'s failure to implement recommended services during the 2023/2024 school year would be cured for the July start of 2024/2025 school year" (Req. for Rev. at p. 14).[8]

However, while the parents' frustration with the district's failure to implement the SETSS recommended for the student over the course of the 2023-24 school year is understandable, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis" upon which to seek relief (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

Having reviewed the hearing record, all claims made by the parents regarding the district's anticipated failure to implement the April 2024 IEP for the 2024-25 school year are speculative. It appears that the district is delivering SETSS to the student under pendency during the adjudication of this matter. The Second Circuit has held that the district has "preexisting and

[8] The parents' request for review is dated August 6, 2024, after the start of the 2024-25 extended school year, and includes an assertion that, as of August 6, 2024, "the student [wa]s only receiving 5 hours a week of SETSS for the 2024/2025 school year via pendency" (Req. for Rev. at p. 14). However, it is not clear what the impact of the student receiving services pursuant to pendency would mean as to implementation of the recommended educational program, as a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004][the student's right to pendency is evaluated separately from the substantive claims alleged in the due process complaint notice], Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005][noting that "pendency placement and appropriate placement are separate and distinct concepts"]).

independent authority to determine how to provide the most-recently-agreed-upon educational program" and it is up to the district and not the parent to decide how a student's pendency program is implemented, provided that the district does so in good faith (Ventura de Paulino, 959 F.3d at 534; see T.M., 752 F.3d at 171). The evidence in the hearing record reflects that the parties agree on the student's hours and services contained in the pendency program and the hearing record does not include evidence of bad faith, just a disagreement as to how to locate providers and what rates are to be paid (Tr. pp. 1-62).[9] Therefore, the parents have not stated a claim for which relief can be awarded for the 2024-25 school year (see E. Lyme Bd. of Educ., 440 F3d. at 456 [parents are only entitled relief for services actually obtained]) and I affirm the IHO's dismissal of the parents' claims for the 2024-25 school year.

C. Rate for Privately Obtained Services

The parents raise one further issue as to the IHO's awarded relief, arguing that the IHO's failure to direct parent counseling and training and compensatory education to be funded at enhanced rates may result in a lack of appropriate providers, thereby denying the student his necessary compensatory education.

In this instance, the IHO awarded the parents compensatory education and set a cap on services at $200 per hour (IHO Decision at pp. 14-15). The parents assert that the IHO's order was "confusing," in that the IHO's decision both orders a rate not to exceed $200 per hour and at the same time limits the award to either "reasonable" or "fair market rate as determined by [the district's] [i]mplementation [u]nit" (Req. for Rev at ¶3). The district concedes that its position is that the IHO intended to order the compensatory services "at a rate not to exceed $200 per hour" and does not appear to take a position as to the remaining language in the order (Answer and Cross-Appeal at ¶6).

A document provided by Perspective ABA shows that for "SETSS/Coaching/Consulting/ABA/'ADL' Direct and Indirect services to individual students in D75, IHO and CSE" the company charged a rate of $200 per hour during the 2023 through 2025 school years (Parent Ex. Y at p. 4). The owner and director of Perspective ABA testified that "[a]ll of the [approximately 27 to 42 Perspective ABA] students are paid for by the [district]," that Perspective ABA's students "come to us sometimes with P-4 forms, sometimes impartial hearing decisions, and sometimes resolution" and that Perspective ABA was "primarily funded through [the district] via voucher, known at a P4 form" (Tr. pp. 52-53; Parent Ex. Z at p. 4).

Here, the student was enrolled in a district public school for the purposes of receiving special education services for the 2021-22, 2022-23, and 2023-24 school years; however, in

[9] To the extent that the parents are seeking a specific rate for pendency services to be paid to a provider of their choosing, such a request is a form of self-help and would require a hearing to establish the appropriateness of any services delivered. As the hearing in this matter took place prior to the conclusion of the 2023-24 school year, there is not any evidence of services delivered to the student during the 2024-25 school year in the hearing record. In the event that the parents continue to dispute the services delivered to the student by the district as part of pendency in this proceeding, and the parties are unable to resolve such dispute, the parents may file another due process complaint notice alleging the district failed to implement pendency services during this proceeding and seek compensatory education for missed pendency services (see Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459).

addition to the student's in-school educational program, the district initially paid for services outside of school delivered by Perspective ABA at an enhanced rates, but ultimately stopped paying for those services resulting in the student not receiving his recommended SETSS for portions of the 2021-22, 2022-23 and 2023-24 school years, although the district agrees that the student was entitled to the services (see Tr. pp. 94-95, 100, 102-16, 119, 121, 122-123, 125, 126-27; Parent Ex. Z ¶¶ 9-13). The evidence in the hearing record regarding the provision of SETSS indicates that the district provided the parents with a list of providers from which they could locate a district-approved special education teacher to deliver the student's SETSS, and, as of September 13, 2023, the student's parents called over fifty providers to arrange for SETSS for the student for the 2023-24 school year, but were unable to do so at the district rates, resulting in the district principal contacting the district to request enhanced rates for the student's SETSS providers (see Tr. p. 129; Parent Exs. I at p. 1; M at p. 1; Z ¶ 18).

Complicating this matter is that the district itself previously contracted with Perspective ABA from approximately February 2018 through June 2019 and again from September 2022 through June 2023 to provide the student with SETSS at enhanced rates (Parent Ex. Z ¶¶ 8-15).[10] On September 18, 2023, the district entered into a resolution agreement with the parents and Perspective ABA to provide the student with five hours per week of SETSS until May 23, 2024 at an enhanced rate of $175 per hour along with 40 hours of compensatory SETSS at an enhanced rate (Parent Ex. Z ¶ 23; Dist. Ex. 15 at p. 2). Additionally, the hearing record shows that the district attempted to secure the provision of direct and indirect SETSS at enhanced rates from both district and non-district employees (Parent Exs. I; J; L; M; O; Z ¶¶ 3, 8, 16, 23; AA ¶ 8; Dist. Ex. 15 at p. 1). The hearing record contains an "Authorization for Independent Special Education Teacher Support Services" reflecting that the student was recommended to receive SETSS, but that the district "[wa]s currently unable to assign a SETSS provider to serve [the student]" and therefore the student "may receive SETSS from an eligible independent provider at no cost [to the parents]" (Parent Ex. O at p. 2).

In review of the above, although the IHO awarded compensatory services with a capped rate, the IHO did not relieve the district from arranging for and providing the student with the compensatory educational services. Accordingly, a proper compensatory award would be to direct the district to fully implement the awarded compensatory services. The parents' request for a modification of the IHO's order regarding enhanced rates for the implementation of the student's compensatory SETSS and ABA therapy is denied. Nevertheless, the IHO's decision shall be modified to reflect that, regardless of cost, it is the district's obligation to provide the student with the compensatory award of 200 hours of SETSS delivered by an ABA provider and 630 hours of ABA therapy delivered by a BCBA, as well as any remaining services owed the student according to the IHO's decision.

[10] According to the Perspectives ABA owner, the district director of office of related and contractual service advised the parent in February 2023 that the Perspective ABA SETSS providers had to be removed from the student's case because the teacher's certifications did not match the student's grade level. (Parent Ex. Z ¶ 13; see Parent Ex. I). The owner of Perspectives ABA argued that the student did not need a teacher who specialized in his grade level curriculum, rather he required a teacher who specialized in ABA and instruction on the student's cognitive level (id. at ¶ 14). She reported that following intervention by a New York City public official and an advocate, the student's services were reinstated after a two-week gap (id. at ¶ 15).

VII. Conclusion

As discussed above, the hearing record supports the IHO's decision to decline to order relief for the 2024-25 school year based on the fact that the parents' complaint related solely to implementation and the hearing concluded prior to the start of the 2024-25 school year. The hearing record further supports the compensatory education awarded by the IHO.

I have considered the parties' remaining contentions and find that 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's decision dated July 10, 2024 is modified to reflect that the district shall provide the student with the compensatory services identified in the IHO's decision, without a cap on the cost of the services, unless the parties otherwise agree.

Dated: **Albany, New York**
October 7, 2024

STEVEN KROLAK
STATE REVIEW OFFICER