The University of the State of New York

The State Education Department
State Review Officer
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No. 24-356

Application of a STUDENT WITH A DISABILITY, by her 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 her request that respondent (the district) fund compensatory education for her daughter for the 2022-23 and 2023-24 school years. The appeal must be sustained in part.

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 fully recited herein.

Briefly, a CSE convened on June 10, 2022 and determined that the student was eligible for special education as a student with a learning disability (Parent Ex. C at pp. 1, 14).[1] According to the June 2022 IEP, the student, who was in fourth grade at the time of the meeting, exhibited a functional reading level of second grade and a functional math level of third grade (id.). The June 2022 CSE recommended that the student receive two periods per week each of group special

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

education teacher support services (SETSS) in math and English language arts (ELA) (Parent Ex. C at p. 9).[2] A June 15, 2022 prior written notice reiterated the June 2022 CSE's recommendations and considerations (see Parent Ex. B).

The next CSE meeting for the student convened on February 6, 2024 (Parent Ex. E). The CSE determined that the student was at a second grade reading level and a third grade math level and continued to recommend two group sessions of SETSS for math; however, the CSE increased the frequency of the group SETSS for ELA from two periods per week to three periods per week (compare Parent Ex. C at p. 9, with Parent Ex. E at pp. 13, 18). In a prior written notice dated February 9, 2024 the CSE reiterated the February 2024 CSE's recommendations and considerations (Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated April 17, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (Parent Ex. A). The parent asserted that at a CSE meeting held in June 2021, the CSE had recommended that the student receive integrated co-teaching (ICT) services in math, ELA, social studies, and science, but the June 2022 CSE inappropriately removed all of the ICT services despite evidence that the student scored at a level one in ELA and math on State exams and that she was performing at a second-grade level in ELA and math (see id. at pp. 3-4). Turning to the next CSE meeting, the parent alleged that, evidence showed that the student was functioning well below her grade level, and the February 2024 CSE denied the student a FAPE by not increasing the number of hours of SETSS and by continuing to not recommend ICT services (id. at p. 4).. Next, the parent alleged that classroom test scores indicated that the student's skills had regressed in both ELA and math from the previous year and that she was "4 to 5 grade levels behind in ELA and [m]ath" (id. at p. 5). The parent argued that the IEP was neither "reasonably calculated to provide meaningful educational benefit" and nor had the student demonstrated academic progress (id. at pp. 5-6). The parent also alleged that the district failed to convene a CSE meeting as required in June 2023 and did not review or revise the student's IEP until eight months later in February 2024, which, according to the parent, was also a denial of a FAPE (id. at p. 6). Finally, the parent argued that the district failed to recommend the student for 12-month (extended school year) services because the student was at high risk for regression (id. at p. 7).

According to the due process complaint notice, the student was attending a charter school and for relief, the parent requested that the district reconvene the CSE to modify the student's

[2] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

February 2024 IEP to include 12-month services, 10 periods per week of ICT services for math, ELA, science, and social studies, and five periods per week of SETSS in reading and math (Parent Ex. A at p. 7). The parent also requested that the district fund a bank of compensatory education services totaling 2,400 hours in the areas of ELA (reading and writing) and math (id.).

B. Impartial Hearing Officer Decision

Following two prehearing conferences (see Tr. pp.1-16), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 12, 2024 and concluded the same day (Tr. pp. 17-62). In a decision dated July 31, 2024, the IHO found that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years as it did not present any evidence or witnesses, or make any argument that it provided the student a FAPE (IHO Decision at p. 3).

Turning to relief, the IHO summarized the testimony of the parent's single witness, a special education teacher, and found that the special education teacher could not provide an explanation as to why her suggested program was best for the student (IHO Decision at p. 5). The IHO found that the special education teacher rationalized the recommended program, which included ICT services five times per week, and SETSS five times per week, as a "first step attempt to see if [the program] would result in improvement," which the IHO found was controverted by the parent's assertion that the student had previously received a combined program of ICT services and SETSS (id.). With respect to the witness's recommendation for 2,600 hours of compensatory tutoring services, the IHO found that the estimate was based on a computation of four hours per week in each subject multiplied by the number of grade levels behind the student was and that there was "no real explanation as to why [four] hours a week was necessary for [the] student" (id.). Moreover, the IHO held that there was no evidence in the hearing record showing the student had regressed over the summer portion of any school year (id.). The IHO concluded that there was no evidence in the hearing record that the parent had put forth a "well-articulated plan that reflect[ed] the [s]tudent's abilities and needs" and denied the parent's requests to modify the February 2024 IEP to include SETSS, ICT services, an extended 12-month school year and for a bank of 2,688 compensatory education hours in ELA and math (id. at p. 6). The IHO did grant; however, the parent's request to reconvene the CSE and ordered the district to develop a new IEP for the student (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent did not present a well-articulated plan, reflecting the student's needs and abilities.[3] The parent further asserts that the IHO erred in denying her request to modify the February 2024 IEP to include five sessions of SETSS per week in ELA and math, five sessions of ICT services per week in ELA, math, science,

[3] The parent argues that the IHO did not address the inappropriateness of the IEP annual goals; however, as discussed above, the IHO found that the district denied the student a FAPE for the school years at issue. A review of the request for review does not indicate in what way the parent's allegations related to the annual goals in the student's IEP relate to the issues presented on appeal, which are limited to what relief to award for the already determined denial of FAPE.

and social studies, and 12-month services. Further, the parent appeals from the IHO's denial of the request for a 2,688-hour bank of compensatory education services in ELA and math.

In an answer, the district asserts that the IHO's order was appropriate and that modifying the IEP as requested by the parent would circumvent the CSE process. The district argues that the order requiring the CSE to reconvene is the appropriate relief in light of the circumstances as was the denial of the bank of compensatory education requested by the parent.

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]).[4]

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

VI. Discussion

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a];

[4] 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).

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]).

During the impartial hearing, the district failed to offer any documentary evidence or witnesses to defend the appropriateness of its recommended programming; it conducted a brief cross-examination of the parent's witness and made a closing statement that in relevant part challenged the appropriateness of the parent's requested modifications and compensatory education program based on the testimony and evidence in the hearing record (Tr. pp. 30-35, 47-51, 53-54). The parent contends that the IHO erred in denying a compensatory education award and that the IHO's determinations that there was no evidence to show that the special education program the parent put forth was a "well articulated plan that reflect[ed] the [s]tudent's abilities and needs" and that there was no evidence of regression over the summer months were error (Req. for Rev. pp. 5-6; see IHO Decision at pp. 5-6). The parent seeks an order implementing the requested modifications of the student's IEP to include increased SETSS and ICT services, in addition to an award of 2,688 hours of compensatory tutoring services (see Req. for Rev. p. 2). The district asserts that the IHO's award was appropriate both in denying the parent's request to modify the IEP and instead ordering the CSE reconvene, and in denying the compensatory education award. The district argues that the modifications would circumvent the CSE process and the justification for compensatory education provided by the parent's witness was "arbitrary," "conclusory," and based on "rote numerical calculations" that were not supported by the hearing record.

I will first consider whether relief, if any, is warranted with respect to the parent's request for prospectively ordering a particular education program or services for the student and then consider the parent's request for compensatory education in light of the outcome of the prospective placement relief as well as any other information that can be gleaned about the denial of a FAPE and the student's needs.

A. The Student's Needs

While the student's academic needs are not in dispute, a description thereof provides context for the discussion regarding the issues on appeal. The student's June 2022 IEP, developed when she was in fourth grade, indicated that at that time her reading skills were at a mid-second grade level (Parent Ex. C at pp. 1, 14). According to the IEP, the student had made progress reading lists of the most common words seen in books and improved her ability to use phonics skills to decode words; however, she needed "intensive, direct instruction in phonics and word analysis" and she did not comprehend grade level text when attempting to read by herself (id. at p. 1). In writing, the IEP indicated that the student was able to write a short paragraph, but it contained many spelling errors, and her ideas were not fully explained (id.). Regarding math, the student's skills were at a beginning third grade level, and the IEP indicated that she needed more practice subtracting with regrouping, memorizing her times tables, and figuring out which operation to use when completing word problems (id. at pp. 1, 2, 14). The CSE determined that the student needed supports and strategies to address her management needs, including frequent prompting/scaffolding, repetition of important information, visual aids and manipulatives, graphic organizers, sentence starters, small group instruction, checklists and check-ins, and rephrasing of questions, directions, and information (id. at p. 3). Further, the CSE recommended that she receive two sessions per week of group SETSS each in ELA and math (id. at p. 9).

The student's February 2024 IEP, developed when she was in sixth grade, reflected "i-Ready" ELA and decoding score of "1," a "Classroom test Q1" score of "2.1," and that her reading skills were at a second grade instructional/functional level (Parent Ex. E at pp. 1, 18). According to the IEP, the student was challenged by reading words with vowel teams and two-syllable words, understanding characters, and asking and answering "wh" questions about key ideas and details (id. at pp. 1-3). The IEP indicated that the student's i-Ready math and classroom test Q1 scores were a "2" and her math instructional/functional level was third grade (id. at pp. 1, 18). The IEP indicated that the student was challenged by rounding whole numbers to the nearest ten hundred, subtracting three numbers with regrouping, identifying fractions that name part of a whole, putting objects into equal parts (halves, fourths, etc.), and comparing and contrasting attributes of solid figures (number of vertices, edges, etc.) (id. at p. 4). The CSE determined that the student needed supports and strategies to address her management needs including guided practice through repetition, guided questions to follow for independent reading, complex information divided into chunks, and use of strategies to determine word meaning, a list of vocabulary words with definitions, manipulatives, modeling, guided checklists, extended time, peer tutoring, demonstration of steps, small group instruction, wait time, and direct instruction in computation and word problem/reasoning strategies (id. at pp. 6-7). The CSE recommended that the student receive three periods per week of group SETSS in ELA, and two periods per week of group SETSS in math (id. at p. 13).

B. Educational Placement

After reviewing the evidence in the hearing record, there are definite concerns regarding recommending educational programming for the student at this stage. The major concern is the lack of evidence about the student's performance at the charter school during the school years at issue as the hearing record does not include report cards or any updates of the student's progress produced by the charter school, nor does it include a classroom observation or any evidence produced by someone who observed the student in her general education classroom (Tr. pp. 1-62; Parent Exs. A-J).[5] However, in addition to the lack of evidence, the hearing record also reflects that the charter school was not forthcoming with the parent's attempts to gain information about the student (Parent Ex. H). The other concerning part is that, according to the limited information in the hearing record, the district last conducted an evaluation of the student in 2021 and there is no additional evidence in the record of the student's present levels of performance since the time of that evaluation (Parent Ex. B at p. 1).

Generally, as the district points out, an award of prospective relief in the form of IEP amendments, under certain circumstances, has the effect of circumventing the statutory process,

[5] As the student was only recommended for SETSS in both of the IEPs at issue, the student was attending a general education setting at the charter school (see Parent Exs. C; E). However, a regular education teacher was not identified on the attendance sheet for either the June 2022 or the February 2024 CSE meetings (Parent Exs. C at p. 16; E at p. 20). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

With regard to past services that the student received, of particular import and almost entirely absent from the record are the circumstances relating to the student's enrollment in the charter school, the services she received therein, and any reports of progress demonstrated or lack thereof. In New York, both the public school district of residence, as the local educational agency under the IDEA and State law, and the charter school are assigned responsibilities to ensure the provision of a FAPE to a student with a disability who attends a charter school, with the public school having the initial responsibility for creating a student's IEP.[6] Before a charter is approved, the applicant must, when filing an application with a charter entity, provide the "[m]ethods and strategies for serving students with disabilities in compliance with all federal laws and regulations relating thereto" (Educ Law § 2851[s]). Thus, according to the State's charter school office, the "charter school is responsible to implement the IEP as written. The charter school may provide these services directly or arrange to have such services provided by the school district of residence

[6] The Education Law provides that

> a charter school shall be deemed a nonpublic school in the school district within which the charter school is located. Special education programs and services shall be provided to students with a disability attending a charter school in accordance with the [IEP] recommended by the [CSE] of the student's school district of residence. The charter school may arrange to have such services provided by such school district of residence or by the charter school directly or by contract with another provider. Where the charter school arranges to have the school district of residence provide such special education programs or services, such school district shall provide services in the same manner as it serves students with disabilities in other public schools in the school district, including the provision of supplementary and related services on site to the same extent to which it has a policy or practice of providing such services on the site of such other public schools.

(Educ. Law § 2853[4][a]).

or by contract with another provider" ("Charter Schools and Special Education," at ¶¶ 14, 17-19, Charter School Office, available at https://www.nysed.gov/charter-schools/charter-schools-and-special-education; see also Educ. Law § 2853[4]).[7] When it comes to the IDEA's procedural safeguards, the public school district is responsible for compliance with the due process procedures, but "[c]harter schools must cooperate with school district personnel and school district attorneys in the conduct of due process proceedings, by making charter school personnel available to testify and providing documentary evidence upon request. ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at https://www.nysed.gov/charter-schools/charter-schools-and-special-education). In addition to due process it may be necessary to file a complaint against a charter school if it has failed to comply with the IDEA responsibilities assigned to it under State law ("Charter Schools and Special Education," at ¶ 22, Charter School Office, available at https://www.nysed.gov/charter-schools/charter-schools-and-special-education; see also "How to File a Charter School Complaint" available at https://www.nysed.gov/sites/default/files/programs/charter-schools/doecomplaintprocess2019.pdf).

The parent seeks ICT services for the student going forward, yet the evidence in the hearing record does not indicate whether or not the charter school the student attends would be unable to accommodate this request. Accordingly, I will direct the district to conduct a reevaluation of the student, obtain the student's charter school records including report cards, and reconvene a CSE to determine appropriate programming. The district should ensure that all required participants are present at the CSE meeting as well as charter school personnel, as the hearing record indicates this may not have occurred at the prior CSE meetings for the student. In addition, the participation of charter school personnel at the CSE meeting would ensure that all parties will know whether the educational program being requested by the parent is available at the charter school.

C. Compensatory Education

The parent requests 2,688 hours of special education instruction/tutoring as recommended by the private special education teacher to make up for the district's denial of FAPE to the student for the 2022-23 and 2023-24 school years.

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.

[7] According to guidance issued by the charter school office,

> If the charter school is providing all special education and/or related services either directly or by contract, one of the child's special education providers must serve as the special education teacher member of the CSE. If both the school district and the charter school, directly or by contract, provide special education and/or related services to the child, the school district must designate the most appropriate provider to serve as the special education teacher member of the CSE. Charter schools are expected to cooperate fully with school districts by assuring that charter school teachers and other charter school personnel participate in CSE meetings relating to charter school students.

("Charter Schools and Special Education," at ¶ 4, Charter School Office, available at https://www.nysed.gov/charter-schools/charter-schools-and-special-education).

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"]).

In this instance, the district conceded that it failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, or at least made the decision not to put on any witnesses or enter any evidence into the hearing record (Tr. pp. 20-21). The parent now requests all of the 2,688 hours of compensatory tutoring services as recommended in the compensatory education plan developed by the special education teacher who testified at the hearing (Tr. pp. 31-32; Parent Ex. G). To be sure, 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). 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 the appropriate compensatory education remedy.

However, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process 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]).[8] Indeed, an award ordered so blindly could ultimately do more harm

[8] Authority specific to the issue of a parent's 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

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 education relief requested by the parent was ordered, including the monetization thereof, it would 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."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts.

The IHO denied the parent's request for compensatory education services, finding that the hearing record lacked evidence to show that the special education program the parent put forth was tailored to meet the student's needs (IHO Decision at pp. 5-6). In June 2024, a special education teacher, who had not worked directly with the student but testified that she interviewed the student and the parent and reviewed documents about the student, prepared recommendations for compensatory education (Parent Exs. G; J at pp. 1, 3). According to the parent, the June 2024 compensatory education plan explained the special education teacher's rationale regarding how the student's 2022-23 and 2023-24 IEPs were deficient and what services would put her in the position she would have been in had appropriate services been provided (Parent Ex. G).

According to the plan, the student's reading skills as of June 2022 (fourth grade) were at a second-grade instructional level, and in February 2024 (sixth grade) they were at a first-grade instructional level, which the special education teacher concluded showed regression of skills (Parent Ex. G at p. 1). As for math, as of June 2022 the student's skills were at a third-grade level, and in February 2024 they were on a second-grade level, which also showed regression (id.). The special education teacher determined that "[g]iven [the student's] cognitive functioning" it was "expected that she would have progressed one grade level each year" if she had been provided with appropriate services (id. at p. 2).

The student was just finishing sixth grade at the time the special education teacher developed the compensatory education plan (Parent Ex. G at p. 1). The special education teacher provided a formula for how she calculated how much compensatory education was warranted to put the student in the position she would have been in had the district provided her with an appropriate educational program (id. at p. 2). According to the special education teacher, the student required four hours per week (equaling 16 hours per month) of tutoring in reading, writing, and math for 12 months (equating to 192 hours) (id. at p. 2). The special education teacher then multiplied that number by the number of years she calculated the student was behind in reading/writing (five years; currently a sixth grader at a first-grade level) and math (four years; currently a sixth grader at a second-grade level) totaling 960 hours each for reading and writing and 768 hours for math (id. at pp. 1, 2).

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.

This approach was problematic for two reasons. First, the special education teacher calculated the number of hours based upon the number grade levels would be required for her to perform at her current grade level (sixth grade),[9] rather than for the period of time of the FAPE deprivation that the IHO determined (two school years) (see IHO Decision at pp. 3, 5). As noted above, even using the special education teacher's analysis, the student would have been expected to progress one grade level per school year (Parent Ex. G at p. 2). Accordingly, any calculation should be limited to a remedy designed to advance the student one grade level per school year of a denial of a FAPE at most.

The second problem is that the special education teacher calculated the compensatory hours by a 12-month/52-week period of time, which is not reflective of how educational services are delivered. For most students, a school year spans 10 months (36 weeks), or for students receiving 12-month services, an additional period of services during the summer (see Schneps v. Nyquist, 58 A.D.2d 151, 153 [3d Dep't 1977]). Therefore, assuming the special education teacher was correct to recommend four hours per week of reading and math special education teacher instruction, for a 10-month deprivation of FAPE the student would be entitled to 144 hours (four hours per week for 36 weeks) of compensatory reading and math services for each year of a denial of a FAPE.

The special education teacher determined that the student needed 12-month services due to her regression in skills between the June 2022 IEP and the February 2024 IEP (IHO Decision at p. 5; Parent Ex. G). A comparison of the June 2022 IEP and the February 2024 IEP shows that the student may have regressed in some skills, although both IEPs reflect that the student had significant needs in ELA and math and she was identified as being at a second-grade level in reading and a third-grade level in math on both IEPs (compare Parent Ex. C at pp. 1-2, 14 with E at pp. 5, 18). The IHO denied 12-month services because she determined that there was "no evidence that the regression occurred over the summer months" (IHO Decision at p. 5).[10] "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf). At present, the hearing record is devoid of any evidence that the student had specific skills she lost over breaks that took longer than eight weeks to recover when school resumed. Accordingly, I will not disturb the IHO's findings regarding regression and the need for 12-month services.

Turning to the IHO's finding that the special education teacher did not explain how she

[9] In other words, the special education teacher used a calculation based upon a four- to five-year FAPE deprivation so that the student would perform on grade-level as if she did not have a disability. That is not the standard.

[10] The IHO determined that the lack of evidence on this point was due to "the large gap in time between" the June 2022 IEP and the February 2024 IEP, which does not appear to be the fault of the parent (IHO Decision at p. 5).

determined that the student should receive four hours per week each of reading and math compensatory education services, review of her testimony shows that she explained that because the student was "significantly behind" and had "regressed in all academic areas," the student needed "intense tutoring hours during the week to recoup or to get close to where [the student] should" have been, adding that she "felt like four hours per week [of] tutoring was appropriate" (Tr. pp. 32-33). I note that the special education teacher acknowledged that the student received some SETSS during the school years in dispute (IHO Decision at p. 5; Parent Exs. C at p. 9; E at p. 13; J at pp. 3, 4). However, despite the SETSS provided for in the IEPs, the student failed to make progress in reading and math and, given the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, the student is entitled to some compensatory education services to make up for the district's denial of a FAPE (IHO Decision at p. 3; compare Parent Ex. C at pp. 1, 9, 14, with Parent Ex. E at pp. 1, 13, 18).

As a final point, the special education teacher summarized information in the student's IEPs regarding her reading and math skills, but did not do so for writing, yet she determined that the student should be entitled to 960 hours of compensatory writing special education teacher instruction (see Parent Ex. G). Additionally, the due process complaint notice specifically requested "tutoring" hours in "ELA (reading and writing)" as a combined service (Parent Ex. A at p. 7). Therefore, the special education teacher's compensatory education plan does not provide a sufficient basis for a separate award of compensatory education in writing by a special education teacher.

Overall, as further described above, an appropriate compensatory education award is 144 hours per year each for ELA and math for the two-year denial of a FAPE, or 288 hours each for ELA and math.

VII. Conclusion

In light of the above, I will modify the IHO's decision with respect to relief and direct the district to conduct a reevaluation of the student, obtain the student's charter school records including report cards, and reconvene a CSE to determine appropriate programming. Additionally, I will direct the district to provide the student with compensatory education in the amount of 288 hours each for ELA and math.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, the IHO's decision dated July 31, 2024 is modified, by reversing that portion which denied compensatory education relief; and

IT IS FURTHER ORDERED that the district shall conduct a reevaluation of the student, and obtain the student's charter school educational records including report cards which shall be considered by the CSE in the development of the student's next IEP; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the district shall provide compensatory education services to the student in the amount of 288 hours of instruction provided by a special education teacher for ELA and 288 hours of instruction provided by a special education teacher in math, with the services to be completed within four years from the date of this decision.

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

JUSTYN P. BATES
STATE REVIEW OFFICER