



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-421

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Saratoga Springs City School District

Appearances:

Martin Kehoe & Associates, P.C., attorneys for petitioner, by Martin J. Kehoe III, Esq.

Girvin & Ferlazzo, P.C., attorneys for respondent, by Tara L. Moffett, 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, among other determinations, found that respondent (the district) did not violate its child find obligations during the 2021-22 and 2022-23 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]-[j]).

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

On or around February 1, 2022, after the parent moved to the district from another state, the parent enrolled the student in a pre-kindergarten program in the district (see Parent Exs. A; BB at ¶¶ 15-16; Joint Ex. 28 at pp. 1-2). On March 14, 2022, the parent withdrew the student from the pre-kindergarten program (Joint Ex. 28 at pp. 2, 15).

On or around June 2, 2022, the student went to the district elementary school for a kindergarten screening assessment (Tr. pp. 359-62; Parent Ex. BB ¶ 22; Joint Ex. 34). On July 28, 2022, the district referred the student to Behavior Health Services North (BHSN), an "outside health group[] company" located in the district's elementary school building that provided community supports and programming like an "outside counseling office" (Tr. pp. 356-57, 1084;

Joint Ex. 41). On August 23, 2022, the student was admitted into the BHSN program for individual and family/collateral therapy one to two times per month or as needed (Parent Ex. C). The student began attending a kindergarten class in the district as one of the general education students in classroom with integrated co-teaching (ICT) services, on September 8, 2022, and following a behavioral incident, the student was excused from school for early departure (Parent Exs. S at p. 1; BB ¶ 31 Joint Ex. 18 at p. 2). After another incident on September 12, 2022, the student was suspended from school for one day (Parent Ex. D at p. 2; Joint Exs. 15 at p. 1; 17 at p. 2).

On September 13, 2022, the parent sent an email to the district requesting that the CSE evaluate the student; the district responded the same day indicating the parent's request was forwarded to the special education department (Parent Ex. F; Joint Ex. 5 at pp. 1-2; see Tr. pp. 416-17). On the same day, district staff met to discuss behavior support for the student and created a behavior plan, which included a schedule for a 1:1 aide for the student (Joint Ex. 7; see Tr. pp. 40711, 1029-31).¹ On September 22, 2022, the parent signed a letter prepared by the school psychologist indicating the parent did not want to pursue a psychoeducational evaluation at that time (Joint Ex. 6; see Tr. p. 419).²

On October 6, 2022, the student was observed in his classroom by a behavior therapist with BHSN who made behavioral recommendations for the student's team to consider (Joint Ex. 8). On October 19, 2022 the student underwent a psychiatric assessment at the Nurturing Minds Wellness Center which resulted in a diagnosis of attention deficit hyperactivity disorder (ADHD) (Parent Ex. H).

Following an incident with the student's aide on November 21, 2022, the student was suspended for a half-day (Parent Ex. D at p. 5).

On November 25, 2022, the parent sent an email to the district requesting that the student be evaluated for special education services and further indicated that she had previously asked for an evaluation but the district had asked her to rescind her initial request in September 2022 (Joint Ex. 10 at p. 2). On November 28, 2022, the district sent the parent a prior written notice which indicated that the student had been referred to the CSE and requested the parent's consent for evaluations (Joint Ex. 11). On or around December 2, 2022, the parent gave consent for the district to evaluate the student which resulted in a social and medical history update dated December 2, 2022; a classroom observation dated December 19, 2022; a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) dated January 12, 2023; and a psycho-educational evaluation completed on January 13, 2023 (Joint Exs. 12-14; 16-17).

¹ The school psychologist testified that the meeting took place on September 13, 2022, while the elementary school principal testified that the meeting took place on September 14, 2022 (Tr. 407, 1029-30; see Tr. pp. 344, 1018).

² The district school psychologist testified that after she spoke with the parent about the interventions and strategies that the district wanted in to put in place, and the need to give the student a chance to acclimate to the school setting, the parent agreed to withdraw the CSE referral (Tr. pp. 417-20). The school psychologist reported that the parent was looking into a psychiatric evaluation through BHSN and was in agreement with pursuing other evaluations and with withdrawing her referral to avoid duplicating evaluations (Tr. pp. 417-18, 420). The school psychologist testified that she drafted a withdrawal form, which the parent signed (Tr. pp. 419-21).

On December 20, 2022, following an incident in class where the student was described as being disruptive, the student was suspended for a half-day (Parent Ex. D at p. 6). The next day, following a separate incident, the school principal advised the parent that the student was suspended from school for one day for "chronic disrespectful and disruptive behavior" (Parent Exs. D at p. 6; N). In a second letter, dated January 4, 2023, the school principal advised the parent that the student was suspended from school for two days for "[d]isruption of [the [e]ducational [p]rocess" (Parent Ex. P). On January 9, 2023, the student was suspended for one day (Parent Ex. D at p. 9).

A. January 9, 2023 Due Process Complaint Notice and Subsequent Events

On or around January 9, 2023, the parent filed a due process complaint notice alleging the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Joint Ex. 3 ¶ 4).³ The parent alleged the district should have known the student had social, emotional, and behavioral deficits from the start of the 2022-23 school year when the parent made her referral to the CSE (*id.* ¶¶ 4-8). The parent requested an IEP for the student and compensatory education as relief (*id.* ¶¶ 11-12).

On January 5, 2023 and January 13, 2023, the parent sent letters to the district requesting the student be put on a modified day until an IEP was developed (Joint Exs. 20-21). On January 18, 2023, the district granted the parent's request to allow the student to attend school for a half-day in the mornings from January 18, 2023 to January 27, 2023, the date of the CSE meeting to determine the student's initial eligibility for special education (Joint Ex. 22).⁴

On January 23, 2023, the district submitted a response to the due process complaint notice denying most of the allegations raised by the parent and asserted that the district responded appropriately to the parent's concerns at the beginning of the 2022-23 school year and that the student was then-currently undergoing evaluations pursuant to an initial CSE referral (Joint Ex. 4 ¶¶ 3-9).

On January 27, 2023, the CSE convened, found the student eligible for special education as a student with an emotional disability and recommended that he attend an 8:1+2 special class and receive one 30-minute session per week of individual psychological counseling services (Joint Ex. 24 at p. 14). The January 2023 CSE also recommended supplementary aids and services, program modifications, and accommodations in the form of a BIP, break time for self-regulation, modeling, refocusing and redirection, visual supports, and reteaching of materials (*id.* at pp. 14-15).

On March 6, 2023, the CSE reconvened to conduct a requested program review and to discuss additional information and reports shared by the parent and her request for a reduced school day (Joint Ex. 30). The March 2023 CSE recommended updating the student's FBA/BIP but did

³ Two copies of the January 9, 2023 due process complaint notice were admitted into the hearing record (*see* Joint Ex. 3; IHO Ex. I). For purposes of this decision only the joint exhibit will be cited to.

⁴ By letter dated January 18, 2023, the district informed the parent that the student's initial eligibility determination meeting was scheduled for January 27, 2023 (Joint Ex. 23).

not recommend a reduced school day noting that the student was not consistently attending school which was undermining the student's response to the supports and expectations (id. at pp. 1-2).

The parties proceeded to a prehearing conference on April 28, 2023 (Tr. pp. 1-30). The parent's attorney represented that the parent was seeking compensatory education, a placement, and an evaluation (Tr. pp. 5-6). The same day, the CSE reconvened for the student's annual review and to create an IEP for the student for the 2023-24 school year (Joint Ex. 35). The April 2023 CSE recommended that the student attend an 8:1+2 special class on a 12-month basis (id. at pp. 1, 11, 13). In addition, for the 10-month portion of the school year, the CSE recommended that the student receive three 30-minute sessions per month of psychological counseling services in a group of three and, for the summer (July/August) portion of the school year, the CSE recommended that the student receive one 30-minute session per week of psychological counseling in a group of three (id. at p. 13). The April 2023 CSE recommended the same supplementary aids and services, program modifications, and accommodations as the January 2023 CSE (compare Joint Ex. 35 at pp. 12-13, with Joint Ex. 24 at pp. 14-15).

Five status conferences took place beginning on May 24, 2023 and concluding on September 22, 2023 (Tr. pp. 31-168).⁵ On October 10, 2023, the district filed a motion to dismiss the parent's due process complaint notice on the basis that the parent's claims were moot because the relief sought had been provided by the district (IHO Ex. XIII). On October 11, 2023, the parent's attorney filed an attorney affirmation in response to the district's motion to dismiss (see IHO Ex. XIV). On October 16, 2023, the district filed a response to the parent's attorney's affirmation (see IHO Ex. XV). On October 18, 2023, the parties proceeded to a hearing on the district's motion to dismiss (Tr. pp. 169-198). In an interim decision dated October 20, 2023, the IHO determined the parent's claims were not moot and dismissed the district's motion (see Oct. 20 2023 Interim IHO Decision).

B. October 20, 2023 Amended Due Process Complaint Notice

In an amended due process complaint notice dated October 20, 2023, the parent alleged that the district denied the student a FAPE for the 2021-22 and 2022-23 school years (see Joint Ex. 1). The parent alleged the district knew or should have known about the student's social, emotional, and behavioral deficits in January 2022 when the student began attending preschool in the district (Joint Ex. 1 ¶ 20). The parent alleged procedural violations impeded the student's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; and caused a deprivation of educational benefits (id. ¶ 21). In addition, the parent alleged the district failed to comprehensively evaluate the student in a timely manner, and as a result the student's kindergarten year was an educational, social, and emotional loss (id. at ¶ 26).⁶ As relief, the parent requested an order: finding the student was

⁵ In August 2023, the parent sought and received a subpoena from the IHO related to records held by the county department of social services (IHO Exs. II-IX). In September 2023, after being advised, by the department of social services, that release of any confidential child protective services records could open the disclosing party to criminal liability, counsel for the parent sought an order to show cause in federal district court to compel the county department of social services to comply with the subpoena and was denied (IHO Exs. X-XII).

⁶ The parent also raised multiple claims under section 504 of the Rehabilitation Act of 1973 (Section 504) (see Joint Ex. 1 ¶¶ 27-39).

denied a FAPE for the 2022-23 school year and a portion of the 2021-22 school year; finding the district failed to uphold its child find duty; awarding "make-up services" from October 20, 2023 until such time that the district provided a FAPE; and awarding qualitative compensatory education designed to put the student in the situation he could have been in had the district not failed to provide appropriate services (id. ¶ 41).

C. Impartial Hearing Officer Decision

The parties proceeded to a prehearing conference on December 8, 2023 and a status conference on January 22, 2024 (Tr. pp. 199-248).⁷

An impartial hearing convened on March 12, 2024 and concluded on May 23, 2024 after seven days of proceedings (Tr. pp. 249-1398).⁸ On July 5, 2024, the parties submitted closing briefs (see IHO Exs. XVIII-XIX).

In a decision dated September 6, 2024, the IHO found that the district complied with its child find obligations for the 2021-22 and 2022-23 school years and provided the student with a FAPE from January 2022 through the 2022-23 school year (see IHO Decision at p. 67).

Regarding the district's obligation under child find procedures, the IHO noted that the parent referenced three time periods in her amended due process complaint notice that the district violated its child find obligation: when the parent initially registered the student with the district in January 2022; when the parent registered the student for kindergarten on or around June 2022; and when the student first entered kindergarten in September 2022 (IHO Decision at p. 32). The IHO determined the evidence proved there was no reason for the district to suspect the student had disability or reason to suspect that special education services may have been needed to address such a disability for each of those time periods (id.). Overall, the IHO found the district's actions appropriate during the time periods at issue and noted that the parent was happy with the student's progress in the district up to the November 21, 2022 incident (id. at pp. 32-40).

The IHO noted that the parent withdrew her September 13, 2022 CSE referral after discussion and agreement with the district proposal to put in place behavior supports and conduct behavioral observations (IHO Decision at pp. 44-46). The IHO determined that the timeline for evaluations of the student did not begin to run until the parent's November 28, 2022 CSE referral (id. at p. 47). The IHO determined the district completed the initial evaluations and held a CSE meeting within sixty days of parental consent and thus timely evaluated the student (id.).

Regarding the parent's allegation that the district failed to adequately evaluate the student after the November 2022 referral, the IHO determined the evidence showed that the district appropriately assessed the student in all areas of his suspected disability, including, his emotional

⁷ During this time, on January 3, 2024, the student underwent a private evaluation administered by a licensed psychologist board certified in clinical neuropsychology (see Parent Ex. Z). There was an addendum to the private evaluation dated the same day (id. at pp. 21-23).

⁸ In an interim decision, dated March 11, 2024, the IHO denied counsel for the parent's request to question witnesses regarding a report made on or about January 5, 2023 to child protective services or the identity of the reporter who made the report (March 11, 2024 Interim IHO Decision).

needs, and was therefore, sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (IHO Decision at pp. 40-43).

Regarding the parent's allegation that she was denied meaningful participation in the CSE process, the IHO determined that the parent's main argument was the district failed to "apprise" the parent of her right to participate in a CSE meeting when she made her initial referral in September 2022 (IHO Decision at p. 48). The IHO determined that the parent's initial referral was made in direct response to the principal's statement that the student could be evaluated in school by the CSE and that her subsequent agreement to withdraw the referral was after the district fully explained the behavioral interventions and supports it was putting in place, and the evaluations that it was seeking in order to properly address the student's needs (id.). Accordingly, the IHO determined the parent knew of her right to participate in CSE meetings for the student (id.). The IHO also determined in the alternative that the parent was provided with an adequate opportunity to participate in the development of the student's IEP at the initial CSE meeting in January 2023 (id. at pp. 49-52).

Noting that the parent's claim of predetermination was only raised in her closing brief, the IHO found that it was outside the scope of the hearing (IHO Decision at pp. 52-54). The IHO then determined, in the alternative, that the CSE discussed and considered alternative classifications, programs, and services and, thus, the claim was not substantiated (id. at pp. 53-54).

Next, the IHO addressed the parent's request for compensatory education (IHO Decision at pp. 54-61). The IHO noted the parent in her closing brief requested compensatory education based on the report of the January 2024 private evaluation (id. at pp. 54-59). The IHO determined that the neuropsychologist who conducted the evaluation did not provide a clear picture of the compensatory education she was recommending for the student; however, the IHO determined that the district coordinator of special education agreed that the student was entitled to some amount of compensatory education services for the instruction and services the student missed when he attended school for a reduced school day (id. at p. 60). Accordingly, the IHO ordered the district to provide the student compensatory education for the instruction and services he missed when he attended school for a reduced day, for the period of January 2022 through the end of the 2022-23 school year, "by using the quantitative approach to calculate the exact number of minutes/hours of such missed instruction and services" by reviewing the days on which the student had an "Excused Early Departure" on the district's attendance report (id. at pp. 60, 67).⁹

IV. Appeal for State-Level Review

The parent appeals. The parent raises the following four arguments on appeal: (1) the IHO erred in finding that the district upheld its child find obligation; (2) the IHO erred in finding that the independent neuropsychologist was unable to provide accurate recommendations for the student; (3) a specific learning disability has never been acknowledged by the district or the IHO;

⁹ The IHO also determined the parent failed to maintain her claims under section 504 (see IHO Decision at pp. 61-67).

and (4) the IHO erred in determining the district afforded the parent an opportunity to participate. The parent filed a memorandum of law with her request for review.

The district filed an answer to the parent's appeal, generally arguing to uphold the IHO's decision and dismiss the parent's request for review. Also, the district argues the parent's request for review should be dismissed for failure to comply with regulations governing the initiation of a request for review and the form and content requirements for pleadings. The district argues the request for review fails to include specific reasons for challenging the impartial hearing officer's decision; fails to include what relief the parent is seeking; fails to set forth citations to the record on appeal; and is not verified by the parent but rather by the parent's attorney. Additionally, the district argues the parent's memorandum of law should be rejected due to failure to comply with the State regulations governing the form and content, which requires a table of contents, and fails to include citations to appropriate legal authority or to the record on appeal for the majority of the arguments included therein.¹⁰ The district also submits its own memorandum of law in support of its answer.

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]).

¹⁰ The district submits additional evidence with its answer consisting of an email dated August 19, 2024 with an attachment indicating the parent gave consent to the district to transfer the student's special education records to his new school district located out-of-state (see Proposed SRO Ex. A). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Though the evidence was not available during the impartial hearings, the document is unnecessary for a determination in this matter and will not be considered.

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]).¹¹

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

VI. Discussion

The district does not challenge the IHO's award of compensatory education for the instruction and services the student missed when he attended school for a reduced day from January 2022 through the end of the 2022-23 school year. Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the request for review fails to include specific reasons for challenging the impartial hearing officer's decision; fails to include what relief the parent is seeking; fails to set forth citations to the hearing record; and is not verified by the parent but rather by the parent's attorney. The district also asserts the parent's memorandum of law should be rejected for failure to comply with practice regulations governing the form and content; specifically, that the memorandum of law fails to include a table of contents and fails to include citations to appropriate legal authority or to the record on appeal for the majority of the arguments included therein.

State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the

¹¹ 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).

precise rulings, failures to rule, or refusals to rule presented for review; and

(3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]).

In a two-page request for review, the parent's attorney put forth four main issues with the IHO's decision:

- I. The IHO erred in finding that the District upheld its child find obligation.
 - a. Universal Pre-Kindergarten (January/February/March 2022)
 - b. Pre-Kindergarten Screening (June/July/August 2022)
 - c. The IHO failed to consider the initial CSE referral by the Parent (September 2022)
- II. The IHO erred in finding that [the independent neuropsychologist] is unable to provide accurate recommendations for the Student.
 - a. [The independent neuropsychologist] properly defended her evaluation of the Student.
 - b. Significant District input supports the Learning Disorder diagnosis
 - c. A classroom observation is not dispositive.
- III. The Specific Learning Disability has never been acknowledged by the District or the IHO.
- IV. The IHO wrongly determined that the District afforded the Parent an opportunity to participate.

(Req. for Rev. at p. 2). Though the request for review is not in compliance with practice regulations because it does not include the specific relief sought, does not contain specific citations to the hearing record, and includes the bare minimum as to the issues presented for review without specific grounds for reversal or modification being advanced, the parent through her attorney identified four issues with the IHO's decision and the district does not allege that its ability to timely prepare, serve, or file its answer in this matter was compromised or prejudiced in any way. Moreover, the parent's memorandum of law does address each issue further with contains citations to the hearing record and relevant case law, as well as the specified relied, identified as a bank of compensatory education consisting of 90 hours each of: evidence-based reading instruction; math instruction; writing instruction; and psychological support/intervention.¹²

¹² According to the parent's memorandum of law, the compensatory education hours were based on calculating 30-minutes per day for 180 school days or 36 weeks (Parent Memo. of Law at p. 18).

Another violation of the practice regulations is that the request for review was not verified by the parent but rather her attorney. State regulation requires a request for review to be verified by the petitioner (see 8 NYCRR 279.7[b]). Although CPLR ¶3120 permits a verification of a pleading filed in State court to be verified by an attorney under certain circumstance—and, while the elements and principles underlying the CPLR or the federal rules of civil procedure if used cautiously and consistently with all IDEA-specific caselaw and regulations can be a useful, familiar framework when filling in gaps to structure the administrative proceedings, especially when the IDEA hearing framework is silent—there is no formal adoption of the CPLR procedures in administrative due process proceedings under the IDEA. Accordingly, in violation of the State practice regulations, the parent has not verified the request for review and there is no pleading on appeal signed by the parent.¹³

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). Here, although the request for review does not comply with the practice requirements and the lack of a proper verification borders on warranting a dismissal of the pleading, I decline to exercise my discretion to dismiss the parent's request for review.

While I decline to reject the request for review based upon noncompliance in this instance, the parent's counsel is cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]), an SRO may be more inclined to do so after a party's or his or her attorney's repeated failure to comply with the practice requirements. Additionally, while the request for review is not dismissed, the scope of the appeal is limited to those issued explicitly raised within the request for review. As a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131).

¹³ What makes the lack of a verification in this matter more troubling is that there is evidence in the hearing record of some discord between the parent and her attorney (Tr. pp. 725, 731-32, 1350-53). More specifically, the district coordinator of special education testified that the parent was content with the district program created by the CSE but was afraid to communicate this with her attorney and that she did not want compensatory education (see Tr. pp. 725). Further, the district special education coordinator testified that the parent did not want compensatory education or make-up services for the student because she did not want him taken out of class to attend school beyond the school day and repeatedly made this known to her attorney (see Tr. pp. 1350-53). The special education coordinator also testified that the parent brought up concerns regarding her attorney asking her to sign paperwork regarding compensatory education services stating she was "feeling nervous" because she did not want compensatory education services for the student (Tr. pp. 731-32).

B. Child Find

Turning now to the parent's claim that the IHO erred in his determination that the district did not violate its child find obligations, the purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

Separate from a district's child find obligations, upon written request by a student's parent, subject to State regulations governing the format of such a request, a district must initiate an individual evaluation of a student (see Educ. Law §4401-a[1], [3]; 8 NYCRR 200.4[a][1][i], [a][2][ii]-[iv], [b]; see also 20 U.S.C. 1414[a][1][B]; 34 CFR 300.301[b]).

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a][2][i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 school days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]).

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial individual evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

The parent argues that she repeatedly shared information with the district regarding the student's needs and therefore the district should have been on notice that the student may have required an evaluation for special education services. In its answer, the district argues that it complied with its child find obligations. As identified above, the parent indicates three specific time periods where the district should have initiated an evaluation of the student: (1) January 2022-March 2022 when the student was in pre-kindergarten; (2) June 2022-August 2022 when the student was screened for kindergarten; and (3) September 2022 when the student was referred by the parent for an initial evaluation. I will address each time period separately.

1. January 2022-March 2022—Pre-Kindergarten

According to the parent's testimony via affidavit, the student was enrolled in the district in or around January 2022 (Parent Ex. BB ¶ 16; see generally Joint Ex. 28). The district's registration and enrollment document included responses from the parent regarding the student's medical, health, and educational history and did not identify any concerns in those areas (Tr. pp. 660-61; Joint Ex. 28 at pp. 3-14). The district coordinator of special education testified that the information available at the time of the student's registration indicated the student did not have a 504 plan or IEP in place, had not "been [] previous[ly] refer[ed] to special education," and that no other concerns were "highlighted . . . by the parent" (Tr. p. 668; see generally Joint Ex. 28). A review of the registration form shows that the parent did not think that the student had "any difficulties or

conditions that affect[ed] his [] ability to understand, speak, read, or write in English or any other language" (Joint Ex. 28 at p. 11).

The parent testified, via affidavit, that within a week of enrolling the student in the district, she "brought [the student] to the [] Universal Pre-K program," which "was a half-day class," and shared with the teachers her "concerns regarding [the student's] aggression, irregular sleeping habits[,] and his sensory issues" (Parent Ex. BB ¶¶ 17, 19). The parent indicated that the student attended the universal pre-kindergarten (UPK) program "for about one month" after which point she "decid[ed] to withdraw" the student based on his ongoing symptoms of distractibility, the fact that he fell asleep at the program on more than one occasion, and a report from program staff that he had "aggressively kicked a fellow student" (Parent Exs. B; BB ¶ 19; Joint Ex. 28 at pp. 2, 15). At the point of withdrawal, the parent testified in her affidavit that discussed the student's distractibility, unwillingness to go to school, school problems objection to school discipline, sleep issues, and aggression with the director of the program (Parent Ex. BB ¶ 20).

In her affidavit, the parent testified that "[w]hile in [another state] and in New York, [she] regularly took [the student] for medical care and ... there was always a suspicion of ADHD (Parent Ex. BB ¶ 21). Based on the information available in the hearing record, the student was formally enrolled in the district on February 1, 2022, began attending the UPK program the next week, and was then withdrawn from the UPK program by March 14, 2022 (Parent Exs. A; BB ¶ 17; Joint Ex. 28 at p. 15). It is uncontested that the parent shared her concerns with the staff at the UPK program but given the information available to the district at the time of the student's registration and his brief attendance at the UPK program, the district did not have sufficient reason to suspect the student had a disability during this time period and therefore, the IHO's determination that the district complied with its child find obligations is affirmed on appeal.

2. June 2022-August 2022—Kindergarten Screening

The parent argues that the district missed another opportunity to identify the student's potential special education needs during its kindergarten screening. In its answer, the district argues that it again met its child find obligations.

The parent testified in her affidavit that the student attended a kindergarten screening on June 2, 2022 (Parent Ex. BB ¶ 22). The school psychologist testified that the district used the Developmental Indicators for the Assessment of Learning, Fourth Edition (DIAL-4) "as a screening tool to assess the readiness of the incoming kindergarten students" and to obtain "a general sense" of "their skill level[s]" and "what type[s] of . . . supports they may need" (Tr. p. 360; Joint Ex. 34). The school psychologist further testified that the district relied on the use of cutoff scores to determine if a student "might need a little added support" upon entering kindergarten (Tr. pp. 364-65; Joint Ex. 42).

According to the results of the DIAL-4, used during the kindergarten screening, the student obtained a motor score of 20 (district cutoff was 25), a concepts score of 23 (district cutoff was 23), a language score of 21 (district cutoff was 21), and a total score of 64 (district cutoff was 70) (Tr. pp. 365-66; Joint Exs. 34; 42). The school psychologist testified that the student "was within the cutoff score for concepts and language," and that "he scored a little bit lower" on "[t]he motor component" (Tr. pp. 364-66). On the DIAL-4 summary sheet, one of the screeners wrote that the student "d[id] not know how to hold [a] pencil correctly" (Joint Ex. 34 at p. 3).

Additionally, the results of the DIAL-4 indicated the student obtained a self-help score of 33 (district cutoff was 30) and a social-emotional score of 31 (district cutoff was 37) (Tr. pp. 365-66; Joint Exs. 34; 42). According to the DIAL-4 scoring sheet, behavioral observations during the screening indicated that the student exhibited "some wiggling," that he "pa[id] attention some of the time," that he sometimes "beg[a]n[] before directions [were] finished," and that he was "antsy" (Joint Ex. 34 at pp. 3, 7). On the parent questionnaire portion of the DIAL-4, the parent indicated she was "a little worried" about the student's social-emotional skills but that she was "not worried" about his motor, cognitive, language, self-care, vision, or hearing skills (*id.* at p. 12). Specifically, the parent marked on the DIAL-4 that the student frequently "argued when denied [his] own way," "act[ed] without thinking," "interrupt[ed]," "whine[d] or pout[ed]," and could not "sit still," and also noted that the student rarely "stay[ed] calm when things d[id] not go as planned" (*id.* at p. 11).

During cross-examination, the school psychologist testified that the DIAL-4 was used as a screening tool, and when a student obtained scores that fell below the district's cutoff score, they provided "suggestions to the parents" regarding "activities and things they c[ould] do over the summer to build on those skills" (Tr. pp. 578-579). Additionally, the school psychologist testified that based on the student's performance during the screening, she did not have any immediate concerns regarding the need for a referral (Tr. p. 390). The school psychologist testified that based on the student's limited exposure to a structured preschool program, the student's performance on the DIAL-4 was "pretty typical of what [they] would expect" (Tr. pp. 362-63). The school psychologist further testified that the behavior observations on the DIAL-4 indicated the student "was able to attend generally" and that "he . . . participate[d]" and "engaged in the task[s]" (Tr. p. 363).

The parent testified in her affidavit that she shared her concerns regarding the student at the kindergarten screening (Parent Ex. BB ¶ 23). The parent reported that the screener who worked with the student told her that there were concerns about the student's "fidgety behavior" and his fine motor skills, specifically, "his pencil grip" (*id.* ¶ 24). According to the parent, she was under the impression that the screener who worked with the student, as well as the screener who asked her questions and seemed to listen to her concerns, were both concerned about the student's future in kindergarten (*id.* ¶¶ 24-26). The parent stated that "[i]n fact, the screening team recommended counseling services for [the student] through (BHSN)" (Tr. p. 353; Parent Ex. BB ¶ 27). When counseling services did not begin, the parent testified via affidavit that she "called the school [d]istrict" and the district "set up the BHSN services" (Parent Ex. BB ¶ 28). Further, the parent included in her affidavit that during this call with the district she shared her "concerns about [the student]" including that the size of the classroom might be overwhelming for the student (*id.*).

The school psychologist confirmed in her testimony that she spoke with the parent in July 2022 regarding concerns related to the student's "transition to kindergarten" (Tr. pp. 348, 352). According to the school psychologist's testimony regarding that phone call, the parent shared that the student "was not happy about the [recent] move...to New York," and that he had attended a UPK program "for a very short period of time" (Tr. p. 352). The school psychologist testified that the parent shared "[s]he withdrew" the student from the UPK program because the student had "difficulty with . . . scribbling, [] refusals[,] and kicking another student" (Tr. pp. 352-53).

According to the school psychologist's testimony, she and the parent discussed "supports [that] were available in the general education curriculum" and she offered to complete "an

application" for the BHSN program if the parent "wanted extra support for [the student]" (Tr. p. 353). The school psychologist testified that the BHSN program was "an outside counseling office" that was "housed at," but "not affiliated with the school" (Tr. pp. 356-57). Further, the school psychologist clarified that the school "partner[ed] with" BHSN "when parents ha[d] concerns or students [had] difficulties" at which point the school "ma[de] a referral for [the BHSN] program" (id.). The school psychologist testified that if parents allowed the district to communicate with BHSN, then the school would "get a better understanding of [students'] medical needs and how to support them [] at school, and vice versa" (Tr. p. 357).

On the BHSN referral form, dated July 28, 2022, the school psychologist indicated that that parent was the "referral source," and the reasons for the referral included "[a]ttention and behavioral concerns" as well as "[s]ome social issues" (Tr. pp. 358-59; Joint Ex. 41).¹⁴ The July 2022 BHSN referral included the school psychologist's note from the parent that the student recently moved, that the student threw things, hit, kicked, and that he was diagnosed with ADHD (Joint Ex. 41). Additional notes from school psychologist as relayed by the parent included that the student was about to enter kindergarten, demonstrated anxiety related to going to school, and that the student "[p]lay[ed] better with older kids" and "[l]ack[ed] interest in forming friendships" (id.).

Overall, the hearing record shows that the parent shared her concerns about the student at the time of the kindergarten screening and the results of that screening indicated some areas the district needed to address once the student attended school. The school psychologist and the parent spoke in July 2022 wherein these concerns were discussed; a discussion that included confirmation that the student had not yet consistently attended a structured educational program. Additionally, the school psychologist indicated she shared with the parent the general education supports available to the student when he entered kindergarten, and, at the parent's request, the district referred the student for additional counseling supports through the BHSN program. Based on the information before the district at the time, there was not a sufficient reason to suspect the student had a disability such that he required special education and, therefore, the district complied with its child find obligations.

3. September 2022—CSE Referral

Next, the parent argues that the district failed to evaluate the student after it received the parent's referral to the CSE in September 2022. In response, the district argues that at the point of the parent's referral, district staff met with the parent to discuss potential interventions available, given that the student had just entered kindergarten. The district also argues that the parent withdrew her initial referral to the CSE.

After the student's kindergarten screening, the student "was placed in an integrated co-taught classroom . . . as a general education student to provide additional support for his needs" (Parent Ex. V at p. 2). The coordinator testified that the kindergarten ICT classroom to which the student was assigned had "a general education teacher throughout the school day, [] a special education teacher [that] push[ed] in for two hours, [] [and] a TA" in the room "for two and a half

¹⁴ A copy of the BHSN referral is also contained in Parent Exhibit EE (compare Joint Ex. 41, with Parent Ex. EE at p. 1). For purposes of this decision only the Joint Exhibit will be cited.

hours" (Tr. p. 679; see Tr. pp. 390-91, 821-22). The coordinator testified that "essentially there [were] two adults throughout the school day supporting the classroom" (Tr. p. 679). In addition, the school psychologist testified that the "classroom [was] designed" to provide "opportunities for repetition, repetition of directions, [and] reteaching" and that it provided "small group instruction" with "more supports," including "visual supports," "embedded in the program" (Tr. p. 391).

The school psychologist testified that the district "provide[d] extra support for the first week for all students because [they] kn[ew] that [] the whole experience of being a new kindergarten student [was] a lot for them" including "learning the expectations and rules" as well as being around "multiple students in a classroom" (Tr. p. 400 see Tr. pp. 679-80). In her testimony, the special education kindergarten teacher described the ICT kindergarten program, how the teachers coordinated with one another, and provided an overview of the ways new students were taught the expectations and routine (see generally Tr. pp. 821-38). The special education kindergarten teacher also testified that at the beginning of the year, students vary in their response to the new routine, but over time, many "start to build confidence" and eventually "follow rules and expectations" (Tr. pp. 842-43).

The parent testified via affidavit that during her tour of the kindergarten classroom, with the student, the day before school started, she shared her concerns that the student would have difficulty in kindergarten with the teacher (Parent Ex. BB ¶ 30). The special education kindergarten teacher described the student as "very curious" and "very smart" with "a great sense of humor" (Tr. p. 840). The special education kindergarten teacher further testified that on the first day of school, the student "had a difficult time separating when he first came into the classroom" and "seemed easily frustrated" (Tr. pp. 843-44). The special education teacher testified that on the first day of school, the student "scratch[ed] another student" (Tr. p. 844; Parent Ex. D at p. 1).

According to the student referral form, dated September 8, 2022, the student "purposely poked a student . . . with a pencil" and made a verbal threat (Parent Ex. D at p. 1). The student referral form indicated that the parent "was contacted," "met with [the] school psychologist" and the student "was picked up from school" (id.). The school psychologist testified that during her conversation with the parent about this incident, the parent shared that the student's pediatrician had concerns about a potential diagnosis of ADHD, and she "had [the parent] sign consents so [the district] could talk to [] their pediatrician" (Tr. pp. 397-98). This was confirmed by the student referral form that indicated a release was signed, and that behavior data would be "collect[ed]" by the student's teacher going forward (Parent Ex. D at p. 1).

The special education kindergarten teacher testified that district staff "recognized that [] some of [the student's] behaviors were concerning, but it was the first day of school" (Tr. p. 844). As a result of this incident, the school psychologist testified that the team met to determine how to "support [the student]" and that these supports were discussed with the parent (Tr. pp. 398-99, 400; see Tr. p. 844).

On September 12, 2022, the student received a second disciplinary referral for "[a]busive/[t]hreatening [s]tatement(s)" and as a consequence, the student was suspended (Parent Ex. D at p. 2). The student referral form indicated the "school psychologist [was] working with the family to provide the support necessary for the student" and that "a team meeting" was scheduled for September 14 "to make [a] plan" (Tr. p. 404-05; Parent Ex. D at p. 2). In her

testimony, the school psychologist shared that she and the parent spoke earlier in the day on September 12th during which time the parent indicated the student had difficulty sleeping the night before, and then the parent, school psychologist, and principal spoke after this second behavior incident (Tr. pp. 404-06). The school psychologist testified that they "talked about different interventions" the district would establish for the student including additional "adult support" to "help supervise him and to collect data" (Tr. p. 406).

The school psychologist testified that she spoke with the student's doctor who indicated "they had recommended a behavioral evaluation" for the student to "address[] the [p]arent's concern" (Tr. p. 406-07). The school psychologist further testified that on September 13, the district "met as a team to collaborate" and develop "a behavior support plan" (Tr. pp. 407-08). The school psychologist testified that the "behavior support plan [] included rewards," "an individual aide," "choices," "breaks," "preferential seating," and "visuals" to promote the student's use of "safe hands," "safe feet," and "kind words" (Tr. pp. 407-08; Joint Ex. 7). The school psychologist testified that the behavior support plan was discussed and shared with the parent and the student's provider at BHSN on September 14, 2022 (Tr. pp. 408-09, 411, 412, 423-24).

The school psychologist testified that in her meeting with the principal and parent, "a CSE referral was brought up" (Tr. pp. 415, 417). The school psychologist testified that they discussed "it briefly, and then talked about the interventions that [the district] wanted to implement and try" given that the student "had just started kindergarten" (Tr. p. 415). The school psychologist testified that they reviewed what the parent shared about the student's move to a new state and his limited exposure to a structured program, and how the district "wanted to try to get him into a structured setting [and] get him acclimated and adjusted to the kindergarten setting" with the addition of the "behavior supports" (Tr. pp. 415-16).

The parent included in her affidavit that the student demonstrated two behavior incidents within the first three days of school, at which point she referred the student to the CSE at the "invit[ation]" of the principal (Parent Ex. BB ¶¶ 31-33). According to the parent, the principal "speculated that [the student] may have more than ADHD and suggested s psychiatric evaluation id. ¶ 33). The email that included the parent's referral was dated September 13, 2022 (Joint Ex. 5 at pp. 1-2). The parent further testified in her affidavit that she was not provided with a copy of the procedural safeguards notice at that time (Parent Ex. BB ¶ 34).

The school psychologist testified that after the parent submitted her request for a referral to the CSE, she spoke with the parent "during pick-up or drop-off times" and they discussed "all of the interventions and strategies that [they] wanted to put in place for [the student]" (Tr. p. 417). The parent testified in her affidavit that she "was told to withdraw the referral to the CSE by the [s]chool [p]sychologist" on September 22, 2022 (Parent Ex. BB ¶ 36). According to the parent', she was reluctant to do so but the school psychologist indicated the district "wanted to get to know [the student] better" prior to pursuing a CSE referral (id.).

The school psychologist testified that she was made aware that the parent was pursuing "a psychiatric evaluation . . . through Behavioral Health Services North" as well as an evaluation from "Freedom First" (Tr. pp. 417-18). The school psychologist testified that she spoke with the parent about withdrawing the referral, and the parent "seemed like she was in agreement with it,"; she also testified that they would "revisit [the student's] needs as needed" (Tr. pp. 415-16, 417,

418-19). The parent signed a letter drafted by the school psychologist in which the parent withdrew her request for a "psychoeducational evaluation" on September 22, 2022 (Tr. pp. 419-21; Joint. Ex. 6).¹⁵

However, as noted above, after receipt of the referral, the district was required to immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, if the district received a request for a referral, the district would have been required, within 10 school days, to either request parent consent to initiate the evaluation or provide the parent with a copy of the request for a referral (8 NYCRR 200.4[a][2][iv]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (8 NYCRR 200.4[a][9]). "If at such meeting the parent and the building administrator agree in writing that, with the provision of additional general education support services, the referral is unwarranted, the referral shall be deemed withdrawn (8 NYCRR 200.4[a][9][i]). However, in the event an agreement is reached, the agreement must contain a description of the additional general education support services to be provided, instructional strategies to be used and student centered data to be collected and the proposed duration of such program" (8 NYCRR 200.4[a][9][ii]).

Here, the district's failure to immediately provide the parent with a prior written notice when it received the parent's referral on September 13, 2022 and its failure to have a building administrator meet with the parent to discuss general education supports were procedural violations. More concerning, the agreement drafted by the school psychologist did not identify any of the information required to be in such an agreement (Joint Ex. 6), i.e. the additional general education supports to be provided to the student, any proposed instructional strategies such as the behavior plan that was to be implemented, any data to be collected, or the proposed duration of the additional supports (see 8 NYCRR 200.4[a][9][ii]).

Further, the student received individualized supports from September 2022 up and until the student's January 2023 IEP was implemented, however such individualized supports, though provided in a general education setting, were special education in nature. As indicated above and further below, after incidents during the first week of school, the student was assigned a full time individual aide and he was being observed for behavior supports and additional adult support (see Tr. p. 406; Parent Exs. D; V at p. 2). The district also created a behavior support plan based on teacher input and observations, which included a schedule for the 1:1 aide (see Joint Ex. 7).

Additionally, on October 6, 2022, the student was observed by a board certified behavioral analyst (BCBA) and recommendations were made to add to the behavior support plan (Joint Exs. 8; 24 at p. 1). According to the school psychologist's testimony, the district asked for the BCBA

¹⁵ The parent reported that she explained her confusion to the school principal regarding the school's directive to withdraw her CSE referral (Parent Ex. BB ¶ 37). She indicated that the principal told her that if she had not withdrawn the referral she would be acting against the best interests of her son and, although she tried her best to continue to cooperate with the school, she felt in her heart that the student needed to be evaluated (*id.*).

consult "to make sure [they] [] look[ed] at [the student's] overall needs and to support him in the classroom" (Tr. p. 422). The school psychologist testified that the behavioral specialist "consulted and collaborated with the team" in early October, and the behavioral specialist's report indicated the team met on October 13, 2022 (Tr. p. 430; Joint Ex. 8 at p. 1).

According to the behavioral specialist's report, "an individual [reinforcement] system" was recommended for the student as opposed to reliance on the classroom reinforcement system (Joint Ex. 8 at p. 2). The behavioral specialist indicated that "a high frequency reinforcement system" was "critical" for the student and she prepared suggestions for its implementation (*id.* at p. 2). The behavioral specialist also recommended use of a choice board; built-in, non-contingent breaks; modification of how behavior data was shared with the parent; the addition of school-based counseling to the counseling the student received through BHSN; incremental movement of the student's desk placement to bring him back with his peers; relationship building; and teaching replacement behaviors as part of a behavior support plan (*id.* at pp. 2-5). The school psychologist testified that this report was reviewed with the student's school team and the team added a support for use of more consistent language with the student (Tr. pp. 432-33).

The school psychologist testified that she received consent from the parent to provide counseling to the student to address his "coping skills," "skill building in general," "social skills," and "self-regulatory skills" (Tr. pp. 428-29; Ex. 36 at p. 3). While not defined in State regulations, counseling services are listed as an example of a related service, which are defined, in part, as "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]). Federal regulations identify counseling services as a related service, and define counseling services as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel" (34 CFR 300.34[c][2]).

The school psychologist further testified that she also addressed the student's ability to "identify[] feelings" and "different strategies" to increase "flexib[ility]," and they discussed "unexpected and expected behaviors" and his use of "kind words" (Tr. p. 429). The school psychologist testified that she "saw a lot of nice progress over time" and she taught him how to appreciate personal space to address "his physical behavior" (Tr. p. 429).

The school psychologist testified that the district collected data on the student's "disruptive behaviors" along with "his physical aggression" and "verbal aggression" (Tr. p. 425). According to the data collected between September 19 and October 14, the frequency of the student's problematic behaviors decreased (Joint Ex. 9 at pp. 1-2). The school psychologist testified that the student "respond[ed] to the interventions that were [] put in place" (Tr. pp. 433-34), and both the school psychologist and the special education kindergarten teacher testified that the frequency of the student's inappropriate behaviors decreased in the beginning of the school year as shown by the data (Tr. pp. 433, 434, 439-40, 461, 866-67). The school psychologist testified that when the student became "more acclimated to school, the school routine, the school environment, [and] the expectations of being a kindergarten student," the student "made really nice progress" with "the supports" that were established (Tr. p. 440).

Following the implementation of the behavior plan, the special education kindergarten teacher testified that the student responded to the reward system, though "[i]t took a little bit of time" (Tr. p. 851). The special education kindergarten teacher testified that "towards the end of

October" the student "earn[ed]" his points, "achiev[ed] his goals," and the teachers did not "see[] a lot of those behaviors that [they] were concerned with" (Tr. p. 868). The special education kindergarten teacher described that they did not "expect[] perfection," but "wanted to see improvement" (Tr. p. 868). However, the special education kindergarten teacher further testified that "[i]n November" the student's "respon[se] to the behavior plan" "bec[a]me inconsistent" (Tr. p. 868).

According to the special education kindergarten teacher's testimony, the student shared with her that "he [did not] sleep well" at night and "he stay[ed] up late watching things on his iPad" which was why he was unable "to stay awake" during some school days (Tr. p. 869). The special education kindergarten teacher testified that the student's frequent tardiness had an impact given that he missed the "explicit instruction" in "social skills and behavior expectations" provided in the morning (Tr. pp. 871-72).

The school psychologist testified that the parent shared information with the school about the student's "poor sleep patterns" and the parent requested to be informed about his level of fatigue so that she could "make the decision whether to take him home or not" (Tr. p. 426). According to the attendance record, between September 2022 and November 2022 the student had three early departures, 14 tardies, and 10 absences (Dist. Ex. 3 at pp. 1-2). The attendance record indicated that the majority (8) of tardies were "unexcused" and the majority (9) of absences were "excused" (*id.* at pp. 1-2). The district provided the parent with a chronic absenteeism letter dated November 29, 2022, at which point the student "ha[d] accumulated 10 absences" (Dist. Ex. 4). The principal testified that the parent shared with him that the student had difficulty sleeping, so she "g[a]ve him time to sleep" and that was "why he was often tardy" (Tr. p. 1036).

The student's first trimester report card indicated the student obtained ratings of "needs additional support" for writing and reading, and "proficient" in listening and speaking (Joint Ex. 19 at p. 1). The first trimester report card indicated that "[a]ttendance and tardiness [] affected [the student's] rate of progress in reading and writing" but that he "actively participate[d] in class discussions" (Joint Ex. 19 at p. 1). In math, the first trimester report card indicated the student's progress was affected by his attendance, and that he "struggl[ed] with number recognition, writing numbers to [five], and understanding the concept[s] of greater than, less than, and equal to" (Joint Ex. 19 at p. 1). The first trimester report card indicated the student obtained a rating of "needs additional support" in "counting and cardinality" (Joint Ex. 19 at p. 1). In all other areas, the first trimester report card rated the student as "proficient" and his teachers indicated the student "ha[d] a noticeable love for learning, especially when it c[a]me[] to science," that he "ha[d] grown a lot since September," and "improved on listening and following directions" (Joint Ex. 19 at p. 2).

During cross-examination, the school psychologist testified that she provided the student with approximately six counseling sessions during October and November 2022 (Tr. p. 588). The school psychologist further offered that "the counseling was not always consistent" because "sometimes [the student] was absent" or "tardy" (Tr. p. 595). The school psychologist confirmed during cross-examination that the student's behavior improved between September and October, but "that his behavior deteriorated" after a parent-teacher conference in November (Tr. pp. 602-03).

The parent testified in her affidavit that between the time of the withdrawal of the CSE referral in September 2022 and the second referral in November 2022 she "cooperate[d] with the school," brought the student "to the psychiatric nurse practitioner," "continu[ed] with the BHSN counselor," and "arrang[ed] for [a] [p]sychiatric evaluation and intervention" (Tr. p. 1260; Parent Exs. BB ¶¶ 36-43; H). The student was diagnosed with ADHD by the psychiatric nurse practitioner in October 2022 (Tr. p. 1263; Parent Ex. H at pp. 2, 3, 5).

On November 21, 2022, the student was involved in a physical incident with his aide which resulted in the aide visiting the school nurse and the student referral form indicated the student received a half-day out-of-school suspension (Tr. pp. 445-46; Parent Ex. D at p. 5).

On November 25, 2022, the parent sent an email to the principal in which she requested an evaluation through the CSE (Dist. Ex. 5 at p. 2). The district sent a prior written notice on November 28, 2022 that informed the parent about the evaluations that would be completed as part of the student's initial evaluation (Joint Ex. 11). The parent provided her consent for the evaluations on December 2, 2022 (Joint Ex. 12).

Based on the above, the evidence in the hearing record shows that the process the district took in response to the parent's referral of the student for an initial evaluation in September 2022 was not in accord with State regulations. In particular, the district did not provide the parent with sufficient information as part of the letter drafted by the district school psychologist for withdrawal of the parent's referral. In addition, the district, sometime around the time of the parent's September 2022 referral of the student for an initial evaluation, knew or should have known the student had behaviors that were affecting his and other students' ability to learn and which required special education supports to address. In particular, the district as of the first week of school began providing the student with a 1:1 aide and had a behavior plan in place for the student. The evidence shows that the district decided to observe the student in the general education environment for a prolonged period of time prior to performing an initial evaluation so that the CSE could convene and discuss the student's eligibility (see Tr. pp. 425; Joint Ex. 9). Though there was evidence that the student made some improvement with the behavior support plan in October 2022, the district should have proceeded with the initial CSE referral on September 13, 2022 and evaluated the student.

The district's failure to evaluate the student timely after the student's initial referral in September 2022 denied the student a FAPE. The district had 10 school days to obtain consent from the parent and then 60 days to complete the initial evaluation and 60 school days to arrange for appropriate special programs and services (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5], [e][1]; see also 34 CFR 300.300[a]). As such the district denied the student a FAPE from January 9, 2023 until February 1, 2023, when the January 2023 IEP was set for implementation after the CSE convened, found the student eligible for special education, and developed an IEP for the student and sent the parent consent for the initial provision of special education and a prior written notice of the January 2023 CSE's recommendations. The IHO's determination to the contrary must be reversed.

C. Relief – Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The

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

As noted above, the IHO awarded compensatory education for the instruction and services the student missed when he attended school for a reduced day, from January 2022, through the end of the 2022-23 school year based on an hour for hour computation of any missed instruction and services to be calculated by the district and neither party has appealed from that finding (IHO Decision at p. 67).

Turning to my above finding that the student was denied a FAPE from January 9, 2023 through February 1, 2023 due to the district's failure to conduct the student's initial evaluation and have an educational plan in place, according to the student's behavior support plan, the student had reading/writing for 90-minutes per day from 9:45-11:15 a.m., math 60-minutes per day from 12:30-1:30 p.m., a special class 40-minutes per day from 1:50-2:30 p.m. and "[c]lassroom for WIN (What I Need) Time" 40-minutes per day from 2:30-3:10 to help the student with his work or review skills (see Joint Ex. 7 at p. 2). According to the attendance report, the student had excused early departures on 17 days between September 8, 2022 and June 13, 2023 (Dist. Ex. 3). The attendance report also shows that on the excused days the student left primarily around lunch time, meaning the student mainly missed out on math instruction, a specials class, and the WIN classroom time (*id.*). Since the district denied the student a FAPE for 15 school days (January 9, 2023 to January 27, 2023) and has not cross-appealed from the IHO's award of compensatory education, the amount of compensatory education awarded by the IHO is reasonable and the hearing record does not provide a sufficient basis for increasing the already awarded compensatory education.¹⁶

¹⁶ The parent also raises claims in her request for review that the IHO erred in finding that the private neuropsychologist was unable to provide accurate recommendations for the student, that neither the district nor

VII. Conclusion

Having found that the district denied the student a FAPE from January 9, 2023 to January 27, 2023 by failing to timely evaluate the student after the initial referral to the CSE on September 13, 2022, the IHO's determination must be reversed.

I have considered the parties' remaining contentions and find them unnecessary to address given my ultimate decision above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision, dated September 6, 2024, is modified by reversing those portions which determined the district did not deny the student a FAPE for a portion of the 2022-23 school year from January 9, 2023 to January 27, 2023.

**Dated: Albany, New York
December 3, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**

the IHO acknowledged the student as having a specific learning disability, and that the parent was denied the opportunity to participate, the parent has not identified in the request for review any basis for finding that these identified issues may have resulted in a loss of an educational opportunity for the student. Accordingly, even if I were to address such issues and found that in fact these violations did occur, the violations would be equivalent to procedural violations and compensatory education is not a proper remedy for procedural violations absent a finding of a substantive deficiency due to either the content of the IEPs or the delivery of the mandated services (see J.N. v. Jefferson County Bd. of Educ., 12 F.4th 1355, 1366 [11th Cir. 2021] [finding that a right to compensatory education as relief turns on whether a procedural violation resulted in a loss of educational opportunity for the student]; Maine Sch. Admin. Dist. No. 35 v. Mr. R., 321 F.3d 9, 19 [1st Cir. 2003] [recognizing "that compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA"]).