The University of the State of New York

The State Education Department
State Review Officer
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No. 24-429

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:
Cuddy Law Firm, PLLC., attorneys for petitioner, by Benjamin M. Kopp., Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see Y.S. v. New York City Dep't of Educ., 2024 WL 4355049 [S.D.N.Y. Sept. 30, 2024]). This proceeding initially arose 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), as relevant to this administrative review, previously appealed from the decision of an impartial hearing officer (IHO), which found that the educational program respondent (the district) recommended for her daughter for the 2020-21 school year was appropriate and denied the parent's request for compensatory educational services. Having provided the parties with an opportunity to be heard and upon reexamination of the hearing record of the impartial hearing proceedings, the prior State-level submissions and administrative decisions, as well as the District Court's order of remand, the evidence demonstrates that the parent, as explained herein, is not entitled to an additional award of compensatory educational services for the 2020-21 school year.

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 detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in

Application of a Student with a Disability, Appeal No. 23-024. The parties' familiarity with those matters and the IHO's decision is presumed; however, the judicial review that followed the local and State-level administrative proceedings and the subsequent remand by the District Court are set forth below with some pertinent facts repeated from the prior State-level decision to provide the relevant context for this determination.

The student in this case has been diagnosed as having a "mild ASD [autism spectrum disorder]" and an attention deficit hyperactivity disorder-combined type (ADHD), and initially began receiving special education and related services through the Early Intervention (EI) program and Committee on Preschool Special Education (CPSE) (Parent Ex. Q at p. 3; Dist. Ex. 1 at pp. 2, 4-5). The district found the student eligible to receive school-aged special education and related services as a student with autism in April 2018 (kindergarten) (see Parent Ex. I at p. 1, 10).[1] During the 2018-19 school year, the student attended a 12:1+1 special class placement in a district specialized school and received related services consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy pursuant to the recommendations in the student's April 2018 IEP (see Tr. pp. 30-33).[2]

In a letter to the district dated February 5, 2019, the parent expressed disagreement with the district's January 2018 evaluations of the student's academic, social/emotional, and behavioral abilities (see Parent Ex. BB at p. 3). As a result, the district reevaluated the student in April 2019 by completing a social history update, a classroom observation, a bilingual speech-language evaluation, an OT evaluation, and a PT evaluation; in May 2019, the district also completed a functional behavioral assessment of the student (FBA) (see generally Parent Exs. R-V; Dist. Ex. 1).

By letter dated May 21, 2019, the parent expressed disagreement with the district's April and May 2019 reevaluation of the student (see Parent Ex. C at p. 4). Thereafter, in a due process complaint notice dated May 24, 2019 (May 2019 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, and 2018-19 school years (id. at p. 3).

In the meantime, the student continued to attend the district in the same special class placement at a district specialized school for the 2019-20 school year (first grade) (see Tr. pp. 30-33).

On February 2, 2020, the IHO presiding over the impartial hearing related to the parent's May 2019 due process complaint notice issued a final decision in that matter (February 2020 IHO decision) (see Parent Ex. C at p. 6). According to the February 2020 IHO decision, although the parent had expressed disagreement with the district's April and May 2019 reevaluation of the

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

[2] In the April 2018 IEP, the CSE recommended that all of the student's instruction and related services were to be delivered in English (see Parent Ex. I at pp. 6-7, 10). Subsequent to the development of the April 2018 IEP, the parent, in June 2018, completed a Home Language Identification Survey identifying English as the student's dominant language (see Dist. Ex. 1 at p. 5).

student, the district had not filed its own due process complaint notice to defend the appropriateness of the reevaluation (id. at p. 4). As relief, the IHO ordered the district to directly fund (or to reimburse the parent for) an independent educational evaluation (IEE), including, as relevant to the instant administrative review, an independent PT evaluation of the student (id. at pp. 5-6). In addition, the IHO ordered the district to reevaluate the student in "all areas of her suspected disabilities not identified [therein] and not evaluated within the last two years" (id. at p. 6). The IHO also ordered the district to convene a CSE meeting to "produce a new IEP for the student that consider[ed] all of the student's available evaluations and any related information and produce a new IEP" for the student for the 2020-21 school year (id.).[3]

In or around April 2020, the district shifted to remote instruction due to the COVID-19 pandemic; the student's special education remote learning plan included the delivery of one 30-minute session per week of counseling (English), one 30-mintue session per week of speech-language therapy (English), and one 30-minute session per week of OT (English) (see Parent Ex. H at p. 1).

On June 26, 2020, the district's impartial hearing office transmitted the February 2020 IHO decision to the parties (see Parent Ex. B at p. 3). Evidence in the hearing record reflects that the district acknowledged that the delayed transmittal of the February 2020 IHO decision was due to "'clerical oversight and [the] volume of cases'" (id.). By letter dated August 3, 2020, the parent filed a State complaint with the New York State Education Department, alleging that the district's impartial hearing office failed to mail the final decision to the parties in a timely manner (id. at p. 1).

For the 2020-21 school year (second grade), the student continued to attend the same district specialized school she had attended since kindergarten, with instruction provided remotely due to the COVID-19 pandemic (see Tr. pp. 30-33; see also Parent Ex. E at p. 3).

In a letter dated September 29, 2020, the Office of Special Education sustained the parent's State complaint alleging that the district failed to timely transmit the February 2020 IHO decision to the parties until June 26, 2020 (see Parent Ex. B at pp. 1, 3). However, the Office of Special Education also determined that "no further action [wa]s required as the final decision and orders ha[d] been transmitted to the parties" (id. at p. 3).

Consistent with the February 2020 IHO decision, a CSE convened on October 8, 2020, and developed an IEP for the student for the 2020-21 school year (see Parent Ex. G at pp. 1, 27). At that time, the October 2020 CSE recommended that the student participate in a 12-month school year program (delivered in English), which consisted of a 12:1+1 special class placement in a "non-specialized" district community school with the following related services: one 30-minute session per week of counseling in a group, two 30-minute sessions per week of OT in a group, one 30-minute session per week speech-language therapy in a group (classroom), one 30-minute

[3] Consistent with the IHO's decision and order, the parent obtained a neuropsychological IEE of the student, which occurred over the course of four dates in July 2020, and resulted in an evaluation report dated September 18, 2020 (see Application of a Student with a Disability, Appeal No. 23-024). However, the hearing record is devoid of evidence demonstrating that the parent provided the district with a copy of the September 2020 neuropsychological IEE report prior to the October 2020 CSE meeting (id.).

session per week of speech-language therapy per week in a group (therapy room), and one 30-minute session per month of parent counseling and training services (id. at pp. 21-22).

On February 19, 2021, the parent obtained the PT IEE of the student (signed on March 26, 2021; hereinafter, March 2021 PT IEE), as ordered in the February 2020 IHO decision (see Parent Ex. L at p. 1). Thereafter, on March 22, 2021, the district conducted a psychological evaluation update of the student, as part of her triennial reevaluation and pursuant to the February 2020 IHO decision (see Dist. Ex. N at p. 1). On April 19, 2021, a CSE convened and developed the student's IEP for the 2021-22 school year (third grade) (see Parent Ex. F at pp. 1, 27). Based on the evaluative information available to the April 2021 CSE—which included the March 2021 PT IEE—the CSE recommended that the student participate in a 12-month school year program, consisting of a 12:1+1 special class placement in a State-approved nonpublic school together with the following related services: one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual OT (therapy room), one 30-minute session per month of parent counseling and training, two 30-minute sessions per week of individual OT (classroom), two 30-minute sessions per week of individual PT, and three 60-minute sessions per week of individual speech-language therapy (id. at pp. 22-24).

By due process complaint notice dated May 16, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A at pp. 1, 7). Specific to the 2020-21 school year, the parent asserted that the district significantly impeded the student's comprehensive evaluations by failing to provide the parent with the February 2020 IHO decision until June 26, 2020, and by failing to sufficiently evaluate the student timely to identify and accommodate her needs (id. at pp. 2-3). The parent further argued that these delays impeded the student's right to a FAPE and significantly impeded the parent's meaningful participation in the decision-making process (id. at p. 4).

Next, the parent alleged that the October 2020 IEP failed to offer the student a FAPE because the CSE failed to offer an appropriate program to the student, specifically noting that the October 2020 IEP did not reflect the student's evaluations or needs and failed to include a recommendation for PT services (see Parent Ex. A at pp. 5-6).

As relief for these alleged violations, the parent sought an order directing the district to provide the student with "compensatory academic and related services, at an enhanced rate, with the appropriate nature and total hours of such to be determined following the above evaluations"; and an order awarding "related services, at an enhanced rate, with the appropriate nature and total hours of such to be determined following the above evaluations" (Parent Ex. A at pp. 7-8).

Following an impartial hearing related to the parent's May 2022 due process complaint notice, an IHO issued a decision, dated January 8, 2023 (January 2023 IHO decision), which found that the district offered the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, and, therefore, denied all of the parent's requested relief (see IHO Decision at p. 21).

In a State-level administrative appeal from the January 2023 IHO decision, the parent argued, in part, that the IHO erred by finding that the district offered the student a FAPE for the 2020-21 school year and by denying the parent's request for compensatory educational services (see Application of a Student with a Disability, Appeal No. 23-024). As relevant herein, the parent

asserted that the IHO failed to find that the district significantly impeded the parent from obtaining the evaluations as ordered in the February 2020 IHO decision, and by failing to find that the October 2020 IEP failed to provide the student with an appropriate program (id.). As relief, the parent requested an order directing the district to provide the student with compensatory educational services consisting of 15.5 hours of PT services (id.).

On April 20, 2023, the undersigned sustained the parent's appeal, in part (see Application of a Student with a Disability, Appeal No. 23-024). With respect to the 2020-21 school year and the parent's allegations pertaining to the delayed transmittal of the February 2020 IHO decision, it was determined that the parent's claim concerned the enforcement of the prior February 2020 IHO decision, and therefore, the SRO had no jurisdiction to review the claim (id.; see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Additionally, it was noted that, even if the SRO had jurisdiction to review the parent's claim, the evidence in the hearing record demonstrated that after the parent provided the district with the completed IEE, a CSE timely convened or reconvened to discuss the findings of the IEE (see Application of a Student with a Disability, Appeal No. 23-024).

With regard to the October 2020 IEP, the parent claimed that the IHO had erred by finding the IEP appropriate in absence of a recommendation for PT services (see Application of a Student with a Disability, Appeal No. 23-024). On this point, the undersigned SRO found that the evidence in the hearing record did not support the parent's claim (id.). Rather, it was determined that the October 2020 CSE's decision to discontinue PT services was substantiated by the evaluative information available at the time of the October 2020 CSE meeting (id.). As a result, the SRO upheld the IHO's finding that the discontinuation of PT in October 2020 did not result in a denial of a FAPE, and furthermore, that compensatory education in the form of PT services was not warranted (id.).

The parent sought judicial review of the undersigned's April 20, 2023 State-level decision in the United States District Court for the Southern District of New York (see Y.S., 2024 WL 4355049). The parties cross-moved for summary judgment; with exception of the discrete issues remanded for further administrative review, the District Court granted "[i]n all other respects," the district's motion for summary judgment and denied the parent's motion for summary judgment (Y.S., 2024 WL 4355049, at *1, *23). On remand, the District Court ordered the SRO to consider the following: first, whether the district "timely acted on [the parent's] request for [IEEs]"; and second, "only to the extent required by any determination on that issue, to consider the adequacy of the October 2020 IEP with respect to its failure to include a mandate for [PT] services" (Y.S., 2024 WL 4355049, at *23). With respect to the consideration of the parent's request for IEEs, the District Court noted that a district's failure to timely act on a request for IEEs "may constitute a procedural violation of the IDEA" (Y.S., 2024 WL 4355049, at *13, citing Taylor v. Dist. of Columbia, 770 F. Supp. 2d 105, 109-10 [D.D.C. 2011] and Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 373, at *3 [N.D. Cal. Dec. 15, 2006]). The Court also noted, however, that "not every procedural violation results" in a denial of a FAPE; rather, procedural violations "render an

IEP inadequate only where they '(1) impeded the child's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or (3) caused a deprivation of educational benefits'" (Y.S., 2024 WL 4355049, at *13, citing S.W. V. New York City Dep't of Educ., 92 F. Supp. 3d 143, 155 [S.D.N.Y. 2015]). After noting that the parent's allegation in the May 2022 due process complaint notice "track[ed] closely the type of claim" described by the District Court, the Court took "no position on whether the [district's] six-month delay in transmitting or otherwise acting on" the February 2020 IHO decision "constituted a procedural violation of the IDEA, or if it did, whether that delay interfered with [the parent's] or [the student's] substantive rights" (Y.S., 2024 WL 4355049, at *13-*14).

On October 8, 2024, the District Court filed the remand order with the undersigned at the Office of State Review. Accordingly, as part of the review process and in response to the District Court's concerns, in a letter dated October 9, 2024, the parties were offered an opportunity to be heard by submitting their respective positions regarding issues remanded.

IV. Arguments on Remand

Each party submitted a supplemental brief in accordance with the schedule set after remand. The parent argues that the district did not timely act on the parent's request for an IEE, pointing to the State complaint determination in her favor. The parent contends that, as a result, the "IEEs were necessary and unavailable" for the October 2020 CSE meeting (Parent Verified Response ¶ 14). With respect to the student's October 2020 IEP, the parent argues that the CSE "omitted an entire area of need," namely, PT services. According to the parent, the March 2021 PT IEE identified deficits in the student's "gross motor, postural muscle strength and range, body coordination, and balancing" and, therefore, the student is entitled to an award of compensatory PT services consisting of "at least" two 30-minute sessions per week (if not three 30-minute sessions per week) for the 27 weeks between the implementation dates of the October 2020 IEP and April 2021 IEP, for a total of either 27 hours or 40.5 hours.[4]

In its supplemental brief, the district initially contends that the student's October 2020 IEP was developed "over three months after" the district transmitted the February 2020 IHO decision to the parties in June 2020. Next, the district argues that the appropriateness of an IEP must be determined prospectively and with respect to what evaluative information the CSE had available to it. According to the district, the October 2020 CSE had sufficient evaluative information—including the district's 2019 evaluations of the student, teacher reports, input from participants at the meeting, and the student's speech-language IEE (dated September 2020). To the extent that the October 2020 CSE did not have the student's neuropsychological IEE report—also dated September 2020—available for review at the meeting, the district alleges that the parent failed to provide it to the district prior to the meeting. With regard to the March 2021 PT IEE, the district argues that the hearing record lacks any evidence establishing why the parent did not obtain the

[4] To the extent that the parent asserts that the student is also entitled to an additional 145 hours of tutoring and 27 hours of speech-language therapy because the student was "less able to access and enjoy" other areas of need because she did not receive PT services, the parent does not cite to any evidence in the hearing record to support this contention and as discussed in this decision, the lack of PT services for the time period at issue does not appear to have impacted the student's ability to benefit from her educational program. Additionally, these claims are beyond the scope of the District Court's remand.

IEE until months after receiving the February 2020 IHO decision; as a result, the district submits that the delay in transmitting the February 2020 IHO decision cannot form the basis for the 2021 PT IEE not being available to the October 2020 CSE. In addition, the district contends that the October 2020 CSE's decision to not recommend PT services was supported by the evaluative information available to the CSE, and any subsequent decision by the April 2021 CSE to recommend PT services is irrelevant to the substantive appropriateness of the October 2020 IEP.

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]).[5]

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

A Transmittal of the February 2020 IHO Decision

As remanded by the District Court, it must be determined whether the late transmittal of the IHO's February 2020 decision to the parties' constituted a procedural violation and whether such a violation interfered with the student's substantive rights (Y.S., 2024 WL 4355049, at *14).

[5] 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).

According to State regulation, an IHO is required to "mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education" no later than 14 days from the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Here, the district received the IHO Decision on February 2, 2020; however, it is undisputed that the February 2020 IHO decision was not transmitted to the parent until June 26, 2020 (Parent Ex. B at p. 3). As a result, there can be no question that the district violated State regulation.

While neither party presents an argument in their respective supplemental briefs directly on point with the District Court's issue submitted on remand, to wit, whether the delayed transmittal of the February 2020 IHO decision constituted a procedural violation that interfered with the student's substantive rights, at least one other District Court decision provides some guidance. In tackling a similar issue in Herrion v. District of Columbia, the Court found that, while it was well settled that the failure to timely evaluate a student constituted a procedural violation, the failure to "provide a child with disabilities and her parents with an [IEE] at public expense, c[ould]—at least at times—'significantly compromise[] [the child's] educational opportunities and [could thereby] den[y] him a FAPE'" (Herrion v. Dist. of Columbia, 2023 WL 2643881, at *8-*9 [D.D.C. Mar. 27, 2023], citing Hill v. Dist. of Columbia, 2016 WL 4506972, at *18 [D.D.C. Aug. 26, 2023] [concluding that, where a delayed evaluation proposed recommendations that were, because of the delay, not considered by the IEP team, the delay "caused a deprivation of [the student's] educational benefits"]). The Herrion Court analogized that it was "possible, of course, that a delay in conducting a required IEE—or a failure to provide a child and her parents with the means of obtaining an IEE altogether—might not 'affect [a student's] substantive rights,' where, for example, 'the student's education would not have been different had there been no delay'" (Herrion, 2023 WL 2643881, at *9). The Court explained that this "might be the case" if, for example, a hearing record did not contain evidence that the student's placement would differ if the evaluations had been completed or if the evaluations, once completed, did not result in any change to the student's placement or education (id.).

Following this rationale, the district's failure to timely transmit the February 2020 IHO decision in this matter constitutes a procedural violation, which resulted in a failure to offer the student a FAPE for the 2020-21 school year from the implementation date of the student's October 2020 IEP through the implementation date of the student's April 2021 IEP. Here, the evidence in the hearing record reveals that the October 2020 CSE declined to recommend PT services for the student based on the evaluative information available at that time, which did not include the March 2021 PT IEE, but instead, relied primarily on information obtained from the district's April 2019 PT evaluation (Parent Ex. G at pp. 8-10). In contrast, the April 2021 CSE, which had both the March 2021 PT IEE and the April 2019 PT evaluation available for review, recommended that the student receive PT services based on the recommendation contained within the PT IEE (Parent Ex. F at pp. 8-11, 23). Thus, the Court's holding in Herrion dictates that, because the hearing record in this matter included evidence that the student's educational program changed as a result of the recommendations in the March 2021 PT IEE that had been delayed by the late transmittal of the February 2020 IHO decision, it follows that the October 2020 IEP failed to offer the student a FAPE as, presumably, the October 2020 CSE would have recommended PT services had the PT IEE been available for review at that time.

B. Relief—Compensatory Educational Services

Having reached a determination regarding the issues remanded by the Y.S. Court, the inquiry now turns to whether the student is entitled to an award of compensatory PT for the district's failure to offer the student a FAPE in the October 2020 IEP. The parent argues that the student is entitled to an award of compensatory PT services for the timeframe between the implementation date of the October 2020 IEP (October 8, 2020) through the implementation date of the April 2021 IEP (May 4, 2021). The parent also argues that the student should have received either two or three 30-minute sessions per week of PT during that time.

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"]).

The evidence in the hearing record reflects that, at the April 2021 CSE meeting, the CSE recommended that the student receive two 30-minute sessions per week of individual PT services (see Parent Ex. F at pp. 10-11, 23). In reaching this decision, and as documented in the April 2021 IEP, the CSE appeared to weigh evaluative information obtained from the March 2021 PT IEE, the April 2019 PT evaluation, discussions held by the district's school based support team (SBST), and input from the physical therapist who participated at the CSE meeting (id. at pp. 10-11, 30). However, at time of the April 2021 CSE meeting—and for the entire 2020-21 school year to date—the student was receiving instruction remotely and, therefore, was not attending school in person (id. at p. 3). Based on the evidence in the hearing record, the purpose of school-based PT services is to provide "support to help students physically participate within the context of his/her educational program whereas medical-based PT provides rehabilitative support that does not directly relate to a student's academics and school performance" (Parent Ex. S at p. 4). Therefore, since an award of compensatory educational services aims to place the student in the position he

or she would have been in had the district complied with its obligations under the IDEA, an award of compensatory PT services under the circumstances of this case is not warranted, as the student was not attending school during the 2020-21 school year and did not require PT services to participate in, or to receive the benefit of, her educational program.

VII. Conclusion

For the reasons described above, the evidence in the hearing record supports a finding that the district's failure to timely transmit the February 2020 IHO decision to the parties constituted a procedural violation that impeded the student's right to a FAPE from October 2020 through April 2021. However, the evidence in the hearing record does not support a determination that the student is entitled to receive compensatory PT services as a remedy for this violation.

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

STEVEN KROLAK
STATE REVIEW OFFICER