The University of the State of New York

The State Education Department
State Review Officer
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No. 24-462

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:
The Legal Aid Society, attorneys for petitioner, by Dawn L. Yuster, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 that part of a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund compensatory education and transportation to and from the requested services for the student for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The Committee on Preschool Special Education (CPSE) arranged for an initial evaluation of the student in July and August 2022, at which time an agency conducted a bilingual social history, a bilingual (Spanish) psychological evaluation, a bilingual educational evaluation, a bilingual speech-language evaluation, and an occupational therapy (OT) evaluation (Parent Exs. C; D at p. 4).[1] The student turned five years old in September 2022, and correspondence between the district and counsel for the parents indicated that as of November 1, 2022, the student was not "registered at her zone school," and the CSE had not convened a meeting to determine the student's

[1] The educational evaluation report indicated that in the cognitive, communication, fine motor and adaptive developmental domains, the student presented with delays of at least 25 percent (Parent Ex. C at pp. 24, 26-27). At the time of the educational evaluation, the student was not toilet trained, had difficulty expressing herself, and showed aggressive behaviors (id. at pp. 23, 26).

eligibility for special education or developed an IEP for the 2022-23 school year (kindergarten) (Parent Exs. D at pp. 1, 3-4; E at pp. 6, 7).

The parent enrolled the student in public school and a CSE convened on or about November 23, 2022, found the student eligible for school-age special education, and developed an IEP (see Parent Exs. E at p.1; G; see also IHO Exs. I at pp. 2-3; II at p. 6).[2] On December 9, 2022, a district school psychologist informed the social worker from the parent's attorney's office via email that the CSE would "reconvene" on December 21, 2022 to change the type of paraprofessional services recommended for the student (Parent Ex. G; see Parent Ex. D at p. 2).

A CSE reconvened on December 21, 2022, and, finding that the student was eligible to receive special education as a student with a speech or language impairment, recommended 12-month programming consisting of an 8:1+1 special class placement in a specialized school with related services (Parent Ex. F at pp. 1, 17-18, 19, 22).[3] Specifically, the CSE recommended that the student receive one 30-minute session per week of individual OT, two 30-minute sessions per week of group OT, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy (id. at p. 18). The student was also recommended to receive daily, full-time, group health paraprofessional services to assist with her toileting needs (id.).

The student began attending a district public school "in December 2022, and was placed in an [integrated co-teaching] ICT class" composed of two teachers and 25 students (Parent Ex. I at 2). It was reported that the student did not do any work in the ICT class on the first day, and that, despite being provided with 1:1 paraprofessional services the next day, did not engage with schoolwork on the second day either (id.). On the third day, the student was transferred to a "pre-k" class that had four adults and 11 students (id. at pp. 2, 28). While in the pre-k class, the student was reported to exhibit aggressive behaviors and required "constant individual attention" (id. at p. 2). During this time the student was not receiving speech-language therapy "due to lack of availability," and that the speech-language supervisor was "notified of [the] compliance issue" (id. at p. 28).

[2] The exhibit list appended to the IHO's decision, as well as the discussions regarding proposed evidence during the impartial hearing, indicated that parent exhibit F is a copy of an IEP related to a CSE meeting held on November 23, 2022 (see IHO Decision at p. 22; Tr. p. 36). The parent's assertions in the request for review also seem to imply that parent's exhibit F is a copy of the November 2022 IEP (Req. for Rev. at p. 3). However, in reviewing parent exhibit F, it actually appears to be an IEP related to a CSE meeting held on December 21, 2022, and has an implementation date of November 28, 2022 (Parent Ex. F at pp. 1, 23). Those same dates appear on another IEP included in the record, under parent's exhibit H, described as an IEP from December 2022 by the IHO and the parent (compare Parent Exs. F pp. at 1, 23 with H at pp. 1, 23; see IHO Decision at p. 22; Tr. p. 36). Presumably, both exhibits include a copy of the same IEP, and there does not appear to be a copy of an IEP from November 2022 in the record. I note that both exhibits include bates stamps reflecting their respective exhibit denominations, so it is likely that the December 2022 IEP was included as both exhibits during the impartial hearing. There is evidence in the record that the IHO noted this discrepancy, among others, after the impartial hearing (IHO Ex. I at pp. 2-4). However, while these minor discrepancies are noted for record clarification purposes, they otherwise do not have any bearing on the findings made herein.

[3] The student's eligibility for special education as a student a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

A CSE reconvened on February 9, 2023 and developed an IEP with a projected implementation date of February 13, 2023 (Parent Ex. I at pp. 1, 26). The February 2023 CSE recommended 12-month programming consisting of a 6:1+1 special class in a specialized school together with one 30-minute session per week of group counseling services in Spanish, three 30-minute sessions per week of individual OT in English, three 30-minute sessions per week of individual speech-language therapy in Spanish, and daily, full-time, group health paraprofessional to assist with the student's toileting needs (id. at pp. 21-22, 26).

Also on February 9, 2023, the social worker, on behalf of the parent, emailed the district requesting issuance of a "P-1 Nickerson letter," as the student had been awaiting placement in a specialized school since the "original" CSE meeting in November 2022, and that the "community school" was unable to adequately address the student's special education needs (Parent Ex. J at pp. 4-5).[4] The social worker indicated that at the student's then-current placement she was only receiving "one and a half hours of instruction per day" (id. at p. 4).[5] On February 16, 2023, the district provided the parent with a "list of approved schools" and letter allowing the parent to enroll the student in "an appropriate approved private day school" at district expense (Nickerson letter) (Parent Exs. J at pp. 1-2; K; L).

On April 28, 2023, the social worker, on behalf of the parent, emailed the student's school principal noting that the student's then-current placement with a truncated schedule was "incredibly disruptive," and asked if it were possible to offer the student a full-day program while she awaited proper placement (Parent Ex. M at p. 2). The same day the student's community school principal emailed other district staff, indicating that the student was entitled to a 6:1+1 special class in a specialized school placement as of February 13, 2023, yet she had not received a placement offer (id. at p. 1).

On May 19, 2023, a physical therapist conducted a physical therapy (PT) evaluation of the student at her school, which found that the student presented with functional strength, balance and coordination to physically perform school functional activities and navigate her school environment to access her educational program (see Parent Ex. N). A CSE reconvened on May 31, 2023, included the PT evaluation results in the student's IEP, and declined to recommend PT for the student (Parent Ex. O at pp. 2, 8-9, 24; see Parent Ex. N). The May 2023 CSE did not modify the student's recommended program and related services from the February 2023 IEP (compare Parent Exs. I at pp. 21-22, 26, with O at pp. 23-25, 28).[6]

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[4] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that resulted from a stipulation and consent order in a federal class action suit and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). As a remedy, a Nickerson letter was available to parents and students who were class members in accordance with the terms of the consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]).

[5] According to the parent, "the school called [him] to pick up [the student] about one hour to one hour-and-a half after [he] dropped [the student] off," and that the school told him to "pick [the student] up from school every day" due to her "aggressive" behavior (Parent Ex. CC ¶¶ 20-21).

[6] For purposes of further record clarification, it appears that a second version or copy of the May 2023 IEP has

On May 25, 2023, the parent signed a contract and addendum for the student's enrollment in the Rebecca School for the 2023-2024 extended 12-month school year, spanning a term of July 5, 2023 to June 21, 2024 (see generally Parent Ex. R).[7] It was noted in the contract that the tuition paid did not include the cost of 1:1 health professional services (id. at p. 1). The addendum indicated that a nonrefundable deposit of $150 was payable to the school, and that the parent agreed to seek public funding for the student's attendance (id. at pp. 5-6). Additionally, the parent agreed that he would be responsible for the balance of tuition if a final due process decision denied the parent's claim for public funding (id. at p. 6).

By letter to the CSE dated June 15, 2023, the parent, through his attorney, noted that, despite attending several CSE meetings, the student had continued to await an appropriate school placement since November 2022, while also continuing to spend 1.5 hours per day at school on a truncated schedule (Parent Ex. A). The parent alleged that he was unable to use the Nickerson letter issued February 16, 2023, and that, even if the district offered the student her recommended 6:1+1 special class placement, the program "would not offer [the student] the special education services that she require[d]" (id. at p. 1). The parent notified the district that he would be withdrawing the student from the district school, unilaterally placing her at the Rebecca School, and would be seeking public funding for the student's tuition for the 2023-24 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated May 22, 2024, the parent, through his attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (Parent Ex. B). Specifically, the parent alleged, among other things, that the district unlawfully denied the student a full day of instruction during the 2022-23 school year and failed to provide timely and appropriate school placements for both school years (id. at pp. 2, 5-8). The parent alleged that the district failed to implement the many IEPs developed for the student, as the district had enrolled the student in a large "3-K ICT class" with students who did not have disabilities, instead of her recommended program in a kindergarten class with related services (id. at pp. 3, 5-8). The parent also noted that, despite being provided with a Nickerson letter, the parent was unable to find a school that would accept the student (id. at p. 3). The parent also alleged that the district failed to offer the student a placement for the 2023-24 school year until after the school year had started, forcing the parent to unilaterally place the student at the Rebecca School, which was an appropriate placement, where the student was "thriving" (id. at pp.

been included in the record as parent's exhibit P (compare Parent Ex. O, with Parent Ex. P). Both documents indicate that they are IEPs related to a CSE meeting (or meetings) held on May 31, 2023, and both documents have an implementation date of February 13, 2023 (compare Parent Ex. O at pp. 1, 30, with Parent Ex. P at pp. 1, 29). There are some variations between the two documents, including that parent exhibit O includes progress reports that are not included in parent exhibit P (compare Parent Ex. O at pp. 11-15, 19-22, with Parent Ex. P at pp. 11-14, 18-21). Additionally, a portion of text has been highlighted in parent's exhibit P that is not highlighted on parent's exhibit O (compare Parent Ex. O at p. 6, with Parent Ex. P at p. 6). I further note that the exhibit list appended to the IHO's decision, as well as the discussions on proposed evidence during the impartial hearing, indicated that parent exhibit P is a copy of an IEP related to a CSE meeting on June 14, 2023, despite the discrepancies noted above, including that the document reflects a CSE meeting of May 31, 2023 (see IHO Decision at p. 22; Tr. p. 37).

[7] A representative from the school executed the contract and addendum on June 16, 2023 (Parent Ex. R at pp. 4, 6).

3, 8-9). The parent further contended that equitable considerations favored the parent's requests for relief (id. at pp. 9-10). The parent also alleged that he was seeking an impartial hearing, in part, under Section 504 of the Rehabilitation Act (id. at p. 1).

The parent sought an order that the district denied the student a FAPE for the 2022-23 and 2023-24 school years (Parent Ex. B at p. 10). To address the denial of a FAPE for the 2022-23 school year, the parent sought a bank of compensatory education that included 200 hours of speech-language therapy by a provider of the parent's choosing at the provider's customary rate, as well as 800 hours of "DIR/floortime" services or another type of "play therapy" by a provider of the parent's choosing at the provider's customary rate (id. at pp. 3, 10-11). The parent further sought private vehicle transportation for the student and parent to travel to and from all compensatory services (id. at p. 11). [8] To address the denial of a FAPE for the 2023-24 school year, the parent sought an order directing the district to fund the student's full tuition at the Rebecca School for the 12-month 2023-24 school year, to reimburse the parent for a $100 tuition deposit, and to provide the student with transportation to and from the unilateral placement for the 2023-24 school year (id. at pp. 3, 10).

B. Impartial Hearing Officer Decision and Intervening Events

After a prehearing conference on June 26, 2024 (Tr. pp. 1-25), an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 6, 2024 (Tr. pp. 26-71).[9] The district presented no exhibits or witnesses and declined to cross-examine the parent's witnesses (Tr. pp. 35-39). The district further conceded that it failed to offer the student a FAPE for the 2022-23 and 2023-24 school years (Tr. p. 46).

Through a series of emails between September 3 and September 5, 2024, the IHO, with district's counsel copied, asked parent's counsel, among other things, how the parent calculated the requested compensatory education award of 200 hours of speech-language therapy, noting that the evidence in the record indicated the student was recommended to receive 1.5 hours per week of speech-language therapy beginning on November 28, 2022, and asking that parent's counsel point to evidence in the record that demonstrated the student's need for that amount of speech-language therapy (IHO Ex. I at pp. 2-4). The IHO further asked parent's counsel to direct her to evidence in the record that stated that the student required 800 hours of "DIR/Floortime" to address any deficits caused by the failure of the district to offer a FAPE for the 2022-23 school year (id. at p. 3).

The parent, through his attorney, submitted a memorandum of law in response to the IHO's questions, dated September 5, 2024 (IHO Exs. I at p. 1; II). The parent contended, among other

[8] The parent also sought an order directing the district to fund an updated private independent educational evaluation (IEE) for the student, that included a bilingual (Spanish) neuropsychological assessment and a bilingual (Spanish) speech and language assessment, as well as transportation to and from those assessments (Parent Ex. B at pp. 3, 10). The parent additionally sought an order directing the district to translate the student's then current and future evaluation reports, as well as the then-current and all future IEPs to Spanish, and to provide them to the parent (Parent Ex. B at p. 10).

[9] Parent's counsel withdrew the request for transportation to and from the Rebecca school for the 2023-24 school year during the prehearing conference, as it was indicated that the district was providing that service for the student (Tr. pp. 8-9). I note that this did not include the request for funding of private transportation to compensatory services, which remained in contention.

things, that a compensatory education award of 200 hours of speech-language therapy was appropriate because of the district's "egregious" failure to provide the student with an education and special education programming for the 2022-23 school year (IHO Ex. II at p. 6). The parent further indicated that the request was based upon a qualitative approach, rather than a "mechanical hour-per-hour calculation" (id.). The parent also alleged that an "hour-by-hour" calculation may have been appropriate if the district's only failure was related to the failure of the provision of speech-language therapy, but, instead, the student was deprived of positive reinforcement in the classroom for any language skills she would have received (id. at pp. 6-7).

With respect to the request of a compensatory education award of 800 hours of "DIR/Floortime," the parent alleged, among other things, that the requested amount was appropriate due to the many alleged failures of the district during the 2022-23 school year, as well as due to the demonstrated progress the student when she was provided this methodology at the Rebecca School (see id. at pp. 6-9). The parent alleged that the requested 800 hours of "DIR/Floortime" was the "minimum number of hours" that would have provided the student the educational benefits she likely would have accrued if she received the services recommended in her IEPs in the 2022-23 school year (id. at p. 9). The calculation was created using a "qualitative standard," but parent's counsel noted that if the total number of hours the student would have spent in school during the 2022-23 school year were added, the sum would have totaled 1,470 hours (id.).

In a decision dated September 10, 2024, the IHO noted that the district conceded that it failed to offer the student a FAPE for both the 2022-23 and 2023-24 school years, thereby failing to meet its burden to establish otherwise (IHO Decision at p. 4). The IHO also found that the parent met his burden in establishing that the unilateral placement at the Rebecca School for the 2023-24 school year was appropriate, and that equitable considerations favored the parent (id. at pp. 7-9, 18). Therefore, the district was ordered to reimburse the parent for the $100 tuition deposit and to fund the tuition for the student's attendance at the Rebecca School for the 2023-24 school year (id. at pp. 9, 18).[10]

With respect to the parent's request for a bank of compensatory education that included 200 hours of speech-language therapy and 800 hours of "DIR/Floortime" for the district's failure to offer the student a FAPE for the 2022-23 school year, the IHO denied the parent's request (IHO Decision at pp. 10-14, 19). The IHO stated that because the parent was being reimbursed for the student's tuition at the Rebecca School, it was not appropriate to additionally award compensatory education (id. at pp. 10-11). The IHO noted that the student was recommended to receive 1.5 hours per week of speech-language therapy from November 2022 until the conclusion of the 12-month extended school year, which would have amounted to far less than the 200 hours the parent requested (see id. at pp. 11-12). The IHO further found that there was no evidence, including any evaluative information, in the record to indicate that the student required 800 hours of "DIR/Floortime" services (id. at p. 12). The IHO also noted that she had provided parent's counsel the opportunity to direct her to evidence in the record that supported the parent's requests and

[10] It was further ordered that the district translate the May 2023 IEP, as well as all evaluation and assessment reports from the 2022-23 school year, from English to Spanish (IHO Decision at pp. 9, 18). The district was also ordered to provide the parent with any future IEPs and evaluation reports in his native language, or other language of his choosing (id.). Finally, the IHO ordered that the district fund the parent's requested IEEs at the rates requested by the parent (id. at pp. 15-18).

calculations, but that the memorandum of law failed to point to any such evidence (id. at p. 13). Thus, the IHO found that there was no evidence in the record to support either the request for or the calculation of compensatory education as a remedy (id. at pp. 12-13). Additionally, the IHO declined to award the student with compensatory education because the amount of services requested would be akin to a punitive award to the district, and because it had the potential to overwhelm the student by adding such a significant amount of services on top of the student's program at the Rebecca School (id. at pp. 12-13). Finally, the IHO noted the evidence in the record that demonstrated how much progress the student had made since enrolling at the Rebecca School, which would help the student regain any progress she had not been able to make due to the district's denial of a FAPE for the 2022-23 school year (id. at p. 12).

As the IHO denied the parent's requests for compensatory education, the IHO also denied the parent's request for private transportation to and from any awarded compensatory education services (IHO Decision at pp. 17-19).

IV. Appeal for State-Level Review

The parent appeals, alleging, through his attorney, among other things, that the IHO erred in denying his requests for a bank of compensatory education that included 200 hours of speech-language therapy and 800 hours of DIR/Floortime or an equivalent related service, as well as the request for the district to fund private transportation to and from these services, if ordered. Additionally, in the parent's memorandum of law in support of the request for review, he alleges, through his attorney, that the IHO erred by not discussing his claim related to Section 504 of the Rehabilitation Act of 1973.

In an answer, the district contends, among other things, that the IHO ordered appropriate relief that compensates the student for the parent's claims. The district further contends that the parent's compensatory education request should be denied because it is excessive and unreasonable, because the parent is not entitled to default relief, and because the parent's own evidence shows that the student made significant progress at the Rebecca School, demonstrating that the student did not need compensatory education to address any deficits from the district's failure to provide a FAPE during the 2022-23 school year.[11]

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.

[11] The parent submitted a reply to the district's answer. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent's reply merely reasserts many of the same allegations as raised in the request for review and does not appear to address any of the issues permitted in a reply; accordingly, the parent's reply will be disregarded.

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]).[12]

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. Preliminary Matters

Initially, neither party has appealed from the IHO's determinations that:

i. the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years;
ii. the Rebecca School was an appropriate unilateral placement for the student for the 2023-24 school year;
iii. the equitable considerations favored the parent;
iv. the parent was entitled to his requested relief of reimbursement by the district to the parent of the $100 tuition deposit for the 2023-24 school year;
v. the parent was entitled to her requested relief of direct funding by the district for the 2023-24 school year of the student's tuition at the Rebecca School in the amount of $165,360;
vi. the May 2023 IEP and all evaluation reports from the 2022-23 school year be translated into Spanish;
vii. all future IEPs and evaluation reports be provided to the parent in his native language, or other language chosen by the parent, unless otherwise directed by the parent;

[12] 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).

viii. the district fund a comprehensive bilingual Spanish neuropsychological evaluation for the student by an appropriately credentialed evaluator of the parent's choosing, at a rate not to exceed $8,000; and

ix. the district fund a bilingual Spanish speech and language evaluation for the student by an appropriately credentialed evaluator of the parent's choosing, at a rate of $2,800

(see IHO Decision at pp. 18-19). Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only issues presented on appeal relate to whether the IHO erred in denying the parent's requests for compensatory education and private transportation of the student to and from any awarded compensatory education services, as well as the parent's contention on appeal related to Section 504 of the Rehabilitation Act of 1973.

With respect to the latter, the IHO did not discuss section 504 in her decision, and further indicated that she "reviewed the [p]arties' remaining contentions and f[ound] them to be either unnecessary . . . without merit, beyond [her] jurisdiction, or without sufficient basis in the record for a finding and award of relief," thus, the IHO denied any relief not specifically discussed in the decision, and dismissed any remaining claims by the parent with prejudice (see IHO Decision at p. 17). The parent contends, through his attorney, that the IHO erred in not addressing the parent's alleged claim under section 504, erred by not finding that the district violated section 504 and failed to offer the student a FAPE under section 504, and asks that a ruling be issued that the district discriminated against the student under section 504. The parent further alleges that this alleged discrimination is another basis to award the student compensatory education.

I note that the IHO's determination to not specifically address, and thereby dismiss, the parent's section 504 claims, to the extent they were raised, is not reviewable in this forum because an SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parents' claims regarding section 504, and accordingly such claims will not be further addressed. Thus, the only remaining contentions on appeal are related to whether the IHO erred in denying the parent's requests for compensatory education and private transportation for the student's travel to and from any awarded compensatory education services.

B. 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"]).

Initially, I note that an outright default judgment awarding compensatory education—or all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Thus, the IHO was not required to merely adopt the relief proposed by the parent and parent's counsel.

Additionally, despite the parent's contentions to the contrary, a review of the hearing record reveals no basis for a finding that the IHO erred by declining to award compensatory education to the student, or that she awarded inadequate relief. A review of the IHO's decision as a whole reveals that in making her determinations she carefully weighed the evidence, including the evidence and testimony that the student made substantial progress since enrolling at the parent's unilateral placement, the Rebecca School (see IHO Decision at pp. 10-14).

The Rebecca School program director testified that for the 2023-24 school year, the student was in a classroom with eight other students, ages five to seven years old (Parent Ex. EE ¶¶ 4, 20). According to the program director, the students in her class were grouped based on their developmental levels, verbal ability, and sensory processing (id. ¶ 20). There was one head teacher, three teaching assistants, and two paraprofessionals in the student's classroom (id.). The program director testified that the student's individualized weekly program at Rebecca School during the 2023-24 school year consisted of a morning meeting, reading, math, and social studies

instruction, sensory activities, and "DIR/Floortime" sessions (id. ¶ 23). She received OT, speech-language therapy, counseling, and group music facilitated by a music therapist, art, and adaptive physical education (id.). Review of testimony from the Rebecca School's program director indicated that the student made progress in all areas of development during the 2023-24 school year (Parent Ex. EE ¶ 38). For example, the program director testified that when the student first started at Rebecca School, "she was very sensory seeking and had tremendous difficult[y] motor planning and executing an idea" (id. ¶ 38). At the time of the program director's testimony in July 2024, she noted that the student would come by her office, knock on the door, and greet her in either English or Spanish (id.). The program director reported that the student had also recently gone shopping at a grocery store, and that the student was able to independently pull the cart around the store, as well as wait patiently for her turn at the cashier (id.). According to the program director, the Rebecca School "team of educators, therapists, and related service providers work[ed] so closely together" that they were able to coordinate how to support the student in all domains that affected her learning (id.). The program director testified that the student's team reported that the student "ha[d] been like a sponge, absorbing information and skills throughout the school year" (id.).

Specifically, the program director's testimony indicated that the student's reading program took on a multisensory, movement-based, and thinking-based approach to exploring text (Parent Ex. EE ¶ 24). With regard to progress in reading, the program director testified that during literacy groups, the student was able to attend and share attention for a few minutes when provided with maximum adult support (e.g., high affect, deep pressure input, visual and verbal cues) (id. ¶ 25). For math, the student made progress in her ability to count to 10 in English and Spanish, as well as in her matching and sorting abilities (id. ¶ 27). With regard to progress in OT, the program director testified that the student received three 30-minute sessions per week, and that after receiving her sensory diet, the student was more available for interactions and demonstrated sustained engagement (id. ¶¶ 32-34). The student demonstrated progress in her problem-solving skills, sequencing, motor planning, regulation, and shared attention, and engagement around a shared activity, such as creating slime (id. ¶ 34). With regard to speech-language therapy, the student received three 30-minute sessions per week of bilingual English and Spanish speech-language therapy, twice individually and once in a sensory based feeding group (id. ¶ 35). The focus of speech-language therapy was for the student to share attention, engage, and participate in meaningful two-way communication (id.). According to the program director, "[w]hen regulated, [the student] showed progress in her ability to open and close up to 10 circles of communication within routine-based pretend play interactions" (id. ¶ 36). In contrast, when she first "started attending the Rebecca School, [the student] was so dysregulated she was hardly able to open and close up any circles of communication" (id.). With regard to counseling, the student received two individual sessions per week, with one session lasting 30 minutes and the other session lasting 45 minutes (id. ¶ 37). Counseling focused on the student's ability to express her ideas and related emotions, and the program director testified that the student made progress in exploring emotional themes and experiences through play (id.).

Additional information in the hearing record regarding the student's progress was detailed in an interdisciplinary summary dated December 23, 2023, and an interdisciplinary report of progress update dated June 2024 (Parents Exs. W; Y). Consistent with the program director's testimony by affidavit, these progress reports described in detail and expounded upon the areas of need addressed at the Rebecca School and the student's progress in those areas (see Parent Exs.

W; Y; EE ¶¶ 25, 27, 33-34, 36-38). For example, the June 2024 report included that in social studies, the group focused on community (e.g., "All about me" awareness of self and others) (Parent Ex. Y at p. 6). The report described the student's progress with peer interaction, parallel play, waiting her turn, turn-taking, and sharing (id.). With regard to activities of daily living (ADL), the student would request the bathroom ("bano") or say "si" or "No" when asked if she needed to use the bathroom (id. at p. 7). The student expanded her food repertoire and had begun to progress in starting to prepare her own foods (id.).

The parent also testified that he had seen "good changes" in the student since she began attending the Rebecca School (Parent Ex. CC ¶¶ 2, 38). He explained that the student stopped fighting, started laughing, began to play with her sister where she fought with her before, and that the student was overall happier (id. ¶ 38). He described that the student also began to wake up early in order to go to school, got dressed and sat at the table early in the morning, that she was happy to go to school, and that she came home from school laughing and smiling (id.). The parent also conveyed that the student began speaking more words in English than in Spanish, and that she was overall progressing in speaking (id.).

The evidence in the hearing record shows that the student was making significant progress once enrolled in the Rebecca School for the 2023-24 school year. The IHO articulated a qualitative basis for her determination regarding compensatory education that was grounded in the hearing record, including the IHO's review of the evidence regarding the student's "substantial progress" at the Rebecca School (IHO Decision at pp. 11-12). As discussed above, I do not see a basis in the hearing record to disturb the IHO's determination that there is no evidence to support the parent's contentions that 1,000 hours of compensatory education, in addition to the student's full-time 12-month program at the Rebecca School, would be necessary to cure any deficits from the denial of a FAPE for the 2022-23 school year (see id.; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]). Consistent with the IHO's finding, it is proper to not award compensatory education where there is evidence the student has made progress or the deficiency has otherwise been mitigated (see N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [finding even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).

Additionally, I note that, when presented with the opportunity to point to evidence in the hearing record that would support that the student required the 1,000 hours of compensatory education to put the student in the position that she would have been had there not been a deprivation of a FAPE, parent's counsel's contentions focused primarily on the substantial failings of the district during the 2022-23 school year (of which there was no dispute), rather than any specific evidence that clearly indicated that despite her progress at the Rebecca School the student continued to demonstrate deficits such that the specific amount and type of compensatory education services the parent was seeking were warranted to place her in the position she would have been in but for the district's FAPE denial for the 2022-23 school year. Relatedly, the parent did not proffer any evidence explaining why 1000 hours specifically were the "minimum number of hours needed" to do so (see IHO Exs. I; II). Without placing the burden on the parent to demonstrate what an equitable compensatory education award for the student would be under the

particular facts of this case,[13] given the well-developed state of the record with respect to the Rebecca School's educational programming for the student, and the student's progress while attending the school during the 2023-24 school year, I nonetheless do not find any record basis to disturb the IHO's finding that the student's attendance at the Rebecca School constituted an appropriate remediation of the district's failure to offer a FAPE to the student, especially given that the student was in a full-time 12-month program utilizing DIR/Floortime as a methodology and offering her speech-language therapy, she had demonstrated significant progress thereunder without the additional requested 1,000 hours of compensatory education and such an award would have to be implemented in addition to her full-time schedule if the parent's requested relief in the form of compensatory education was granted (see IHO Exs. I; II).

In sum, I find no sufficient basis in the hearing record to disturb the IHO's determination to decline to award compensatory education to the student. Additionally, as I have found no basis to disturb the IHO's determination to not award compensatory education, I likewise find no basis to disturb the IHO's determination to not award private transportation to and from any awarded compensatory education services

VII. Conclusion

Having determined that there is not a sufficient basis in the hearing record to disturb the IHO's decisions to not award the student with an award of compensatory education or related private travel services as well as having determined that the parent's contentions with respect to section 504 are not reviewable, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 28, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER

[13] Indeed, although it declined to do so during the impartial hearing, the district was required under the due process procedures set forth in New York State law to address the compensatory education issue by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that she would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).