UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

W.A., M.S., individually on behalf of W.E.,

Plaintiffs,

v.

HENDRICK HUDSON CENTRAL SCHOOL DISTRICT,

Defendant.

No. 14-CV-3067 (KMK)
No. 14-CV-4285 (KMK)

OPINION & ORDER

Appearances:

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KENNETH M. KARAS, District Judge:

Plaintiffs W.A. and M.S. ("Plaintiffs") brought this suit on behalf of their son, W.E., alleging claims under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2) et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 et seq., Article 89 of the New York Education Law, N.Y. Educ. Law § 4401 et seq., and the implementing regulations thereunder. (*See* Compl. (Dkt. No. 2).) The dispute arises out of the decisions of the Independent Hearing Officers ("IHO") and the State Review Officers ("SRO") who adjudicated

Plaintiffs' administrative claims for relief arising out of Defendant's alleged failure to provide W.E. a free and appropriate public education ("FAPE") during the 2010–2011, 2011–2012, and 2012–2013 school years.[1] On November 23, 2016, the Court issued an Opinion & Order adjudicating Plaintiffs' claims, deciding partly in favor of Plaintiffs and partly in favor of Defendant. (*See* Op. & Order (Dkt. No. 51).) As part of that Opinion & Order, the Court granted Defendant leave to amend its Answer to include a counterclaim that the SRO erred in holding that Defendant had not appealed the portion of the IHO's opinion that awarded compensation for counseling services for W.E. (*See id.* at 102.) Defendant has now amended its Answer, and the Parties have cross-moved for summary judgment on Defendant's counterclaim. (*See* Dkt. Nos. 60, 70.) For the reasons to follow, Defendant's Motion is granted and Plaintiffs' Cross-Motion is denied.

I. Background

A. Factual Background

The facts relevant to the pending Motions are undisputed and consist largely of the IHO and SRO decisions and the Parties' submissions in the administrative proceeding. Although the Parties submitted statements of undisputed material fact pursuant to Local Rule 56.1, (*see* Dkt. Nos. 62, 65), the Court finds it more efficient and useful to cite directly to the administrative documents that comprise the record in this case.

[1] Case number 14-CV-3067 addresses the 2010–2011 and 2011–2012 school years. (*See* Compl.) Case number 14-CV-4285 addresses the 2012–2013 school year, (*see* Compl. (Dkt. No. 2, 14-CV-4285)), and was consolidated with case number 14-CV-3067 on September 24, 2015, (*see* Stipulation to Consolidate (Dkt. No. 24, 14-CV-4285)). Because the cases were consolidated under case number 14-CV-3067, all docket citations will be to that docket unless otherwise noted. Additional school years are addressed in other related, but not consolidated, cases.

On November 18, 2011, Plaintiffs filed a Due Process Complaint requesting an impartial hearing to determine whether W.E. was denied a FAPE during the 2010–2011 and 2011–2012 school years under the IDEA. (*See* IHO Decision 1.)[2] As relief, Plaintiffs requested reimbursement for W.E.'s enrollment at a private school and for "any further relief the impartial hearing officer finds just and necessary." (*See id.*) On January 25, 2012, Plaintiffs filed an Amended Due Process Complaint. (*See* Att'y Aff'n Ex. A ("ADPC") (Dkt. No. 68).) There, Plaintiffs laid out the factual allegations relating to their claim, detailing W.E.'s struggles in public school and his eventual placement by his parents in a private school. (*See id.*) Pertinent to this case, Plaintiffs explained the academic and social difficulties experienced by W.E. in the 2010–2011 school year, while he was still enrolled in public school in the eighth grade. (*See id.* ¶¶ 16–32.) Plaintiffs described that as part of their efforts to combat W.E.'s continued struggles and as part of their preparation for the 2011–2012 school year, W.E. engaged in private counseling with Dr. Drew Robins and Dr. Daniel Williams. (*See id.* ¶¶ 30, 40, 69, 78, 87, 90–93.) In letters dated August 11, 2011 and August 19, 2011, respectively, Dr. Williams and Dr. Robins opined about W.E.'s prospect for success in the current curriculum and about W.E.'s educational needs. (*See id.* ¶¶ 92–93.) These letters were generated after a number of counseling sessions and were provided to Defendant as evidence of W.E.'s need for intervention. (*See id.* ¶ 90.)

Eventually, Plaintiffs made the decision to place W.E. in a private therapeutic school. (*See id.* ¶ 101.) The administrative process was initiated, at least in part, for the purpose of

[2] The IHO's decision is attached as Exhibit A to the Complaint. (*See* Compl.) Because the IHO decision does not have page numbers, the Court will start counting from the page labeled "Hearing Officer's Findings of Fact and Decision W.A.W. and M.W. v. Hendrick Hudson School District," followed by an "Introduction" header.

seeking reimbursement for W.E.'s tuition during the 2011–2012 school year (a subsequent administrative proceeding was initiated to recover tuition for the 2012–2013 school year). Plaintiffs made no explicit demand in the Amended Due Process Complaint for compensation for the counseling services provided by Dr. Robins and Dr. Williams, though they did request that Defendant "provide compensatory educational and counseling services for the 2010–2011 school year, to compensate for [Defendant's] failure to provide appropriate services for W.E.[] for an extended period of time." (*Id.* at 26.) In their post-hearing briefing, Plaintiffs again requested "compensatory education" for Defendant's "failure to provide appropriate tutoring and counseling services for an extended period of time," (IHO Ex. XVIII, at 59–60), and, in a footnote, sought compensation for W.E.'s sessions with Dr. Robins and Dr. Williams, (*id.* at 59 n.43). Both of these requests were made under the heading, "**POINT II: THE DISTRICT VIOLATED THE IDE[]A BY FAILING TO IDENTIFY [W.E.] AS A STUDENT WITH A DISBILITY DURING THE 2010–2011 SCHOOL YEAR**." (*Id.* at 53.)

After a hearing, the IHO rendered a "Second Corrected Findings of Fact and Decision" on May 30, 2012, with a corrected version issued on June 21, 2012. (*See* IHO Decision 38.) The IHO determined that Defendant had breached its child find obligations, that is, its obligation to identify students who may be in need of special education, and thereby failed to provide W.E. a FAPE for at least a portion of the 2010–2011 school year. (*See id.* at 21.) More specifically, the IHO found that by January 2011, the information available to Defendant indicated that W.E. was in need of more aggressive intervention and more appropriate placement. (*See id.* at 24.) The IHO then considered what remedy was appropriate, saying, "Having found that the District deprived the student of a FAPE for a portion of the 2010–2011 school year, a determination must be made as to whether there is an appropriate remedy." (*Id.*) In the section entitled "**Parents'**

Request for Relief for the 2010–2011 School Year," the IHO held that Defendant would reimburse Plaintiffs for the cost of the counseling sessions with Dr. Robins and Dr. Williams, and for 15 hours of prospective counseling, but held that Plaintiffs were not entitled to compensation for the 200 hours of home instruction to which Plaintiffs claim W.E. was entitled. (*Id.* at 24–25.)

With respect to the 2011–2012 school year, the IHO again found that Defendant had not provided W.E. a FAPE. (*See id.* at 26.) The IHO next considered whether Plaintiffs had met their burden in establishing that they were entitled to tuition reimbursement for W.E.'s placement in a private school during the 2011–2012 school year. (*See id.* at 29.) The IHO concluded that they had not and therefore declined to award tuition reimbursement for the private placement. (*See id.* at 36.) There was no other discussion of remedies in the section pertaining to the 2011–2012 school year. Finally, the IHO determined that the evidence did not support Plaintiffs' claim that W.E.'s rights under the Rehabilitation Act had been violated. (*See id.* at 37.)

At the end of its decision, the IHO offered the following conclusion:

> For all of the above reasons, it is hereby ordered that:
>
> 1. The Hendrick Hudson School District denied the student a FAPE for a portion of the 2010–2011 school year;
>
> 2. The parents are entitled to reimbursement for Dr. Williams's psychiatric sessions with the student from May 18, 2011 up until the date of his report, August 11, 2011, upon presentation of proof of those services and of payment;
>
> 3. The parents are entitled to reimbursement for the five sessions documented in Dr. Robins [sic] letter dated August 19, 2011, upon presentation of proof of those services and of payment;
>
> 4. The student is entitled to fifteen hours of counseling at District expense;

5. The Hendrick Hudson School District denied the student a FAPE for the 2011–2012 school year;

6. The parents' request for tuition reimbursement is denied; and

7. The parents' Section 504 claim for the 2010–2011 school year is dismissed.

(*Id.* at 37–38.)

Plaintiffs thereafter appealed the IHO's decision to the SRO. (*See* Att'y Aff'n Ex. B.) Specifically, Plaintiffs appealed the denial of compensation for the 200 hours of home instruction, as well as the denial of tuition reimbursement for the 2011–2012 school year. (*See id.* ¶ 4.) Defendant filed a Verified Answer and Cross-Appeal. (*See* Att'y Decl. Ex. 1 (Dkt. No. 61).) Defendant generally denied the allegations made in Plaintiffs' appeal. (*See id.*) Defendant also specifically pointed out, in one of its responses to the allegations made by Plaintiffs,

> that Petitioners did not seek in their Due Process Complaint Notice dated November 18, 2011 or their Amended Due Process Complaint Notice dated January 25, 2012, reimbursement for psychiatric sessions with Dr. Williams or sessions with Dr. Robins, or offered [sic] any oral testimony or documentary evidence in support of such reimbursement in the hearing before the IHO.

(*Id.* ¶ 54.) In the section entitled "**AS AND FOR A THIRD AFFIRMATIVE DEFENSE AND CROSS-APPEAL**," Defendant contended that the IHO's determination that W.E. was denied a FAPE during the 2010–2011 school year was "not based on the evidence in the Record and legally erroneous." (*Id.* ¶ 75.) Defendant also claimed that the IHO had "erroneously determined" that Defendant had "failed to timely evaluate and recommend a placement for" W.E. during the 2011–2012 school year, thereby denying him a FAPE. (*Id.* ¶ 89.) In the section discussing the cross-appeal, Defendant made no mention of the compensatory education award for counseling services.

On January 31, 2014, the SRO rendered its decision. (*See* SRO Decision.)[3] Before discussing the merits, the SRO defined the scope of the appeal:

> I note that, relative to the 2010–11 school year, the parties cannot properly raise the IHO's dismissal of the parents' Section 504 claims, nor do they appeal or cross-appeal the relief of reimbursement for sessions with the student's clinical psychologist and 15 hours of compensatory counseling services for the student. Additionally, relative to the 2011–12 school year, the parties do not appeal or cross-appeal the IHO's directive to reimburse the parents for expenses incurred in connection with the preparation of the August 11, 2011 psychiatric evaluation (IHO Decision at pp. 28, 40–41). An IHO decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, I am without authority to review these findings and they will not be further addressed in this decision.

(*Id.* at 13 (footnote omitted).)

The SRO first addressed Defendant's appeal of the IHO's finding that it had breached its child find obligations for the 2010–2011 school year, thereby denying W.E. a FAPE. (*See id.*) The SRO found that Defendant had not breached its child find obligations, and therefore reversed the IHO's conclusion on that issue. (*See id.* at 20.) Although the SRO understood that Defendant's alleged breach of its child find obligations had served as the basis for the IHO's finding that Defendant had denied W.E. a FAPE, (*see id.* at 13), the SRO nonetheless went on to address, in the next section, both Plaintiffs' appeal from the denial of 200 hours of compensatory education and Defendant's "cross-appeal from the IHO's finding that the district denied the student a FAPE for a part of the 2010–2011 school year," (*id.* at 21). The SRO found that due to the timing of when Defendant received Plaintiffs' consent for an evaluation, the evidence did not support the IHO's finding that Defendant had denied W.E. a FAPE for the 2010–2011 school year, and therefore reversed on that issue. (*See id.* at 23.) Because Defendant did not deny W.E. a FAPE, "the student was therefore not entitled to an award of compensatory home instruction

[3] The SRO's decision is attached as Exhibit B to the Complaint. (*See* Compl.)

services." (*Id.*) The IHO's decision was therefore reversed insofar as it found that Defendant denied W.E. a FAPE during the 2010–2011 school year, but affirmed insofar as it found that Plaintiffs were not entitled to 200 hours of compensatory instruction. (*See id.*)

The SRO affirmed the IHO's decision in all other respects. (*See id.* at 32.)

B. Procedural History

On April 30, 2014, Plaintiffs filed their Complaint in docket number 14-CV-3067, challenging the SRO's conclusions regarding the 2010–2011 and 2011–2012 school years. (*See* Dkt. No. 2.) On June 13, 2014, Plaintiffs filed a new Complaint under docket number 14-CV-4285, challenging an SRO decision regarding the 2012–2013 school year. (*See* Dkt. No. 2 (14-CV-4285 Dkt.).) Defendant filed its Answer in 14-CV-3067 on June 18, 2014. (*See* Dkt. No. 4.) After some discussion regarding scheduling and the scope of the claims, the two Actions were consolidated on September 24, 2015. (*See* Dkt. No. 26.)

Briefing on the Parties' cross-motions for summary judgment followed, as well as briefing on Defendant's request to amend its Answer to include a counterclaim challenging the portion of the SRO's decision that affirmed, or at least refused to reconsider, the IHO's grant of compensatory education. On November 23, 2016, the Court issued an Opinion & Order granting each Party's motion for summary judgment in part and denying it in part. (*See* Dkt. No. 51.) Specifically, the Court affirmed the SRO's decision with regard to the 2010–2011 and 2011–2012 school years in all respects, and reversed only with regard to the claim for tuition reimbursement for the 2012–2013 school year. (*See id.* at 103.) The Court granted Defendant's application to amend its Answer. (*See id.*)

Defendant filed its Amended Answer on December 6, 2016, asserting a counterclaim that the portion of the SRO's decision that found that Defendant did not appeal the IHO's award of

compensatory education was error. (*See* Dkt. No. 52.) A scheduling order was thereafter set for summary judgment motions regarding Defendant's counterclaim, (*see* Dkt. No. 54), and Plaintiffs filed their Answer to the counterclaim on December 26, 2016, (*see* Dkt. No. 57). On January 20, 2017, Defendant filed the instant Motion for Summary Judgment on its counterclaim and supporting papers. (*See* Dkt. Nos. 60–63.) Plaintiffs filed their opposition papers and Cross-Motion for summary judgment on February 18, 2017, (*see* Dkt. Nos. 65–68, 70), and Defendant replied on March 10, 2017, (*see* Dkt. Nos. 72–73).

II. Discussion

A. Legal Framework

"The IDEA's purpose is 'to ensure that all children with disabilities have available to them a free appropriate public education,'" which, "[i]n practice, . . . means that [s]tates have an affirmative obligation to provide a basic floor of opportunity for all children with disabilities." *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016) (quoting 20 U.S.C. § 1400(d)(1)(A)). Accordingly, the IDEA requires that "states receiving federal funds . . . provide 'all children with disabilities' a 'free appropriate public education.'" *Hardison v. Bd. of Educ.*, 773 F.3d 372, 376 (2d Cir. 2014) (quoting 20 U.S.C. § 1412(a)(1)(A)). To provide a FAPE, a school district must offer "special education and related services tailored to meet the unique needs of a particular child, which are reasonably calculated to enable the child to receive educational benefits." *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 238–39 (2d Cir. 2015) (internal quotation marks omitted).

If a parent of a child with a disability is dissatisfied with the quality of education received, that parent is entitled to an impartial due process hearing, *see* 20 U.S.C. § 1415(f)(1)(A), which in New York takes the shape of the administrative process described

above, whereby the parents may put their case before an IHO, whose decision may be appealed to an SRO, *see* N.Y. Educ. Law § 4404(1)–(2). The SRO's decision may, in turn, be challenged by an appeal to either state or federal court. *See* 20 U.S.C. § 1415(i)(2)(A).

B. Standard of Review

In an ordinary case, summary judgment is appropriate only if there exists no genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a). In an IDEA case, however, the existence of a disputed issue of material fact will not always defeat a motion for summary judgment. *See T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009). Instead, summary judgment in IDEA cases is typically "in substance an appeal from an administrative determination, not a summary judgment." *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 83 n.3 (2d Cir. 2005) (internal quotation marks omitted).

Accordingly, the general rule is that some measure of deference is owed to the conclusions of the SRO because the Court "is not an expert on education or childhood learning disabilities." *M.A.K. ex rel. S.A. v. N.Y.C. Dep't of Educ.*, No. 12-CV-435, 2014 WL 1311761, at *1 (E.D.N.Y. Mar. 30, 2014); *see also L.K. v. Dep't of Educ. of the City of N.Y.*, No. 09-CV-2266, 2011 WL 127063, at *1 (E.D.N.Y. Jan. 13, 2011) ("The SRO's findings of fact are due appropriate deference by this Court, which is not an expert on education or childhood learning disabilities."). However, while deference is generally owed to the SRO's decision, the level of deference depends on the type of issue being decided. *See M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012) (holding that "the weight due administrative determinations" "will vary based on the type of determination at issue"). Thus, "[a]lthough [the Court] must give due weight to the state proceedings, mindful that [it] lack[s] the specialized knowledge and experience necessary to resolve questions of educational policy, [it] need not defer to the

findings of state administrative officers on questions . . . that fall outside of their field of expertise." *E.M. v. N.Y.C. Dep't of Educ.*, 758 F.3d 442, 456–57 (2d Cir. 2014) (citation and internal quotation marks omitted).

C. Discussion

The issues in this case elude any simple description. The IHO found that Defendant denied W.E. a FAPE for both the 2010–2011 and 2011–2012 school years, and awarded Plaintiffs reimbursement for W.E.'s psychiatric sessions with Dr. Williams and Dr. Robins, as well as compensation for 15 additional hours of counseling. (*See* IHO Decision 37–38.) Whether the IHO issued that relief in connection with the 2010–2011 school year or the 2011–2012 school year is the subject of some debate and will be addressed below. The IHO denied, however, Plaintiffs' request for 200 hours of compensatory education for the 2010–2011 school year and their request for tuition reimbursement during the 2011–2012 school year. (*See id.* at 25, 36.)

Plaintiffs appealed the adverse portions of the IHO decision, and Defendant cross-appealed the IHO's finding that it had denied W.E. a FAPE during the 2010–2011 school year; although Defendant referenced the award of compensatory education in its answer to Plaintiffs' petition on appeal, it made no mention of that award in its cross-appeal. The SRO concluded that those reimbursements had not been appealed, but was unclear as to whether it considered the psychiatric counseling sessions and additional 15 hours of counseling reimbursement to be part of the relief offered for the 2010–2011 school year or for the 2011–2012 school year:

> I note that, relative to the 2010–11 school year, the parties cannot properly raise the IHO's dismissal of the parents' Section 504 claims, nor do they appeal or cross-appeal the relief of reimbursement for sessions with the student's clinical psychologist and 15 hours of compensatory counseling services for the student. Additionally, relative to the 2011–12 school year, the parties do not appeal or cross-appeal the IHO's directive to reimburse the parents for expenses incurred in

> connection with the preparation for the August 11, 2011 psychiatric evaluation (IHO Decision at pp. 28, 40–41).

(SRO Decision 13.)

There are thus two questions raised on these Motions: (1) did the SRO err in determining that at least some portion of the compensatory education applied to the 2011–12 school year, and (2) did the SRO err in holding that Defendant had not appealed the award of compensatory education? Neither of these questions implicates the educational expertise of the SRO, and therefore no deference to the SRO is warranted. *See Lillbask*, 397 F.3d at 82 ("[T]he due weight we ordinarily must give to the state administrative proceedings is not implicated with respect to issues of law . . . ." (alterations and internal quotation marks omitted)); *K.H. v. N.Y.C. Dep't of Educ.*, No. 12-CV-1680, 2014 WL 3866430, at *15 (E.D.N.Y. Aug. 6, 2014) (declining to afford deference to the SRO's judgment with respect to the law regarding claim accrual). They do, however, require a close look at the decisions of the IHO and SRO and at the relevant papers filed by the Parties.

1. Scope of Relief

The first issue is whether the SRO was wrong to view the IHO's decision as dividing up the award of compensatory education between the 2010–2011 and 2011–2012 school years. Even a cursory look at the record makes clear that the compensatory education was afforded solely in connection with the 2010–2011 school year.

First, the compensatory education is awarded in a section of the IHO's decision entitled "**2010–2011**," (IHO Decision 21), and the specific paragraphs discussing the reimbursements fall under the subsection entitled "**Parents' Request for Relief for the 2010–2011 School Year**," (*id.* at 24–25). Indeed, the award of compensatory education is discussed before the IHO engages in any analysis of the 2011–2012 school year. (*See id.* at 25–26.) And in the section

dedicated to discussing the 2011–2012 school year, the IHO addressed only Plaintiffs' request for tuition reimbursement in connection with W.E.'s enrollment at a private school, and made no mention of the counseling services he received. (*See id.* at 35–36.)

Second, the summary of relief included at the end of the decision tracks the structure of the decision itself and confirms that the compensatory education was awarded in connection with the 2010–2011 school year. The decision first states that Defendant denied W.E. a FAPE during a portion of the 2010–2011 school year before awarding Plaintiffs reimbursement for the counseling sessions W.E. received as well as for 15 additional hours of counseling. (*See id.* at 37–38.) Then, *after* discussing the compensatory education, the decision concludes that Defendant denied W.E. a FAPE for the 2011–2012 school year and states that Plaintiffs are not entitled to tuition reimbursement. (*See id.* at 38.) The structure of this relief thus suggests that the compensatory education was contemplated as relief for the violations during the 2010–2011 school year, while the tuition reimbursement was connected to the 2011–2012 school year.

Third, to the extent it is relevant, the record strongly indicates that it was the Parties' understanding that the compensatory education award related to the 2010–2011 school year. While Plaintiffs point out that, in their Amended Due Process Complaint, they asked for "[a]ny further relief the [IHO] finds just and necessary," it was only with respect to the 2010–2011 school year that they specifically sought "compensatory educational and counseling services . . . to compensate for [Defendant's] failure to provide appropriate services for W.E.[] for an extended period of time." (ADPC 26.) And in their post-hearing briefing, where Plaintiffs first brought up the issue of reimbursement for Dr. Robins's and Dr. Williams's services, (*see* IHO Ex. XVIII, at 59 n.43), the issue was discussed only in connection with the 2010–2011 school year, (*see id.* at 53).

Finally, before any testimony was heard, the IHO confirmed with the Parties the scope of the relief sought:

> I understand that the parents are seeking for the 2010–2011 school year compensatory services and for the 2011–2012 school year that the parents are seeking tuition reimbursement and reimbursement for related expenses in connection with their unilateral placement of the student at the Northwood School, and that the parents assert that equitable considerations support that claim.

(IHO Hr'g Tr. 63–64 (Feb. 1, 2012 Hr'g).) After stating this, the IHO asked, "would that generally represent the outline of the parents' position?" to which Plaintiffs responded, "I think you have painted it quite well with your broad strokes." (*Id.* at 64.) While Plaintiffs point out, and the Court recognizes, that the IHO was providing only a general framework for the case, painting it in "broad strokes," (*see* Pls.' Resp. to Def.'s Statement of Material Facts Pursuant to Local Rule 56.1 ¶¶ 2–3 (Dkt. No. 66)), Plaintiffs never made *any* suggestion to the IHO—at the hearing, in their briefing, or elsewhere—that they sought compensatory education in connection with the 2011–2012 school year. It is unsurprising, then, that the IHO's award of such compensation is tied solely to the 2010–2011 school year.

Plaintiffs do not dispute the basic structure of the IHO's decision. Instead, they offer a number of reasons why the compensatory education should be considered, at least in part, as part of the remedy for the denial of a FAPE during the 2011–2012 school year. (*See* Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. on Def.'s Counterclaim and in Supp. of Pls.' Cross-Mot. for Summ. J. ("Pls.' Opp'n") 10–14 (Dkt. No. 67).)

Plaintiffs first point out that the IHO awarded reimbursement for the session with Dr. Williams that formed the basis of his evaluation report, dated August 11, 2011, which was forwarded to Defendant and relied upon during the Committee for Special Education ("CSE") meeting held in anticipation of W.E.'s 2011–2012 school year. (*See id.* at 10–11 (citing IHO

Decision 25).) Plaintiffs note also that the sessions with Dr. Robins for which Plaintiffs were reimbursed formed the basis for his letter dated August 19, 2011, which was also written and forwarded to Defendant in advance of the CSE meeting held immediately prior to the 2011–2012 school year. (*See id.* at 11.) Plaintiffs additionally point out that under New York law, the school year runs from July 1 of each year to June 30 of the following year, and several of the reimbursed counseling sessions took place after July 1, 2011, and all of them related to evaluations that were prepared for the CSE meeting that took place in August 2011. (*See id.* at 5–6.)

Finally, Plaintiffs argue that while the 15 additional hours of counseling were not explicitly tied to any particular school year, the IHO noted when awarding the 15 hours of counseling that "most courts seek to ascertain the child's needs at the time the relief is sought." (*Id.* at 11 (emphasis and internal quotation marks omitted); *see also* IHO Decision 25 (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).) Thus, because Plaintiffs filed their Due Process Complaint in November 2011 (during the 2011–2012 school year) and the relief was awarded in June 2012, the IHO must have, in Plaintiffs' view, assessed W.E. as being in need of counseling "at the time the relief [was] sought," (IHO Decision 25), and therefore awarded the 15 hours of counseling in connection with the then-current school year, i.e., the 2011–2012 school year, (*see* Pls.' Opp'n 11–12).

All of these arguments miss the mark. The question is not what the IHO *should* have done, but rather what the IHO *actually* did. Plaintiffs make detailed arguments for why the IHO could have reimbursed them for counseling services during the 2011–2012 school year, but the fact remains that the IHO unambiguously awarded the reimbursement solely in connection with the 2010–2011 school year. The IHO may have been wrong to conclude that the counseling

sessions that gave rise to the evaluations produced in August of 2011 and used as part of the CSE meeting meant to address W.E.'s upcoming school year were tied to Defendant's alleged denial of a FAPE during the 2010–2011 school year, but for purposes of this Action, the Court is concerned only with what the IHO thought the appropriate remedy was, because it is that issue that informs the question of whether Plaintiffs are still entitled to the award of compensatory counseling notwithstanding that the SRO determined, and the Court did not disagree, that Defendant had not denied W.E. a FAPE for the 2010–2011 school year.

In light of the plain structure of the IHO's decision, as well as the apparent understanding of the Parties, there is little question that the IHO viewed the compensatory education as related only to the denial of a FAPE for the 2010–2011 school year. While the IHO could have allocated the compensatory education differently, she did not, and there is no basis upon which this Court may rewrite the IHO's decision to conform to Plaintiffs' interpretation of the record.

The SRO was therefore incorrect in concluding that any portion of the IHO's award for compensatory education was for the 2011–2012 school year, as such a conclusion is belied by the plain language of the IHO's decision. (*See* IHO Decision 24–26, 37–38.) Where the SRO commits an error "of framing, rather than application," the error is of a legal dimension, *FB v. N.Y.C. Dep't of Educ.*, 132 F. Supp. 3d 522, 541 (S.D.N.Y. 2015); *see also C.U. v. N.Y.C. Dep't of Educ.*, 23 F. Supp. 3d 210, 227 (S.D.N.Y. 2014) (holding that the SRO committed "legal error" of "framing" when it wrongly "interpreted the procedural right at issue as the right to participate in school *selection*" instead of the "procedural right to participate in the school selection *process*"), and an SRO's decisions of law are not entitled to any deference, *see Lillbask*, 397 F.3d at 82; *K.H.*, 2014 WL 3866430, at *15. Because the SRO improperly framed the issues on appeal, the Court need not defer to its decision in that respect, and concludes that

the SRO erred in allocating a portion of the compensatory counseling to the 2011–2012 school year.

2. Scope of Appeal

Having concluded that the IHO's award of compensatory counseling related solely to the 2010–2011 school year, the Court must additionally determine whether the SRO was wrong to conclude that Defendant had not appealed that award. Because the SRO concluded that Defendant had not appealed the compensatory counseling relating to *either* the 2010–2011 school year or the 2011–2012 school year, (*see* SRO Decision 13), even though the SRO was wrong about the allocation of compensatory counseling, the Court must nevertheless determine whether the SRO was also wrong about whether Defendant appealed the award of compensatory education.

As Defendant points out, there is no dispute that it cross-appealed the portion of the IHO's decision that found that Defendant had violated its child find obligations and denied W.E. a FAPE for a portion of the 2010–2011 school year. (*See* Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on Def.'s Counterclaim 9 (Dkt. No. 63); *see also* Att'y Decl. Ex. 1, ¶ 75.) As Plaintiffs note, however, there is no reference to the award of compensatory education in the portion of Defendant's answer that addressed the counterclaim. (*See* Pls.' Opp'n 14.) In Plaintiffs' view, and apparently the SRO's, this failure amounts to a waiver of any challenge to the award of compensatory education.

To be sure, Defendant did argue, in another portion of its answer to Plaintiffs' petition on appeal, that Plaintiffs did not seek reimbursement for Dr. Robins's and Dr. Williams's counseling services in their original Due Process Complaint or in their Amended Due Process Complaint. (*See* Att'y Decl. Ex. 1, ¶ 54.) But that paragraph appears as part of Defendant's

response to Plaintiffs' petition on appeal, and does not appear and is not incorporated by reference in the portion of the answer detailing the counterclaim. (*See id.* ¶¶ 54, 75–116.)

But notwithstanding Defendant's failure to specifically reference the award of compensatory counseling in its counterclaim, the Court finds that the SRO erred in concluding that the issue of compensatory education was not properly before it. An award of compensatory education services, such as counseling, "is an available option under the [IDEA] to make up for denial of a free and appropriate public education." *Mr. & Mrs. P. ex rel. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008); *see also Mrs. C v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) ("[C]ompensatory education is a proper remedy in an appropriate situation for enforcing [IDEA] educational rights."). Because compensatory education is "a remedy for substantive FAPE claims," *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 456 (2d Cir. 2015), the absence of a substantive claim for a failure to provide a FAPE necessarily precludes the award of any compensatory services, (*see, e.g.*, Op. & Order 59 n.16 (declining to address Plaintiffs' request for compensatory education in light of the fact that Defendant had not denied W.E. a FAPE)). It thus defies common sense to suggest that when Defendant appealed the IHO's determination that Defendant had denied W.E. a FAPE for the 2010–2011 school year, it was not seeking an order vacating the award of compensatory education arising out of that alleged denial.

Plaintiffs, somewhat ironically, summarize it best: "Reimbursement for counseling is a remedy, not an issue . . . ." (Pls.' Opp'n 18.) Defendant appealed the IHO's finding that it denied W.E. a FAPE during the 2010–2011 school year, and once the SRO reversed the IHO on that point, there was no need for a remedy and the basis for the award of compensatory education fell away. To allow Plaintiffs to retain the compensatory education awarded for the 2010–2011 school year in the face of the finding by the SRO, affirmed by this Court, that W.E. was not

denied a FAPE during the 2010–2011 school year would not only work an injustice on Defendant, it would reward Plaintiffs for the SRO's misinterpretation of the IHO's decision and the issues on appeal. The Court will not further the error.

3. Appropriate Disposition

Having concluded that the SRO erred both in attributing a portion of the compensatory education to the 2011–2012 school year and in determining that Defendant had not properly appealed that portion of the award, the Court must consider what remedy is appropriate.

In some circumstances, remand to the SRO may be necessary to allow the SRO to apply its educational expertise. For example, remand is appropriate "where the district court has received insufficient guidance from state administrative agencies as to the merits of a case, or where proper resolution of the disputed issue requires expertise." *J.S. v. N.Y.C. Dep't of Educ.*, 104 F. Supp. 3d 392, 413 n.5 (S.D.N.Y. 2015) (citation and internal quotation marks omitted), *aff'd*, 648 F. App'x 96 (2d Cir. 2016). Courts have consistently applied this rule, remanding cases to the SRO where the educational expertise of the SRO is needed to address unresolved questions or where further development of the administrative record is necessary. *See, e.g.*, *P.G. v. N.Y.C. Dep't of Educ.*, 959 F. Supp. 2d 499, 516 (S.D.N.Y. 2013) ("[R]ather than review the IHO's determination and draw its own conclusion regarding the appropriateness of a 12:1:1 setting for [the student], the [c]ourt finds it appropriate to remand the question to the SRO for consideration of this education policy in the first instance."); *T.L. v. N.Y.C. Dep't of Educ.*, 938 F. Supp. 2d 417, 436–37 (E.D.N.Y. 2013) (noting that "[r]emand [was] appropriate to obtain the necessary educational expertise of the IHO and the SRO," and noting also that "[a] district court may remand the proceeding for further development and clarification of the record"); *cf. D.N. v. N.Y.C. Dep't of Educ.*, 905 F. Supp. 2d 582, 588–89 (S.D.N.Y. 2012) (remanding case to the

SRO to allow it to consider "unaddressed claims" because the SRO was "uniquely well suited to review the content and implementation of the [s]tudent's IEP" (internal quotation marks omitted)), *stay denied pending appeal*, 2013 WL 245780 (S.D.N.Y. Jan. 22, 2013).

Had the SRO properly determined that the compensatory education was awarded solely in connection with the 2010–2011 school year and that Defendant had appealed that award, there is no question what the SRO would have done, or at least what it would have been required to do—vacate the award of compensatory education. Indeed, the SRO concluded that there was no merit to Plaintiffs' request for compensation for 200 hours of home instruction in connection with the 2010–2011 school year in light of the absence of any underlying FAPE denial for that year. (*See* SRO Decision 23.) Moreover, there is no possibility that the SRO could have, sua sponte, determined that Plaintiffs were entitled to additional compensation for the 2011–2012 school year, as no such issue was put before the SRO on appeal, and any award of the IHO becomes final unless appealed to the SRO. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 200.5(j)(5)(v). Were Plaintiffs under the belief that they were entitled to compensation for counseling services rendered during the 2011–2012 school year, they could have requested that relief or appealed the denial of that relief to the SRO.

Because there are no questions on which the SRO's educational expertise is needed, remand is not necessary in this circumstance. Instead, the award of compensatory education will be vacated, as there is no basis upon which to compensate Plaintiffs in connection with the 2010–2011 school year.

III. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted and Plaintiffs' Cross-Motion for Summary Judgment is denied. All claims having been disposed of,

the Parties are to inform the Court within seven days of the date of this Opinion & Order whether there remain any disputes to be adjudicated. If not, the Parties shall submit a proposed judgment, which shall be entered forthwith, without prejudice to either Party's right to appeal that judgment. The Clerk of Court is respectfully directed to terminate the pending Motions. (*See* Dkt. Nos. 60, 70.)

SO ORDERED.

DATED: July 18, 2017
White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE