



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-085

**Application of the [REDACTED]  
[REDACTED] for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

### Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Bernard Dufresne, Esq., of counsel

## 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 district) appeals from a decision of an impartial hearing officer (IHO) which annulled a determination made by a manifestation determination review (MDR) team and ordered the district to provide certain relief. The appeal must be sustained.

### 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**

At the time of the events relevant to this proceeding, the student received special education and related services pursuant to an IEP dated January 22, 2013 (Dist. Ex. 2 at p. 8). This IEP indicated that the student was eligible for special education as a student with an emotional disturbance and recommended placement in a general education classroom with

special education teacher support services (SETSS) in "all academic areas as needed" for five periods per week (id. at pp. 1, 5). The January 2013 IEP also mandated one 30-minute session per week of the related service of counseling as well as "[t]eacher to [t]eacher/[a]dministrator [c]onsultation [a]s needed" (id.). The student attended a district public high school during the 2013-14 school year (see Parent Exs. E at p. 1; F at p. 2; O at pp. 3-23). The hearing record additionally reflects that the district developed an FBA and BIP for the student on February 25, 2013 (see generally Dist. Exs. 3; 4).<sup>1</sup>

Although a subsequent IEP was developed on January 10, 2014, prior to the incident in question, the implementation date of the January 2014 IEP is identified as February 4, 2014 (see Dist. Ex. 10 at p. 2). The hearing record also indicates that the district developed an updated FBA and BIP for the student on January 10, 2014 (Dist. Exs. 11, 12; see Tr. pp. 58-59).

The hearing record reveals that, on January 16, 2014, the student left his classroom at the public school to address two students who had "repeatedly peer[ed] in" at the classroom (Dist. Ex. 5 at p. 2; see also Parent Ex. U).<sup>2</sup> The classroom teacher closed the door after the student left (Parent Ex. U). The student proceeded to "knock[ ] repeatedly" on the door, "attempting to open [both] the back and front classroom doors" (Dist. Ex. 5 at p. 2). Eventually, the student grabbed a fire extinguisher that was located "on the wall next to the classroom door, held it at his side, and detached the hose" (id.). A teacher from a nearby classroom entered the hallway and told the student to put the fire extinguisher down because he could get arrested (id.). In response, the student approached the teacher with the fire extinguisher, coming "within inches" of the teacher (Parent Ex. V; see Dist. Ex. 5 at p. 2). The student made threatening remarks to the teacher and then proceeded to put the fire extinguisher down and "walk[ ] away" (Dist. Ex. 5 at pp. 2-3). Contemporaneously, the student's classroom teacher opened the classroom door and placed the student's belongings outside in the hallway (Parent Ex. U; Dist. Ex. 5 at p. 2).<sup>3</sup> The hearing record reflects that the student was suspended from school for this conduct, effective January 22, 2014 (Dist. Ex. 5 at p. 1).<sup>4</sup>

According to the evidence in the hearing record, a suspension hearing took place on February 12, 2014 (see Dist. Ex. 5 at p. 1). The district convened an MDR meeting on February 13, 2014 (see generally Dist. Ex. 6). The MDR team concluded that the conduct in question was not a manifestation of the student's disability and was not caused by the district's failure to implement the student's IEP (id. at p. 8). As a result of the suspension hearing and the MDR, the superintendent issued a decision, dated February 24, 2014, suspending the student for 90 days,

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<sup>1</sup> The evidence in the hearing record reveals that the February 2013 FBA and BIP were the subject of a complaint filed with the State Education Department (see Parent Exs. Q; R).

<sup>2</sup> In addition to the written evidence in the hearing record, the parent introduced a video recording of the incident captured by a school camera into evidence at the impartial hearing (see Parent Ex. T).

<sup>3</sup> At the impartial hearing, the parties disputed the degree of care the teacher exhibited in depositing the student's items outside the classroom as well as the distance between the teacher and student; however, these disputes are immaterial to the issue presented on appeal (see Tr. pp. 150-52, 180-81)

<sup>4</sup> The hearing record references a January 21, 2014 letter of suspension; however, this letter was not introduced into evidence at the impartial hearing (see Dist. Ex. 5 at p. 1).

beginning on January 22, 2014 and ending on June 16, 2014, with the possibility of early reinstatement on May 1, 2014 (Dist. Ex. 5 at p. 3). During the suspension period, the student was assigned to attend an interim alternative educational setting (IAES) (see id.).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated March 5, 2014, the parent requested an expedited review of the determination of the February 2014 MDR that the student's conduct was neither a manifestation of his disability nor occasioned by the district's failure to implement the January 2013 IEP (IHO Ex. II at pp. 1-7).

First, the parent alleged that an FBA and BIP created for the student in February 2013 "contain[ed] numerous deficiencies" (IHO Ex. II at p. 2). Specifically, the February 2013 FBA lacked "information obtained from [the student's] teacher or guidance counselor, . . . a baseline of [the student's] problem behaviors[,] . . . and . . . a hypothesis regarding the general conditions under which the target behavior usually occur[red]" (id. at p. 5). The February 2013 BIP did not, according to the parent, include "a baseline measure of the [student's] target behaviors and [failed to] list intervention strategies to be used . . ." (id. at p. 6). Additionally, the parent asserted that the January 2014 FBA and BIP "fail[ed] to properly address [the student's] insubordination[] and interpersonal struggles with authority figures in school" and incorrectly "identif[ied] [the student's] target behavior as off-task conversations and monologues in class" (id. at pp. 2, 6).

The parent next contended that the February 2014 MDR was improperly composed because it did not include a school psychologist (IHO Ex. II at pp. 4-5). And although the student's guidance counselor attended the MDR, the parent alleged that this guidance counselor "offered no information" and was "unwilling[] to discuss [the student's] behavior," thereby affecting the parent's "right to a full review of all relevant information" (id. at p. 5). The parent also averred that a district social worker "determined unilaterally" that the student's conduct "was not a manifestation of his disability" (id. at p. 3). Moreover, the parent argued that the social worker did not consider "input from the rest of the MDR team" and "refused to elaborate on her decision" (id. at p. 4). This social worker also, according to the parent, "refused to discuss any of the antecedent triggers of [the student's] action" and stated that "they were not relevant" (id.). Further, the parent alleged that the social worker exhibited an inability "to describe the characteristics of students . . . who are classified with an [e]motional [d]isturbance" (id.).

The parent further argued that the district did not adhere to its own policy of completing an "MDR worksheet" at the MDR meeting (IHO Ex. II at p. 4). Specifically, the parent contended that the social worker completed only a portion of the worksheet and indicated "that she would fill out the rest once the meeting was over" (id.). One portion of the MDR worksheet the district neglected to complete, according to the parent, was a section assessing whether the student's conduct was the result of the district's failure to implement the student's IEP (id. at p. 5). With further regard to the worksheet, the parent argued that the MDR team did not "consider the events that led up to the behavior for which the suspension [was] sought" in derogation of a requirement contained within the worksheet (id.).

With respect to the conclusion reached by the February 2014 MDR, the parent contended that the student's conduct was caused by, or had a direct and substantial relationship to, his disability (IHO Ex. II at p. 3). The parent averred that the student engaged in "threatening, aggressive, and intimidating" behavior toward "students and staff" and that this behavior was indicative of his "disability [of an] [e]motional [d]isturbance" (id. at pp. 3, 4). The parent additionally argued that the conduct was the direct result of the district's failure to implement the student's IEP (id. at p. 5).

For relief, the parent sought a reversal of the MDR's determination; a determination that the student's conduct was a manifestation of his disability; reinstatement of the student at his then-current public school; an updated FBA and BIP; and "[a]ny other relief available under the law" (IHO Ex. II at pp. 6-7).<sup>5</sup>

## **B. Impartial Hearing Officer Decision**

On April 2, 2014, an impartial hearing convened in this matter and concluded on April 8, 2014, after four days of proceedings (see Tr. pp. 1-203). In a decision dated May 9, 2014, the IHO found that the MDR team's conclusion that the student's conduct was not a manifestation of his disability was in error (IHO Decision at pp. 14-16). Accordingly, the IHO reversed the findings of the MDR team (id. at p. 18). The IHO also ordered that the CSE: reconvene; conduct additional evaluations as necessary; develop an appropriate program for the student, including an updated FBA and BIP; and provide additional compensatory services to the student (id. at p. 18).

First, the IHO opined that the student was "obviously in an inappropriate placement" (IHO Decision at p. 14). The IHO opined that the student's "failing academic grades, lateness, absences[,] and many behavioral incidents" stemmed from "emotional problems . . . manifested [as an] inability to control or manage his behaviors" (id. at pp. 14-15). Thus, according to the IHO, it was "no surprise [that] another incident occurred" involving the student in January 2014 (id. at p. 15).

Next, the IHO concluded that the conduct for which the February 2014 MDR convened constituted a manifestation of the student's disability (IHO Decision at p. 15). The IHO found that the student "was unable to control himself and his need[s] to gain attention, be disruptive[,] and [be] insubordinate" (id.). The IHO further found that the student "was unable to manage his emotions and his overwhelming . . . frustration" (id.). Therefore, the IHO concluded that "the incident was caused by and had a direct relationship to [the student's] disability" (id. at p. 16).

With respect to the parent's claim that the student's conduct resulted from a failure to implement the student's IEP, the IHO found that the "second teacher" who approached the student and "calmly [told him] to put . . . down the fire extinguisher" appropriately followed the

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<sup>5</sup> The evidence in the hearing record shows that, subsequent to the parent's due process complaint notice, on March 26, 2014, the district convened a second MDR to address the student's conduct relative to the January 16, 2014 incident (see Dist. Ex. 7). The March 2014 MDR team also concluded that the student's conduct was not a manifestation of his disability and was not caused by the district's failure to implement the student's IEP (id. at pp. 1, 9).

behavioral management strategy outline in the student's then-current BIP (IHO Decision at p. 16). In this respect, the IHO also noted that the student's classroom teacher "ask[ed] the [s]tudent to leave," a strategy that was not in conformity with the student's BIP (id.).

The IHO proceeded to find that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at p. 17). The IHO found that the district failed to "address[] the [s]tudent's emotional needs" and submit written requests for evaluations to the parent (id.). The IHO further found that the January 2014 CSE "failed to properly evaluate" the student and "develop measurable goals" (id.). Accordingly, the IHO found that the district did not "provid[e] personalized instruction with sufficient support services . . ." (id. at p. 16).

Turning to the parent's requested relief, the IHO reversed the determination of the February 2014 MDR team but indicated that she would not return the student to his current public school because it was "inappropriate" (IHO Decision at p. 16). The IHO therefore ordered that a CSE convene "within ten school days" and "consider the student's existing evaluative data . . . and obtain any necessary additional evaluative data in order to recommend an appropriate program and placement for [the student]" (id.). The CSE was additionally directed to "review [certain] evaluations [and] develop an IEP, along with annual goals . . . to provide a [FAPE] for the [s]tudent" (id. at p. 18). The IHO further ordered that the district "determine [an] appropriate placement with the supports and services that the [s]tudent needs, including . . . a[n] FBA and BIP" (id. at p. 16). The IHO additionally ordered that the district provide the student with "additional related services, including summer school, so that the [s]tudent earns the necessary credits . . . [to] enter the following school year in September 2014 as a senior" (id. at p. 18). Finally, the IHO ordered the district to "issue any assessment authorizations for any additional evaluations and[/]or services that the CSE may deem necessary" (id.).

#### **IV. Appeal for State-Level Review**

The district appeals, objecting solely to the portion of the IHO's decision ordering the district to provide the student with "additional related services, including summer school, so that the [s]tudent earns the necessary credits . . . [to] enter the following school year in September 2014 as a senior" (see IHO Decision at p. 18). The district presents three arguments as to why this portion of the IHO's ordered relief is improper. First, the district argues that this relief was not requested in the parent's due process complaint notice and, thus, was outside the scope of the impartial hearing. Second, even assuming that the parent requested such relief, the district argues that the IHO exceeded her jurisdiction by requiring the district to ensure that the student reach a particular grade level. Third, the district argues that it is impossible to comply with this relief during the summer of the 2014 given the limited timeframe for compliance coupled with the amount of credits the student required. Accordingly, the district requests that this portion of the IHO's order be annulled.

In an answer, the parent denies the district's material assertions and argues that the IHO properly ordered the district to provide the student with additional compensatory services during the summer of 2014. Additionally, given the temporal limitations of the IHO's order, the parent requests that the time to implement this relief be extended through the end of the 2014-15 school year so that the student may graduate in the spring of 2015.

## V. Applicable Standards

The procedure under the IDEA (20 U.S.C. §§ 1400-1482) relevant to this case involves the process by which school officials may seek a disciplinary change in placement of a student with a disability who violates a code of student conduct (see 20 U.S.C. § 1415[k]; Educ. Law § 3214[3][g]; 34 CFR 300.530-300.537; 8 NYCRR Part 201).<sup>6</sup> State regulations provide that a disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2], [c]).<sup>7</sup>

If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct an MDR meeting "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]). An MDR meeting must also be conducted within 10 school days after a superintendent or IHO decides to place a student in an IAES (see 8 NYCRR 201.4[a][1]-[2], 201.7[e], 201.8[a]; see also 20 U.S.C. § 1415[k][1][G], [3][B][ii][II]; Educ. Law § 3214[3][g][3][iv], [vii]; 34 CFR 300.530[b][1], [e], [g], 300.532[b][2][ii]). The participants at the MDR meeting must include a district representative, the parents, and the "relevant members" of the CSE as determined by the parent and the district (20 U.S.C. § 1415[k][1][E][i]; Educ. Law § 3214[3][g][2][ii]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[b]). State regulations additionally require that the parent receive written notification prior to any manifestation team meeting "to ensure that the parent has an opportunity to attend" (8 NYCRR 201.4[b]). Further, State regulations require that such written notice inform the parent of the purpose of the meeting, the names of the people expected to attend, and the parent's right to have relevant members of the CSE participate at the parent's request (id.).

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the manifestation team must "review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]). While courts have not interpreted 8 NYCRR 201.4(c) to be exhaustive, requiring review of every piece of information contained in a student's educational file, a manifestation team must "review

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<sup>6</sup> The procedures also apply to a student presumed to have a disability for discipline purposes (20 U.S.C. § 1415[k][5]; 8 NYCRR 201.2[n], 201.5; see 34 CFR 300.534).

<sup>7</sup> If a district proposes to suspend a student with a disability for more than five school days for alleged misconduct, a superintendent's hearing is conducted in which it is first determined whether the student engaged in the alleged misconduct and, upon such a finding, it is then determined whether a disciplinary change in placement will be considered as a possible penalty (Educ. Law § 3214[3][c]; 8 NYCRR 201.9[c][1]).

the information pertinent to that decision" (Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 559 [E.D. Va. 2008]).

If the result of the MDR is a determination that the student's behavior was not a manifestation of his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 CFR 300.530[c]; see Educ. Law § 3214[3][g][vi]). However, if the result of the MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct an FBA and implement a BIP; or if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances" as defined in the IDEA and State and federal regulations, the district must also return the student to the placement from which he or she was removed or suspended (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>8</sup> If the MDR team determines that the student's conduct was the direct result of the school district's failure to implement the student's IEP, the district must take immediate steps to correct the deficiencies in the implementation of the student's IEP (34 CFR 300.530[e][1][ii], [3]; 8 NYCRR 201.4[e]).

If the parent of a student with a disability disagrees with: (1) a school district's decision regarding the student's placement, including but not limited to the decision by the district to place the student in an IAES; or (2) a determination of the manifestation team, the parent may request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[a][3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

## **VI. Discussion—Scope of the Impartial Hearing; Relief**

On appeal, the district objects to the portion of the IHO's ordered relief requiring the district to provide the student with a sufficient amount of credits during the summer of 2014 so that he may return to school in the fall of 2014 as a senior. Upon review of the hearing record, I agree with the district that this relief was not contained in the parent's due process complaint notice and, further, that the IHO's ordered relief was inappropriate under the circumstances of this case.

First, this portion of the IHO's order—which is in the nature of an award of compensatory additional services—appears to derive from the IHO's finding that the district failed to offer the student a FAPE for the 2013-14 school year. The issue of whether or not the district offered the student a FAPE was not raised in the parent's due process complaint notice and the district did not agree to include this issue at the impartial hearing (see IHO Ex. II; see also 20 U.S.C. §

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<sup>8</sup> A district and parents may agree to a change in the student's placement and, under certain circumstances, a district may continue to maintain the student in an IAES for up to 45 days (20 U.S.C. § 1415[k][1][F][iii], [G]; 34 CFR 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[a], 201.9[c][3]).

1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).<sup>9</sup> Although the parent argues on appeal that her challenge to the student's 2013 and 2014 FBAs and BIPs implied that the district failed to offer the student a FAPE, this is not supported by a review of the parent's due process complaint notice, which was brought pursuant to 8 NYCRR 201.11[a][3] to challenge the outcome of the MDR (see IHO Ex. II at p. 1); not pursuant to 8 NYCRR 200.5[i][1] with respect to the district's provision a FAPE to the student. The parent allegations regarding the student's FBAs and BIPs appear most prominently in that section of the due process complaint notice devoted to alleging that the student's conduct in question was the direct result of the school district's failure to implement the IEP (see id. at pp. 5-6; see also 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[c]). The inquiry arising from these allegations is a narrow one (which by nature facilitates the expedited nature of the proceedings) and, as such, the parent's due process complaint notice cannot be read so broadly as to raise allegations that the district failed to offer the student a FAPE for the 2013-14 school year.

This conclusion is reinforced by the provisions of the IDEA pertaining to MDRs. The IDEA provides that any student removed from his or her current placement "shall . . . receive, as appropriate, a[n] [FBA] [and] behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur" (20 U.S.C. § 1415[k][1][D]). This obligation is incumbent upon districts "irrespective of whether [a student's] behavior is determined to be a manifestation of [his or her] disability . . ." (20 U.S.C. § 1415[k][1][D]; see also Shelton v. Maya Angelou Pub. Charter Sch., 578 F. Supp. 2d 83, 98-100 [D.D.C. 2008]). Thus, if the February 2014 MDR determined that the student's behavior was a manifestation of his disability, the CSE would have been required to review the student's BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3).<sup>10</sup> Therefore, the parent's allegations pertaining to the student's FBAs and BIPs, read in context, pertain to the district's obligations regarding the MDR.

Thus, although the IHO may have enjoyed discretion to craft an award of compensatory additional services such as this if the parent alleged that the district denied the student a FAPE for the 2013-14 school year, no such allegation was presented in the parent's due process complaint notice (see L.M.P. v. Florida Dep't of Educ., 2008 WL 4218120 at \*4 [S.D. Fla. Sept. 15, 2008] ["the power to award a remedy is contingent on a violation of the IDEA"], aff'd, 345 Fed. App'x 428, 2009 WL 2837554 [11th Cir. 2009]; Letter to Kohn, 17 IDELR 522 [OSEP 1991] ["OSEP's position is that . . . an [IHO] has the authority to grant any relief he/she deems necessary . . . to ensure that a child receives the FAPE to which he/she is entitled" (emphasis added)]).

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<sup>9</sup> The parent's argument that her catch-all request for "[a]ny other relief available under the law" preserved the particular remedy at issue in this proceeding must fail (see T.G. v. New York City Dep't of Educ., 973 F.Supp.2d 320, 337, at \*15 [S.D.N.Y. 2013] [explaining that the parent's "catch-all allegations in her due process complaint that the program and/or placement were 'inappropriate' did not preserve any of the plaintiff's specific claims"]).

<sup>10</sup> Moreover, the IDEA grants IHOs the authority to order compliance with the IDEA irrespective of whether the district offered a student a FAPE (see 20 U.S.C. § 1415[f][3][E][iii]; 34 CFR 300.513[a][3]; 8 NYCRR 200.5[j][4][ii]).

However, even assuming that the parent alleged that the district denied the student a FAPE for the 2013-14 school year in her due process complaint notice, the specific award devised by the IHO was inappropriate because it was not designed to address the student's needs or compensate for services that the district failed to provide during the 2013-14 school year. 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]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at \*7 [2d Cir. Jul. 11, 2014] [noting that "when parents believe the local public school district has denied their child a FAPE, one option available to them is to keep the child enrolled in public school and seek administrative (and, later) judicial review of the child's IEP for the purpose of obtaining compensatory education"] [internal quotations omitted]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30, 2014]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*8 [S.D.N.Y. May 14, 2013], aff'd, 2014 WL 2748756 [2d Cir. June 18, 2014] [finding "no basis for an award of compensatory education" where "the alleged procedural violations . . . [we]re not sufficient to support a finding that [the student] was denied a FAPE"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services].

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M., 2014 WL 3377162, at \*7; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also 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] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the

Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services 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"]; S.A., 2014 WL 1311761, at \*7 [compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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. 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"]; Puyallup, 31 F.3d at 1497 ["[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Here, the IHO's award is not related to the student's needs or to services mandated by the January 2013 IEP that were not provided during the 2013-14 school year. The IHO's decision with regard to the purported denial of a FAPE is too broad on this matter. Although the parent points to language in the IHO's decision that the district "shall determine the credits lost and provide additional related services that the student require[d] to recoup the failed classes and any of the regents' requirements in order for the student to graduate . . . ." (IHO Decision at p. 16), the IHO does not elaborate whether or not such purported lost credits resulted from the district's violations of the IDEA. Furthermore, although the hearing record reveals frequent absences during the 2013-14 school year, there is no indication that the district failed to implement the January 2013 IEP (Parent Exs. E at p. 1; F at p. 2; O at pp. 1-2, 4, 17, 18, 19). Without any explanation of how additional coursework would address the student's needs or remedy a denial of a FAPE, this portion of the IHO's order must be annulled.<sup>11</sup>

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<sup>11</sup> Even if such a nexus was apparent, it is at least questionable whether or not an IHO has jurisdiction to order this particular relief, since graduation credits and requirements generally fall under the purview of the district's authority (see Education Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman, 503 F.3d at 205-06 [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17, 2013 WL 5614113 [2d Cir. 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]; see also Educ. Law § 3202[1] [providing that any person under 21 years of age who has not yet received a high school diploma may attend the public schools in their district of residence without paying tuition]).

The IHO's ordered remedy is additionally problematic because it appears from the hearing record that the parent filed a separate due process complaint notice in this matter regarding the 2013-14 school year which may have included allegations regarding the district's failure to offer the student a FAPE (see Dist. Ex. 8; Parent Ex. B). Although the parties did not introduce the second due process complaint into evidence at the impartial hearing, the parent offered and the IHO received the district's response to this due process complaint notice into evidence (see Parent Ex. B). Further, the district introduced a resolution agreement dated March 28, 2014 whereby the parent and district entered to a "full settlement" of the parent's claims arising from this complaint (see Dist. Ex. 8).<sup>12</sup> Pursuant to this settlement agreement, the district agreed to conduct additional evaluations of the student (id. at p. 2). Therefore, because the parties reached a mutually satisfactory resolution of the parent's claim, it was inappropriate for the IHO to vitiate this agreement by ordering additional compensatory relief relative to the same school year.

Finally, the evidence adduced at the impartial hearing did not provide a basis for assessing whether the award and its attendant deadline were appropriate or practical under the circumstances. The district indicates on appeal that, considering the amount of credits the student requires and the amount of time in a school day, compliance with the IHO's order is impossible (see Pet at pp. 8-9). Because the IHO unilaterally crafted this award, the parties were deprived of the opportunity to explore what would be a feasible compensatory award for the student given his academic schedule and graduation requirements.<sup>13</sup>

## **VII. Conclusion**

For all of the reasons outlined above, the IHO exceeded the scope of the impartial hearing by ordering the district to provide the student with sufficient credits during the summer of 2014 so that he may enroll in public school as a senior by the fall of 2014. Accordingly, this portion of the IHO's decision must be reversed. Because I have annulled this relief, I need not address the parent's request to extend the compliance deadline established by the IHO.

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

**THE APPEAL IS SUSTAINED.**

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<sup>12</sup> While I note that it was within the IHO's discretion to "consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual complaint before the same impartial hearing officer," the result here fell somewhere in-between and resulted in a not-insubstantial degree of obfuscation (see 8 NYCRR 200.5[j][3][ii][a]).

<sup>13</sup> The IDEA's requirement that a due process complaint notice contain "a proposed resolution of the problem to the extent known and available to the party at the time" is not a mere formality; it ensures that an adequate record is developed to determine what kind of relief is appropriate under the circumstances of each case (20 U.S.C. § 1415[b][7][A][iv]).

**IT IS ORDERED** that the IHO's decision dated May 9, 2014 is modified by reversing that portion which ordered the district to provide the student with "additional related services, including summer school, so that the [s]tudent earns the necessary credits . . . [to] enter the following school year in September 2014 as a senior."

**Dated:**            **Albany, New York**  
                         **August 12, 2014**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**