



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-071

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED]

Appearances:

Cuddy Law Firm, PC, attorneys for petitioner, Nina C. Aasen and Jason H. Sterne, Esqs., of counsel

Harris Beach, PLLC, attorneys for respondent, David W. Oakes, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for an award of compensatory educational services for her son. 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 student graduated from respondent's (the district's) public schools in June 2013 with a local diploma, prior to the initiation of these proceedings (Dist. Ex. 8). By way of background information, the hearing record reflects that the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), an adjustment disorder, a pervasive developmental disorder-not otherwise specified (PDD-NOS), and a generalized anxiety disorder (Parent Exs. PPP at p. 1; QQQ at p. 6). The student received special education and related services in a variety of environments throughout his preschool and school career (Parent Exs. GGG at p. 1; JJJ at p. 2; MMM at pp. 1-2; PPP. at pp. 1-3; Dist. Ex. 49 at p. 2).

On March 26, 2012, a CSE convened to conduct the student's annual review and to develop the student's IEP for the 2012-13 school year (Dist. Ex. 4 at p. 1).¹ The March 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a board of cooperative educational services (BOCES) therapeutic day program the student attended during the 2011-12 school year as well as individual and small group counseling sessions (*id.* at pp. 1, 8-9; *see* Parent Ex. F at pp. 1, 9). The minutes from the March 2012 CSE meeting reflected that the student would attend the special class for three hours per day and receive a half-day vocational training program (Dist. Ex. 4 at p. 1). The March 2012 IEP also reflected the student's need for a behavioral intervention plan (BIP) to address his disrespectful behavior toward adults and peers, as well as direction following behavior (Dist. Ex. 4 at p. 6; *see* Parent Exs. TTTT-XXXX).

The student attended school pursuant to the March 2012 IEP during the beginning of the 2012-13 school year (Tr. pp. 25-26, 62, 260, 262, 569). However, shortly after the school year began, the student became dissatisfied with the vocational portion of his program and, by November 2012, had ceased to attend that portion of his school program (Tr. pp. 184-85, 262-63, 583-85). On December 14, 2012, the CSE reconvened to formulate a plan to address the student's vocational placement (Dist. Ex. 5 at p. 1). The December 2012 CSE changed the student's disability classification to a student with autism and added the services of an autism specialist for 15 hours per year across all settings to assist the student, his family, and the educational team in understanding the student's needs as related to his diagnosis with a PDD-NOS (*id.* at pp. 1, 9). The December 2012 CSE recommended the student's continued placement in a 6:1+1 special class for three hours per day along with the related services of weekly individual and group counseling (*id.* at p. 8). According to minutes from the December 2012 CSE meeting, the student had expressed a desire in finding a job for the other half of the school day, and a BOCES "transition specialist" would assist in "developing a supported plan" (*id.* at p. 1). In the alternative, the district offered to provide the student with tutoring in order to pass the Regents Competency Tests (RCTs) required for graduation (Tr. pp. 633-39; Parent Ex. T).

On March 22, 2013, the CSE convened to conduct the student's annual review and to review a psychological reevaluation conducted in March 2013 (Dist. Exs. 6 at p. 1; 49). Evaluation results were noted to be similar to previous test results (Dist. Ex. 6 at p. 1). Accordingly, the March 2013 CSE continued the program recommended by the December 2012 CSE and noted that the student was expected to graduate in June 2013 (*id.*).

A. Due Process Complaint Notice

By due process complaint notice dated December 13, 2014, the parent alleged that the district did not provide the student an appropriate program for the 2012-13 school year (Parent Ex. A at pp. 1-11). With regard to the December 2012 and March 2013 IEPs, the parent alleged that the recommended program was inappropriate and that a three hour instructional school day was insufficient to address the student's academic, social/emotional, and behavioral needs and

¹ The district's exhibits are not consecutively paginated as entered into evidence at the impartial hearing; they are cited herein by reference to the number of pages and their ordering as submitted, rather than by internal pagination. The district is encouraged, in accordance with standard legal practice, to fully mark its exhibits.

was in violation of state regulation (*id.* at pp. 4-5). Additionally, the parent alleged that both the annual goals and post-secondary goals contained in the December 2012 and March 2013 IEPs were inappropriate, immeasurable, failed to include evaluative criteria or address the needs of the student and, more specifically, failed to address the student's difficulties in mathematics (*id.* at pp. 4-9). Furthermore, the parent contended that the IEPs did not provide appropriate transition activities to assist the student with attaining his post-secondary goals (*id.* at pp. 5-6, 8). The parent also asserted that both IEPs failed to indicate how the recommended autism specialist would assist the student and his family, and that the district failed to provide the services of the autism specialist (*id.* at pp. 5, 7, 9). Moreover, the parent argued that both the December 2012 and March 2013 IEPs failed to provide for parent counseling and training (*id.*). Finally, the parent alleged that both the December 2012 and March 2013 IEPs failed to address how the student's social and behavioral struggles negatively impacted his education (*id.* at pp. 5, 7). For relief, the parent requested compensatory services including academic tutoring, the services of an autism specialist, and employment training (*id.* at pp. 9-10).

B. Impartial Hearing Officer Decision

On March 2, 2015, the parties proceeded to an impartial hearing which concluded on April 15, 2015 after five days of testimony (Tr. pp. 1-1076).² In a decision dated June 1, 2015, the IHO concluded that the district had not committed a gross violation of the IDEA so as to entitle the student to compensatory education (IHO Decision pp. 1-37).

Specifically, the IHO held that the district recommended a program consisting of three hours of academic instruction in combination with a work-study component, and that the district made multiple attempts to encourage the student to engage in a work-study program, all of which opportunities the student refused (IHO Decision at pp. 6-10). In addition, the IHO determined that in light of the student's repeated resistance to participating in the work-study portion of his program, it was reasonable for the district to provide the student with academic tutoring to assist him in graduating in June 2013 (*id.* at pp. 11-13). With regard to the type of high school diploma that the student received, the IHO found that the hearing record did not indicate that the student had been disadvantaged by his receipt of a local diploma rather than a Regents diploma (*id.* at pp. 13-17). Furthermore, the IHO found that the student was aware that he was preparing to take RCTs as opposed to Regents exams and that the decision to do so was made in consultation with the student (*id.* at pp. 16-17). The IHO also determined that the addition of autism consultant services to the December 2012 and March 2013 IEPs was appropriate and in accordance with the evaluative material provided to the December 2012 and March 2013 CSEs (*id.* at p. 24). With regard to the vocational services provided by the district, the IHO noted that the December 2012 IEP provided specific recommendations regarding the skills the student needed to acquire to accomplish his career goals and provided modifications to his instruction designed to assist him in those goals (*id.* at pp. 26-27). The IHO further noted that district staff worked with the student in attempts to fulfill his career ambitions even though the student did not appear to have the appropriate temperament (*id.* at pp. 27-30). Finally, the IHO determined that while the student

² In interim decisions dated February 25 and 26, 2015, the IHO denied the parent's motion to amend the due process complaint notice and the district's motion to dismiss the due process complaint notice, respectively (IHO Exs. XXI; XXII).

may not have been prepared for the type of post-secondary employment he desired, the district was not obligated to "ensure the student's employability" (*id.* at pp. 30-36).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in determining that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parent argues that the IHO erred by: finding that the parent was required to prove a gross violation of the IDEA to establish the student's right to compensatory services; determining that the district was not in violation of the regulatory requirement to offer the student a full school day³; and absolving the district of responsibility for the student's refusal to attend the work-study component of the program. Moreover, the parent contends that the IHO failed to address her arguments with respect to the failure of the district to: invite outside agencies to participate in the December 2012 and March 2013 CSE meetings; conduct a functional behavioral assessment (FBA) and develop an BIP; and provide appropriate services for a student with autism, including the provision of parent counseling and training.⁴

The district responds in an answer, variously admitting and denying the parent's allegations and arguing to uphold the IHO's decision in its entirety.

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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 [2009]; *Bd. of Educ. 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; *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

³ In a memorandum of law, the parent asserts that by recommending no services for the remainder of the school day, the district failed to address the student's needs relating to transitioning from school to post-secondary activities, and that the district improperly focused on assisting the student to receive his high school diploma, rather than addressing his specific academic needs.

⁴ Since the parent asserts for the first time on appeal that the district failed to invite outside agencies to participate in the December 2012 and March 2013 CSE meetings, these allegations are outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see, e.g., *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 170 [2d Cir. 2014]; *B.P. v. New York City Dep't of Educ.*, 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

way of substantive content in an IEP" (Walczak v. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]).

The IDEA authorizes "appropriate" relief to be awarded for a denial of a FAPE, including compensatory education—specifically, the "replacement of educational services that the child should have received in the first place" (Reid v. Dist. of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005]; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible for special education and related services if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471-72 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], reaff'd sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; cf. Doe v. E. Lyme Bd. of Educ., 2015 WL 3916265, at *12 n.15 [2d Cir. June 26, 2015] [indicating that a showing of "gross procedural violations" is required when an award of compensatory education is requested by a student to whom a district's obligations under the IDEA have terminated]).

VI. Discussion

A. Compensatory Education

On appeal, the parent asserts that the IHO erred in finding that the parent had to prove a gross violation of the IDEA in order for the student to receive compensatory educational services. In New York State, a student who is eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (Educ. Law §§ 3202[1]; 4402[1][b][5]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Here, the student's eligibility for special education programs and related services as a student with a disability ended upon his graduation in June 2013 and, unless the district committed a gross violation of the IDEA, the student would not be entitled to compensatory education thereafter (French, 476 Fed. App'x at 471-72; see Somoza, 538 F.3d at 109 n.2 [an award of compensatory education "beyond the expiration of a child's eligibility . . . is appropriate only for gross violations of the IDEA"]; Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078-79). In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v.

Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory education (see, e.g., Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159). The hearing record in this instance does not support a finding that any of the alleged deficiencies in the student's program for the 2012-13 school year resulted in "the student's complete deprivation of a FAPE during [his] period of eligibility" (French, 476 Fed. App'x at 471-72). Nevertheless, in the interests of providing a complete record for review, I address the parent's arguments below.

B. 2012-13 School Year

1. Academic Program

On appeal, the parent alleges that the program recommended in the December 2012 and March 2013 IEPs was inappropriate because it only provided the student with three hours of daily academic instruction in a 6:1+1 special class placement in a BOCES therapeutic day program.⁵ As discussed more fully below, the hearing record supports a finding that the recommended program was appropriate.

Academically, the student was enrolled in courses that were necessary to complete graduation requirements for a local high school diploma, including English language arts, social studies, and physical education (Tr. pp. 172, 566, 730; Dist. Ex. 8).⁶ According to a May 2010 psychological evaluation report, the student required repeated presentations and individualized assistance for all academics and, consistent with this report, the December 2012 IEP contained modifications and supports to assist the student, including minimal distractions, adult redirection

⁵ While a normal school day for students in seventh through twelfth grades is 5 1/2 hours, the individual needs of each pupil with a handicapping condition must be considered in determining the appropriate length of the school day (see, e.g., Application of a Child with a Handicapping Condition, Appeal No. 90-12). Here, the hearing record supports a finding that a program consisting of three hours of daily academic instruction, in conjunction with a work study program or academic tutoring, was appropriate to meet the student's needs. In addition, while State regulations regarding educational programs for students with autism provide that "[t]he length of the school day for students with autism shall be that set forth in [8 NYCRR 175.5]," 8 NYCRR 175.5 relates to the minimum number of hours a school must be in session to receive state aid (8 NYCRR 175.5[a][3]; see also Matter of Parker v. Kolb, 62 A.D.2d 128, 130 [3d Dep't 1978]), and the district's failure to comply with State regulations in this instance did not rise to the level of a denial of a FAPE.

⁶ The parent alleges that both the December 2012 and March 2013 IEPs lacked mathematics goals despite the student's significant difficulties in mathematics. Although standardized test results reflected that the student's math skills were significantly below average, the student successfully completed the high school mathematics requirements in three years and passed the RCT in mathematics in August 2012 (Tr. pp. 575-76; Dist. Exs. 7; 8; Parent Ex. JJJ at pp. 4-5). The director of special education testified that the student indicated that he did not want to take any additional mathematics classes during his senior year (Tr. pp. 576; 625-26).

and assistance, breaks, repetition and re-teaching, and positive encouragement (compare Parent Ex. JJJ at p. 6, with Dist. Ex. 5 at pp. 4-6). The student's homeroom teacher, who also served as the student's "case manager" and was the special education teacher for his social studies classes during the 2012-13 school year (the special education teacher), testified that the program recommended for the student for the 2012-13 school year provided the student with small group instruction in a small structured environment where expectations were clear and concise, as well as access to staff members who could work one-on-one with him if necessary (Tr. p. 171; see Tr. pp. 145-47, 164-66).

With regard to examinations, the special education teacher indicated that it was standard practice to allow the student to decide if they wanted to retake a Regents examination or take the RCT and the student indicated that he wanted to take the RCT (Tr. p. 105).⁷ The hearing record contains multiple references to the student's desire to graduate at the end of the 2012-13 school year (Tr. pp. 226, 478-79, 597-98, 628, 641, 723-24). The district's director of special education testified that she "discussed at length" with the parent the type of diploma the student would receive and why he took RCTs (Tr. pp. 644, 646-48). Moreover, the director of special education testified that once the student ultimately decided that he would no longer participate in the work-study component of his program, the student was provided with tutoring to assist him with RCT preparation and his goal of graduating in June 2013 (Tr. pp. 633-42). The student passed all required high school courses and RCTs and graduated with a local diploma in June 2013 (Dist. Ex. 8). Accordingly, the hearing record supports the conclusion that the recommended program was appropriate for the student and enabled him to receive educational benefits, as evidenced by his passing the RCTs and receiving a local high school diploma.⁸

2. Vocational Program

Next, I turn to the parent's allegations that the district failed to provide an appropriate program to address the transition needs of the student. The hearing record establishes that the student participated in a vocational training program during the 2009-10 and 2010-11 school years and the director of special education testified that the parent agreed that the work-study program was a natural progression for the student (Tr. pp. 548-51, 557, 581; Dist. Ex. 4 at pp. 1, 4).⁹ The director of special education indicated that the student had repeatedly expressed that he wanted to be done with school; therefore, it was important to prepare him for the world of work (Tr. p. 582). The BOCES transition specialist who participated in the December 2012 and March

⁷ The student's attempts to obtain passing grades on Regents examinations were unsuccessful (see Dist. Ex. 8).

⁸ In particular, the hearing record reflects that the student met the standards for receiving a local high school diploma which, as noted above, is generally considered evidence of academic benefit (8 NYCRR 100.5[b][7][vi]; see also "Diploma/Credential Requirements," Office of Special Educ. [Jan. 2014], available at <http://www.p12.nysed.gov/specialed/diploma-credentials.html>; "Summary of Diploma Requirements for Students who First Enter Grade 9 in 2009-2010," Office of Curriculum and Instruction [Nov. 2011], available at <http://www.p12.nysed.gov/ciai/gradreq/2009GradReqDetails.html>).

⁹ The director of special education testified that vocational education and work-study were considered general education programs as opposed to special education programs (Tr. pp. 550, 582-83). Accordingly, while the student's vocational education and work-study programs were referenced in the CSE meeting minutes, they were not included in the special education program recommendation portions of his IEPs (id.).

2013 CSE meetings testified that the "work program was recommended for any student who needed very close supervision, extra job coaching, extra instruction on the soft skills of work, which are how to respond to a boss, how to respond to negative criticism" (Tr. p. 412).

In the beginning of the 2012-13 school year, the student participated in the work-study program which included two components, a work-study component and participation in the BOCES career skills center (Tr. pp. 583-84).¹⁰ However, in early November 2012 the student refused to attend either portion of the work-study program and the parent requested the work-study program be discontinued (Tr. pp. 184, 299-302, 583-87, Dist. Ex. 51). The hearing record reflects that district staff including special education teachers, a social worker, the program supervisor, transition specialists, and the autism consultant, continued to work on plans to encourage the student to participate in a work-study program or find work in the community (Tr. pp. 188-89, 191, 302-04, 588, 592-93; Dist. Exs. 34; 51). Various staff members testified that the student rejected alternate work-study options and that he stated that he would find a job on his own (Tr. pp. 189, 191, 226, 248, 303, 633). The BOCES transition specialist explored the field of law enforcement with the student because it was an interest of his, but she reported that the student did not react well when he learned that this profession would require a college education or further schooling (Tr. p. 283). When the transition specialist presented the student with the possibility of being a museum tour guide, which was one of his areas of interest, the student turned it down because the program required students to have a job coach and he was not willing to work with a job coach (Tr. pp. 307-08). In sum, a review of the hearing record indicates that up until at least March 2013, the district attempted to work with the student to obtain a suitable work-study program (Tr. pp. 309-12). Thus, in light of the student's repeated refusals to participate in a work-study program, it was appropriate for the district to offer the student tutoring which would ultimately assist him in achieving his goal of graduating in June 2013.

3. Interfering Behaviors

With respect to the student's behavioral needs, the parent alleges that the IHO failed to address her concerns regarding the provision of a FBA and BIP. Initially, as noted by the district, the parent did not directly raise such claims in her due process complaint notice. However, as noted above the parent did raise concerns with regard to the district's alleged failure to address the student's behavioral and social difficulties and they are addressed as such (Parent Ex. A at pp. 5, 7). The December 2012 IEP indicated that the student needed adult support to assist him during conflict situations, strategies for managing anger and frustration, and strategies for expressing his feelings in socially appropriate ways (Dist. Ex. 5 at p. 5). To address behavioral concerns, the December 2012 IEP included small group instruction, a BIP that addressed disrespectful behavior, provided weekly individual and small group counseling, and recommended supplementary aids and services (periodic breaks as needed, check for understanding, refocusing and redirection, positive reinforcement plan), and goals that focused

¹⁰ The work portion of the program involved light assembly work with a job coach and the career skills component focused on career exploration and teaching career skills such as punctuality, attendance, social skills, and communication skills (Tr. pp. 261, 295-96).

on the development of problem-solving skills and coping skills (Dist. Ex. 5 at pp. 5-8).¹¹ The special education teacher testified that the student's BIP focused on problem-solving strategies, was adjusted over time to help the student cope with events in his life, and there was ongoing discussion of the BIP as part of the program (Tr. pp. 116-17; 119; 121).¹² Accordingly, although the district apparently did not implement a formal BIP subsequent to the development of the December 2012 IEP, the hearing record supports a finding that the district adequately identified the student's interfering behaviors and addressed his behavioral needs (T.M., 752 F.3d at 169; see, e.g., F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41 [2d Cir. 2013]; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73). To the extent the parent argues that the student's BIP should have been modified to compel the student to attend the work-study program, the student was past the compulsory age of attendance and the hearing record reflects the parent consented to the student's withdrawal from the work-study program (Tr. pp. 584-85; Dist. Ex. 50; see Educ. Law § 3205[1][a], [3]).

4. Autism Consultant Services

Finally, turning to the parent's allegation that the district failed to provide the student with services to address his needs as a student with autism, I note that the evidence in the hearing record supports a finding that the student was provided with autism consultant services. A review of the hearing record reveals that when the CSE reconvened in December 2012, the director of special education stated that the parent was very insistent that the student's disability classification be changed and accordingly, the December 2012 CSE changed the student's classification and found him eligible for special education and related services as a student with autism (Tr. pp. 597-98; Dist. Ex. 5 at pp. 1, 9). In addition, the December 2012 CSE added the service of an autism specialist for 15 hours per year across all settings to assist the student, his family, and the educational team in understanding the student's needs as related to his PDD-NOS diagnosis (Dist. Ex. 5 at pp. 1, 9). The hearing record reflects that while the district experienced some difficulty in obtaining the services of an autism consultant for a short period of time after the December 14, 2012 CSE meeting, the services were being provided by January 14, 2013 (Tr. pp. 631-32; Dist. Ex. 42). Although the parent alleged that the December 2012 IEP failed to identify how the autism specialist would assist the student and his family, the IDEA does not require that an IEP explain the manner in which it will be implemented (see, e.g., W.D. v. Watchung Hills Regional High Sch. Bd. of Educ., 2014 WL 793459, at *3-*4 [D.N.J. Feb. 26, 2014]), and the autism specialist testified that she discussed priorities and concerns with the

¹¹ While a March 22, 2012 progress report for a BIP developed in January 2012 indicated the student's interfering behaviors had decreased under the BIP, that no revisions were warranted at that time, and that the plan would "be reviewed in Mid-May 2012"; no subsequent BIP was entered into evidence (Parent Ex. TTTT at pp. 1-2; see Parent Exs. WWW-XXXX).

¹² Although the March 2013 CSE determined that the student no longer required a BIP, the March 2013 IEP reflected that the student needed strategies and supports to address his behavior and the IEP addressed these needs by continuing to include small group instruction, weekly individual and group counseling, supplementary aids and services, and goals that focused on the development of problem-solving skills and coping skills (Dist. Ex. 6 at pp. 4-9). According to an undated progress report with respect to the student's annual goals for the 2012-13 school year, the student made marked improvement with respect to impulse control, coping strategies, and positive interactions with others after he discontinued the work-study program (Dist. Ex. 45 at pp. 2-3).

student, the parent, and staff and developed strategies on issues such as emotional regulation, bullying, work-study, pre-job skills, job applications, and future programming (Tr. pp. 471-82). The autism consultant testified that she had several long telephone conversations with the parent in which she shared information and strategies and responded to any of the parent's questions (Tr. pp. 512-15). In sum, a review of the hearing record indicates that the district provided the student with autism consultant services to address both the student's and parent's needs, meeting the State regulatory requirement that districts provide parent counseling and training to the parents of students with autism (Tr. pp. 598-600; see 8 NYCRR 200.13[d]).¹³

VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2012-13 school year. In any event, the IHO's determination that the student is not eligible for compensatory education beyond the period of his eligibility for special education and related services because the district did not commit a gross violation of the IDEA is supported by the hearing record. I am not unsympathetic to the current post-graduation concerns of the parent and student, and encourage them to continue to work with State agencies, such as the State Education Department's Office of Adult Career and Continuing Education Services (www.acces.nysed.gov), that may be able to assist the student in attaining his employment and independent living goals.

I have considered the parties' remaining contentions and find that I need not address them in light of my findings herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 7, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹³ To the extent the parent asserts in her memorandum of law that the district failed to provide adequate services to address the student's receptive language deficits, no such claim was raised in the parent's due process complaint notice (see Parent Ex. A at pp. 1-11).