The University of the State of New York

The State Education Department
State Review Officer
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No. 14-114

Application of the BOARD OF EDUCATION OF THE SOUTH HUNTINGTON UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, Christopher Venator, Esq., of counsel

Law Office of Rosemarie Barnett, attorneys for respondent, Rosemarie A. Barnett, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter for the 2012-13 and 2013-14 school years and ordered it to provide the student with compensatory educational services. The parent cross-appeals from the IHO's determination which denied her request to prospectively place the student at the Fusion Academy (Fusion). The appeal must be sustained. The cross-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

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, however, the CSE convened on February 14, 2013, to conduct the student's initial review and to develop an IEP for the remainder of the 2012-13 school year (see Dist. Ex. 5 at p. 1). At that time, the CSE found the student eligible for special education and related services as a student with an emotional disturbance, and the February 2013 CSE recommended counseling as a related service, in addition to seeking a structured, therapeutic

setting for the student (see Dist. Exs. 5 at pp. 1, 6; 6 at p. 1).[1] For the 2013-14 school year, the CSE convened on June 3, 2013, and although the June 2013 CSE continued to recommend counseling as a related service, the CSE began to explore residential facilities for the student (see Dist. Exs. 8 at pp. 1-2, 7; 9 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated March 10, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years because the district failed to locate a "suitable placement" for the student for both school years (see IHO Ex. I at p. 2). The parent indicated that she located a "school within a reasonable distance" from her home that would provide the student with the "education and setting that would not restrict her learning or interfere with [an] outside therapeutic program" (id.). The parent further indicated that this "school" would provide the student with an opportunity to "catch up on classes and learn at her level as it [provided] one on one teaching," as well as counseling "tailored to the [student's] needs and work in conjunction with private therapy" (id.). Finally, the parent identified Fusion as the nonpublic school.

B. Impartial Hearing Officer Decision

On April 25, 2014, the IHO conducted a prehearing conference, and on May 16, 2014, the parties proceeded to an impartial hearing, which concluded on June 2, 2014 after three days of proceedings (see Tr. pp. 1-726). By decision dated June 18, 2014, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years (see IHO Decision at pp. 15-18). However, the IHO—who analyzed the parent's request for prospective placement of the student at Fusion as a unilateral placement—found that the hearing record failed to contain sufficient evidence upon which to determine whether Fusion was an appropriate placement; thus, the parent failed to meet her burden to establish that Fusion was an appropriate placement warranting an "award of prospective tuition payment" (id. at pp. 18-19). Instead, the IHO crafted an award of compensatory educational services in the form of additional services for the student in order to remedy the district's failure to offer the student a FAPE for the 2012-13 and 2013-14 school years (id. at pp. 19-22). More specifically, the IHO concluded that for the failure to offer the student a FAPE for the 2012-13 school year, the student was entitled to receive a total of five hours of instruction per day for every school day, "calculated from 90 school days" after the date the parent "signed consent for the student's initial evaluation (in the 2012-13 school year), through the last school day" of the 2012-13 school year (id. at p. 22). For the 2013-14 school year, the IHO concluded that the student was similarly entitled to receive a total of five hours of instruction per day for every school day, calculated from the "first day of school in September 2013 through the last day" of the 2013-14 school year, but "less any school holidays, Regents exam days, the number of class hours devoted to English in the first semester of the 2013-2014 school year, and hours documented for tutoring services that the student ha[d] received from March 13, 2014" (id.). The IHO also ordered the district to conduct a functional behavioral assessment (FBA), determine whether a behavioral intervention plan (BIP) was warranted, and develop an

[1] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

IEP for the 2014-15 school year that considered the student's "therapeutic needs as well as her academic ones, consistent with this decision" (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in awarding compensatory educational services as a remedy for the district's failure to offer the student a FAPE for the 2012-13 and 2013-14 school years. The district asserts that the evidence in the hearing record did not support the IHO's finding that the district committed "what amount[ed] to gross violations of [the] IDEA." The district also asserts that the amount of compensatory educational services awarded by the IHO was "irrational and should be reversed. [2]

In an answer, the parent responds to the district's allegations. As a cross-appeal, the parent alleges that the IHO erred in failing to make any findings with respect to whether Fusion was an appropriate placement, and in finding that the parent failed to present sufficient evidence regarding the appropriateness of Fusion.

In an answer to the parent's cross-appeal, the district responds to the parent's allegations and generally argues to uphold the IHO's findings with respect to Fusion. The district further argues that the parent was not entitled to prospective tuition reimbursement and that equitable considerations did not weigh in favor of the parent's requested relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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 board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

[2] The district does not appeal the IHO's findings that it failed to offer the student a FAPE for the 2012-13 and 2013-14 school years; therefore, the IHO's determinations are final and binding on the parties and will not be further addressed in this decision (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

70 [1985]; R.E., 694 F.3d at 184-85; T.P. v Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2007]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Relief

1. Prospective Placement and Funding at Fusion

Notwithstanding the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, the parent's cross-appeal challenging the IHO's failure to make findings regarding whether Fusion was an appropriate placement, and the parent's requested relief—which seeks prospective placement of the student at Fusion, as well as prospective or direct funding of the costs of the student's tuition at Fusion—must be dismissed.

Initially, the parent incorrectly urges an examination of the appropriateness of Fusion as a unilateral placement since the student was never placed there during the 2012-13 and 2013-14 school years. Generally, an award of prospective funding must be predicated upon proof of a lack of financial resources; moreover, the retroactive direct payment of tuition (as opposed to reimbursement) is only available as a remedy when a student has been enrolled in an appropriate private school, but the parents—due to a lack of financial resources—have not made tuition payments although legally obligated to do so (Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). This case is unlike Mr. & Mrs. A., or the principles enunciated in Burlington in which the student in question actually attended a nonpublic school program, because the student did not actually enroll in Fusion for the 2012-13 or 2013-14 school years. Therefore, the relief sought by the parent can only be properly characterized as an unrealized prospective unilateral placement.[3] Moreover, given that the parent sought prospective placement of the student for school years that have both since expired, such relief, at this juncture, is no longer meaningful and may no longer appropriately address the current needs of the student,

[3] Even assuming for the sake of argument that this case involved the student's unilateral placement at Fusion, the IHO properly found that the parent did not sustain her burden to establish that Fusion was an appropriate unilateral placement, as the hearing record failed to contain sufficient evidence upon which to make that determination (see Tr. pp. 1-726; Dist. Exs. 1-17; Parent Exs. A-E; IHO Exs. I-III).

which the CSE—pursuant to both the IHO's order and its legal obligations—should have already determined for the 2014-15 school year.[4]

2. Compensatory Educational Services

The district asserts that the IHO erred in finding that the district committed "what amount[ed] to gross violations of [the] IDEA," and furthermore, the amount of compensatory educational services awarded was "irrational." The parents reject the district's contentions. A review of the evidence in the hearing record supports the district's argument that the specific award devised by the IHO was not rationally based because it was not designed to address the student's needs or compensate for services that the district failed to provide during the 2012-13 and 2013-14 school years.

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 may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise 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 (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), 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]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation 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 Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a

[4] With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A., 769 F. Supp. 2d at 406; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 452-53 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). As such, it is the parent's burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Fusion and whether she is legally obligated for the student's tuition payments (see, e.g., Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). In this instance, even assuming the parent met the first three criteria of the standard, the hearing record contains no evidence regarding the fourth criteria—that is, that the parent met her burden to establish a lack of financial resources, that she did not make tuition payments, and that she was legally obligated to do so (see Tr. pp. 1-726; Dist. Exs. 1-17; Parent Exs. A-E; IHO Exs. I-III).

Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also 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 Mr. and Mrs. P v. Newington Bd. Ed., 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]"]; 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]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-13 [S.D.N.Y. March 6, 2008]). 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]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; 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. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that 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 [finding "[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 IEPs that were not provided during the 2012-13 and 2013-14 school years.[5, 6] Rather, a review of the IHO's decision reveals that for the 2012-13 school year, IHO found that although the student "achieved passing grades for the school year and advanced to [11th] grade," the student achieved "much lower" grades for the final two quarters of the school year and thus, there was "no evidence that she derived meaningful benefit from her education during the time period of April 16, 2013 until the last day of school in June" (IHO Decision at pp. 20-21). As a remedy for the failure to offer the student a FAPE for the 2012-13 school year, the IHO ordered the district to provide the following: five hours of instruction per day for every school day, "calculated from 90 school days" after the date the parent "signed consent for the student's initial evaluation (in the 2012-13 school year), through the last school day" of the 2012-13 school year (id. at p. 22).

A review of the evidence in the hearing record indicates that on January 28, 2013—prior to the February 2013 CSE's determination of the student's eligibility for special education and related services—the student began attending an online blended home tutoring program (online blended program) and received two hours of instruction in a different subject area each day (see Tr. pp. 108-109, 211-12, 451-55; Dist. Ex. 16 at pp. 1-4, 23, 27). At the impartial hearing, the district director of special education described the online blended program as a home teaching alternative program offered in a building across the street from the district public high school (see

[5] The hearing record does not contain any evidence that the parent provided the district with consent for the initial provision of special education and related services (see Tr. pp. 1-726; Dist. Exs. 1-17; Parent Exs. A-E; IHO Exs. I-III).

[6] In addition, the parent admitted upon cross-examination at the impartial hearing that she was not requesting that the district "make up sessions of in-school counseling" (see Tr. pp. 592-93).

Tr. p. 108). He further testified that the course content was presented through a computer curriculum, but special education teachers were present to assist the students (see Tr. p. 109).[7]

According to the evidence in the hearing record, the student's online blended program consisted of the following schedule: Monday, Biology; Tuesday, Global History; Wednesday, English 10; Thursday, French 10/Astronomy; and Friday, Geometry (see Dist. Ex. 16 at pp. 2, 27; see also Tr. p. 452-53). Although the student testified that she did not receive French instruction through the online blended program, but instead met with her French teacher for one hour each week, a review of the evidence in the hearing record demonstrates that the student did attend French through the online blended program each week and also met with the French teacher on several occasions (see Tr. p. 453; Dist. Ex. 16 at pp. 17-18). On April 15, 2013, the student stopped attending the online blended program and returned, albeit attending sporadically, to the district public high school (see Tr. pp. 126, 382,455, 560-65; Dist. Ex. 16 at pp. 16-18, 26-27).). According to the evidence in the hearing record—and as noted by the IHO—the student passed all of her classes and Regents examinations during the 2012-13 school year (see Dist. Ex. 16 at p. 22; see also IHO Decision at p. 21).

With regard to the 2013-14 school year, the IHO noted that the student had "no choice but to attend" the district public school beginning on the first day of September 2013, but also that she attended school when able and met with a counselor; however, similar to the conclusion for the 2012-13 school year, the IHO found that the hearing record contained "little evidence" that the student "derived meaningful benefit" from attending the district public school (IHO Decision at p. 21). While noting that the hearing record did not include a "report card or other documentary evidence" to show that the student "progressed," the IHO indicated that the hearing record did include testimony that the student passed the English Regents examination in January 2014 (id.). The IHO also found, however, that the student was "very behind in chemistry class and labs," the parent did not receive additional "math hours" despite her request, and the student could not "sit for the AP History Exam" due to the failure to secure an "alternate location" when the student could not "get to school" (id.). As a remedy for the failure to offer the student a FAPE for the 2013-14 school year, the IHO ordered the district to provide the following: five hours of instruction per day for every school day, calculated from the "first day of school in September 2013 through the last day" of the 2013-14 school year, but "less any school holidays, Regents exam days, the number of class hours devoted to English in the first semester of the 2013-2014 school year, and hours documented for tutoring services that the student ha[d] received from March 13, 2014" (id. at pp. 21-22).

A review of the evidence in the hearing record demonstrates that during the 2013-14 school year, the student stopped attending the district public high school in November 2013 (see Tr. pp. 187-88, 332-33, 384, 457, 527, 533, 570-72).[8] On February 6, 2014, the CSE convened to review the student's program (see Dist. Ex. 12 at p. 1). At the impartial hearing, the district director of

[7] The student testified, however, that she never accessed a computer because it was not allowed (see Tr. p. 452).

[8] Pursuant to the parent's request for an emergency CSE meeting, the CSE convened on December 12, 2013 to review the student's program (see Tr. pp. 297-99. 350-51; Dist. Ex. 10 at p. 1). The parent admitted on cross-examination that between December 12, 2013 and February 24, 2014, the district public school had a two-week holiday recess in addition to a February 2014 recess (see Tr. pp. 587-88).

special education testified that following the February 2014 CSE meeting, the student did not attend the online blended program but instead attended "straight home teaching" (Tr. p. 140). Shortly thereafter on February 24, 2014, the student was placed on home tutoring (see Dist. Ex. 17 at p. 1; see also Tr. pp. 141, 188, 435, 457, 572). According to the evidence in the hearing record, the student's home tutoring program from February 24, 2014 through March 10, 2014 consisted of the following: two hours of instruction per week in each of her subjects—which included AP U.S. History, English, algebra, physical education, and chemistry (see Tr. p. 572-74; Dist. Ex. 17 at p. 1).[9]

Near the conclusion of the impartial hearing the district director of special education testified that in order for the student to graduate with a Regents diploma at the end of the 2014-15 school year, she only needed to complete one semester of course work (see Tr. pp. 611-15).

Given that an award of compensatory educational services or additional services should aim to place disabled students in the same position they would have occupied but for the school district's violations of the IDEA—and not, as the IHO appeared to determine, be based upon whether the student derived meaningful benefits from attending the online blended program or home instruction or the district's public school—the evidence in the hearing record indicates that the IHO's hour-for-hour computation of instruction as an award is neither proper nor warranted under the facts of this case. Based upon the facts, it is altogether unclear how the purposes of an award of compensatory educational services or additional services in this case are served especially in light of the fact that the student remains on track to graduate with a Regents diploma at the end of the current school year (for which the district should have convened a CSE meeting for the student's annual review for the 2014-15 school year) with only one semester of course work. While I sympathize with the parent's desire for the student to participate in course work of her choosing, the standard for an award of compensatory educational services or additional services more properly focuses on compensating the student for services not received; it is not intended to bring student's skills to a guaranteed result or a specific level of educational benefit. Accordingly, the IHO's order directing the district to provide the student with compensatory educational services must be annulled.

VII. Conclusion

In summary, an independent review of the evidence in the hearing record does not support the IHO's award of compensatory educational services or additional services in this matter.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

[9] In an e-mail dated February 25, 2014, the parent notified the district that even though she accepted this "temporary resolution," she did not believe that 2.5 hours of tutoring per day was sufficient to bring the student "up to speed" and the tutoring did not include any interaction with the student's peers (Parent Ex. D at p. 3).

IT IS ORDERED that the IHO's decision dated June 18, 2014 is modified by reversing that portion which ordered the district to provide the student with compensatory educational services in the form of additional services.

Dated: **Albany, New York**
September 30, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER