The University of the State of New York

The State Education Department
State Review Officer
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No. 15-014

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 New York City Department of Education

Appearances:
Legal Services NYC - Bronx, attorneys for petitioner, Nelson Mar, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 those portions of a decision of an impartial hearing officer (IHO) which failed to award the entirety of the relief she requested to remedy the district's failure to provide the parent's son with an appropriate educational placement for the 2013-14 and 2014-15 school years. The appeal must be sustained in part.

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 impartial hearing, the student was 18 years old and had not received special education and related services since he was discharged from a residential placement in April 2014 (Tr. pp. 38, 41, 232, 236-38; Dist. Exs. 6; 14). The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), a disruptive behavior disorder not otherwise specified (NOS), and an impulse control disorder, as well as a global assessment of functioning score of 50 (severe impairment) (Dist. Exs. 7 at p. 3; 12 at p. 2; 22 at p. 4). The student also presents with social/emotional, behavioral, academic, and language deficits (Tr. p. 44; Dist. Exs. 2 at pp. 1-3; 7; 11; 12; 15; 18; 22; Parent Ex. D).

According to the hearing record, the student was hospitalized in 2010 for aggressive behavior related to anxiety, depression, panic attacks, and "obsessions" (Dist. Ex. 7 at p. 2). Following his hospitalization, the student participated in an outpatient treatment program after which, in December 2010, he began attending a residential treatment center located within a school district outside of his district of residence (district of location) (Dist. Ex. 12 at p.2). The student was reportedly successful during his first year at the residential treatment center, but was ultimately discharged during the 2011-12 school year due to behavioral issues (Tr. pp. 134-35; Parent Ex. C). The hearing record indicates that the student lived at home for six months until October 24, 2012, when he was accepted to another residential placement within the district of location (Dist. Exs. 7 at p. 1; 22 at p. 1).

The student remained at the residential placement during the 2012-13 school year and on April 23, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the student for the 2013-14 school year (Dist. Exs. 20 at p. 2; 21 at pp. 3-4; Parent Ex. B at p. 13). The April 2013 CSE found the student was eligible for special education and related services as a student with an emotional disturbance, and continued to recommend a 12-month program in a nonpublic residential school consisting of placement in a 6:1+1 special class for academic instruction and a 12:1+1 special class for electives, as well as related services of individual and group counseling, and group speech-language therapy (Parent Ex. B at pp. 1, 9-10, 13-14).

In November 2013, the student was absent without leave from the residential placement following an incident with another student (Dist. Ex. 7 at p. 1). In December 2013, the parent contacted the district to request a reevaluation and a new residential placement (Dist. Exs. 9 at p. 1; 10 at p. 1; 21 at p. 3). By notices dated December 11, 2013, the district contacted the parent to schedule a meeting and request consent for the reevaluation (Dist. Exs. 9; 10; 19). The parent consented to the reevaluation on January 15, 2014, and the district conducted various assessments of the student, including a social history update, a psychoeducational evaluation, and a vocational assessment (Dist. Exs. 15; 16; 18; 19). On January 16, 2014, the parent completed a vocational assessment (Dist. Ex. 17).

According to the January 2014 assessments, the student expressed his dissatisfaction with the residential placement and requested a program in a community school wherein he could receive vocational training (Dist. Exs. 15 at pp. 1, 2; 16 at p. 1; 18 at p. 1). The district school psychologist who conducted the January 2014 psychoeducational evaluation indicated in a report dated January 27, 2014, that the student willingly participated in the assessment, readily established and maintained eye contact, and was relatively verbal from the outset of the evaluation (Dist. Ex. 15 at p. 1). The district school psychologist noted that the student exhibited language deficits but employed a productive approach to testing and remained continuously on task (id.). The district school psychologist also indicated that the student did not become frustrated by more difficult tasks; rather, the student remained focused and "persevered without the need for any examiner interventions" (id.). According to the psychoeducational evaluation report, the parent stated that the student did not present with any behavioral issues (id. at p. 2).

The record indicates that the student was absent without leave from the residential placement on January 27, 2014 (Dist. Ex. 22 at p. 3). A CSE was convened by the district on January 28, 2014, which recommended, without explanation, that the student's eligibility classification be changed from emotional disturbance to learning disability and from a 12-month

school year program to a 10-month school year program (Dist. Ex. 23 at pp. 1, 9, 12). The January 2014 CSE further recommended placement in a special class in a community school with a student to teacher ratio of 15:1 (id. at p. 8). The January 2014 IEP also reflected the CSE's recommendation for related services consisting of counseling once per week for 40 minutes in a small group of 5 and speech-language therapy twice per week for 40 minutes each session also in a small group of 5 (id.). According to reports from the student's teachers during the 2012-13 school year, the student was easily frustrated and prone to lash out in anger (id. at p. 3). In contrast, the student was described by a district school psychologist as polite, friendly, and cooperative (id. at p. 4; see also Dist. Ex. 15 at p. 2). The parent testified that she attended the January 28, 2014 CSE meeting, but left early because she did not agree with the recommendations (Tr. pp. 140-41).

By prior written notice dated January 29, 2014, the district advised the parent of the January 2014 CSE's recommendations and of her due process rights (Dist. Ex. 24). The record reflects that the parent rejected the program offered by the district and that the student remained at the residential placement until April 17, 2014 (Tr. pp. 161-64; Dist. Exs. 7; 22). According to a clinical summary prepared by a case worker at the student's residential placement, the student was absent without leave for approximately 21 calendar days from January 2014 through April 2014 (Dist. Ex. 22 at pp. 2-3). The case worker also reported that the student attempted to sign himself "out of care" on April 12, 2014 (id. at p. 3).

The student met with a district CSE chairperson on April 17, 2014, and requested to be discharged from the residential placement (Tr. pp. 32-33; see also Dist. Ex. 21 at p. 2). The record reflects that the student participated in a social history update and consented to further assessment (Dist. Exs. 12; 13; 14). The CSE chairperson testified that the student advised her that he did not want to be in a residential facility and would refuse to attend school should the CSE recommend a residential placement (Tr. pp. 38, 96-97).

By letter dated May 1, 2014, the district CSE chairperson advised a CSE chairperson from the district of location to discharge the student from the residential placement as of April 17, 2014 (Dist. Ex. 6). On May 5, 2014, the student was assessed by another district school psychologist and, in a psychoeducational evaluation report dated June 2, 2014, the student was described as having a "serious oppositional demeanor" during the evaluation and manifesting high levels of anxiety, poor impulse control, and an inability to manage anger (Dist. Ex. 11 at pp. 3-4). The school psychologist concluded that the student's academic progress was impeded by his emotional disturbance and limited cognitive ability (id. at p. 4). The school psychologist recommended that the CSE consider placement in a day treatment or residential treatment program (id.).

On July 14, 2014, the CSE reconvened to make recommendations for the 2014-15 school year (Dist. Ex. 2).[1] The July 2014 IEP reflected the results of the April 2014 social history update and the June 2014 psychoeducational evaluation, and reiterated the recommendations made on the January 2014 IEP. The record indicates that the student's wishes were of significant importance to the July 2014 CSE because he was an adult (Tr. pp. 82, 90, 99; Dist. Exs. 15 at p. 1; 18 at p. 2).

[1] The IEP reflects an implementation date of July 14, 2014; however, the IEP did not recommend that the student receive 12-month services (Dist. Ex. 2 at pp. 1, 6-7, 11).

The July 2014 CSE recommended placement in a 15:1 special class in a community school with the related services of counseling and speech-language therapy (Dist. Ex. 2 at pp. 6-7).

A. Due Process Complaint Notice

By due process complaint notice dated September 15, 2014, the parent requested an impartial hearing (Parent Ex. A). The parent's due process complaint notice alleged that the district allowed the student to discharge himself from the residential placement in the middle of the 2013-14 school year and failed to provide services thereafter (id. at p. 1). For the 2014-15 school year, the parent alleged that the district failed to convene a CSE to recommend an appropriate placement, and failed to make a timely offer of placement (id.).

As a remedy, the parent requested a "Nickerson letter,"[2] 360 hours of 1:1 tutoring by a specific provider, service authorizations for related services not provided, an updated vocational assessment, and that the CSE reconvene and recommend a residential placement (id. at p. 2).

B. Facts Post-Dating the Due Process Complaint Notice

By prior written notice dated September 25, 2014, the district advised the parent of the July 2014 CSE's recommendations and of her due process rights (Dist. Ex. 4). An updated clinical summary from the student's last residential placement of the same date detailed discharge planning attempted prior to the student's self-discharge on April 17, 2014 (Dist. Ex. 22).

C. Impartial Hearing Officer Decision

After a hearing related to pendency held September 25, 2014, by interim decision dated October 1, 2014, the IHO determined that the student's pendency placement was set forth in the April 2013 IEP (Interim IHO Decision at p. 3).

On November 10, 2014, the impartial hearing proceeded on the merits and concluded on December 10, 2014, after three hearing dates (Tr. pp. 11-273). During the course of the impartial hearing, an IEP recommending a residential placement was developed by the CSE on November 19, 2014, without the parent present (Dist. Ex. 25). The hearing record also reflects that a nonpublic school indicated, by letter dated November 4, 2014, that the student would be accepted into its residential program once the CSE convened in order to "make arrangements to begin placement at our facility" (Dist. Ex. 27).

[2] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the Eastern District based upon a class action lawsuit, available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192 n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

In a decision dated December 24, 2014, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (IHO Decision at pp. 7-8). In particular, the IHO found that the student had been "clear" that he did not want to attend, and would not attend, a residential placement (id. at pp. 3, 7-8). The IHO found that the student was entitled to compensatory services and awarded 160 hours of tutoring to compensate the student for the district's failure to provide him with appropriate services between April 17, 2014, and August 17, 2014 (id. at p. 9). The IHO ordered the district to provide the student with authorizations to obtain 16 30-minute sessions of individual counseling, 16 30-minute sessions of group (3:1) counseling and 32 30-minute sessions of group (3:1) speech-language therapy to compensate the student for related services that were not delivered between April 17, 2014 and August 17, 2014 (id. at pp. 9-10). The IHO further ordered the CSE to reconvene, conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP), and develop an appropriate IEP that included a nonresidential placement, one hour per day of individual academic tutoring, and transition goals and services (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by determining that the student did not require a residential placement. The parent also alleges that the IHO erred by failing to order that the awarded compensatory services be delivered by the parent's chosen provider. The parent also contends that the IHO erred in calculating the number of hours of compensatory services that the student was entitled to receive. The parent also alleges that the student is not currently attending a program or receiving any services. The parent has submitted three additional documents that she requests an SRO consider as additional evidence.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. The district also asserts that it is "working diligently" to implement the student's pendency placement.

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]). 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).

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]).

The burden of proof is on the school district during an impartial hearing, other than for claims not at issue here (Educ. Law § 4404[1][c]).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Neither party has appealed the IHO's findings that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, nor the IHO's award of compensatory education to the student as a remedy for the district's failure to offer a FAPE. Therefore, those determinations are final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The issues raised in this appeal are limited to whether the IHO erred in (1) calculating the number of hours of instruction to which the student is entitled as compensation; (2) failing to designate the parent's chosen provider to deliver compensatory education services; and (3) precluding the CSE from considering residential placement for the student.

2. Additional Evidence

The parent has submitted three documents as additional evidence to her petition to demonstrate that the student has recanted his hearing testimony and now requests that the CSE recommend a residential placement. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 15-026; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

As discussed below, the CSE is tasked with making appropriate recommendations in order to offer a student a FAPE. The preference of the parent and/or student is but one element to be considered when determining an appropriate program and placement for a student. Therefore, the documents annexed to the parent's petition are not relevant or necessary to the disposition of the parties' arguments. As such, I decline to accept the additional evidence proffered by the parent.

3. Authority of the Impartial Hearing Officer

On the final day of the hearing, the student testified via telephone (Tr. pp. 212-57). The IHO asked a number of questions of the student and established that the student was unrepresented at the hearing (Tr. pp. 244-48). The IHO acknowledged that she was unsure how to proceed since the parent made the request for an impartial hearing and the attorney present had been retained by the parent (Tr. pp. 247-48).[3]

An impartial hearing officer is empowered to appoint a guardian ad litem "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student... the [IHO] shall appoint a guardian ad litem to protect the interests of such student" (8 NYCRR 200.5[j][3][ix]). State regulation defines a guardian ad litem as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" (8 NYCRR 200.1[s] [emphasis added]). Thus, State regulation expressly contemplates that the IHO has the authority to appoint a guardian ad litem to protect the interests of the student during the impartial hearing. This provision supports the objective of ensuring that a student's rights are adequately represented during an administrative due process proceeding.

The IHO in this case was able to ascertain the student's preferences with regard to his education by questioning him directly (Tr. pp. 244-50, 255-57). The IHO's questioning of the student was sufficient to demonstrate that the interests of the student were represented at the hearing. Nevertheless, if deemed appropriate by the IHO based upon the record before her, it

[3] Counsel for the parent represented on the first hearing date that he was representing both the parent and the student (Tr. p. 7).

would have been well within her purview to suspend the proceedings until such time as a guardian ad litem was secured to represent the interests of the student.

B. Compensatory Education

1. Additional Services

The district does not appeal the IHO's determination that it failed to offer the student a FAPE for both the 2013-14 and 2014-15 school years. Nor does the district appeal the relief crafted by the IHO to remedy its failure to provide the student with an appropriate program. 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 relief in the form of supplemental special education or related services has been awarded to students with disabilities who remain eligible for instruction under the IDEA if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [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]). 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. 14-172; Application of the Bd. of Educ., Appeal No. 13-056; Application of the Dep't of Educ., Appeal No. 13-048; Application of the Dep't of Educ., Appeal No. 12-135).

In order to compensate the student for the district's failure to offer a FAPE for the 2013-14 and 2014-15 school years, the IHO ordered the district to provide 160 hours of individual tutoring and authorization to obtain related services to compensate the student for the time period from April 17, 2014, through August 17, 2014 (IHO Decision at p. 9). The parent argues that the student is entitled to receive compensatory services beginning in either November 2013 or December 2013. The hearing record does not support the parent's contention. The district did not receive unequivocal written notice that a change in program was requested until the student appeared in person at the CSE on April 17, 2014 (Dist. Ex. 21 at p. 2). In addition, the record demonstrates that the student was frequently absent without leave from the residential placement beginning in November 2013, to which the district responded by conducting evaluations and convening a series of CSE meetings in an attempt to address the student's apparently changing needs (Dist. Exs. 9-10; 15-19; 23-24). I agree with the IHO that the district's obligation to provide services to compensate for the failure to provide the student with appropriate services began when he presented himself to the CSE on April 17, 2014 to discharge himself from the residential placement, and find that the IHO awarded appropriate relief.

2. Specific Provider

The parent also contends that the IHO erred by failing to order the district to utilize the parent's chosen provider to deliver compensatory special education and related services to the student. The parent argues that the IHO should have applied a Burlington/Carter tuition reimbursement analysis[4] to her request. This argument is without merit. In this case, the parent has not unilaterally placed the student in a private school or sought reimbursement for her expenses related to services that she unilaterally obtained without the consent of the district.

To the extent that the IHO ordered that the student receive tutoring from a special education teacher, the order does not preclude the district from utilizing the parent's choice, provided that the district remains in compliance with the IHO's order. The hearing record contains no indication that any specific provider would be required to enable the student to receive benefit from the awarded services. Nonetheless, the district is encouraged to work cooperatively with the parent and student to provide these services.

C. Continuum of Services—Residential Placement

The parent alleges that the IHO erred by failing to find that the student required a residential placement. The IHO ordered the CSE to reconvene and recommend a "non-residential placement with an appropriate staffing ratio and related services in a therapeutic environment" (IHO Decision at p. 9). The IHO indicated that her order was in keeping with the student's desire to attend a nonresidential program.

The parent contends that the student required a residential placement in order to address his social/emotional needs as well as his academic needs; however, other than the parent's preference that the student attend a nonpublic residential school, the hearing record contains conflicting evaluative information and is insufficient to support the parent's position that the student requires a residential placement in order to receive educational benefits. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22).[5] While the district was required to consider the preferences of the parent and the student as well as the June 2014 psychoeducational evaluation, it was not required to adopt those

[4] The "Burlington/Carter" analysis refers to decisional law interpreting the Individuals with Disabilities Education Act (IDEA) which established that 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, 369-70 [1985]).

[5] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

recommendations or provide everything that loving parents might desire (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567).

The hearing record indicates that the student has been educated in a residential setting since at least 2010, and it appears that the district has continually acquiesced to the parent's preference for a residential placement until the student turned 18. Even assuming that the student has made greater progress in residential settings than he would have in a day program in a public school, the hearing record is unconvincing on this point. Further, the evidence in the record that supports residential placement is not clearly sufficient to overcome the district's obligation under the IDEA to offer the least restrictive environment within the public school system reasonably calculated to enable the student to receive educational benefits (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]).

Nevertheless, as the hearing record is unclear on this point, the student's special education needs may be so severe that they can only be appropriately addressed in a residential placement. The district is required to offer an appropriate placement and the IHO erred by precluding the CSE from considering the entire continuum of services. While it is appropriate for the CSE to consider the student's preferences, they are not dispositive with regard to the appropriateness of the program developed for the student.

VII. Conclusion

In summary, the IHO erred by ordering the CSE to consider only nonresidential placements when developing an IEP for the student. The IHO's decision is affirmed in all other respects. I have considered the parent's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that when the CSE next convenes to develop a program for the student, it shall consider whether the student requires a residential placement in order to receive a FAPE.

Dated: **Albany, New York**
April 15, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER