The University of the State of New York

The State Education Department
State Review Officer
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No. 20-127

Application of a STUDENT WITH A DISABILITY, by her 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:
The Law Office of Elisa Hyman, P.C., attorneys for petitioner, by Elisa Hyman, Esq. and Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

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 a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2017-18 school year was appropriate. The district cross-appeals from the IHO's determination not to reduce or deny relief based on equitable considerations. The appeal must be sustained in part. 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

The student's educational history includes her attendance in a number of different educational programs; she has previously attended district public schools; a private school; a charter school; an approved, nonpublic school (NPS); and, since 2016, she has been receiving home instruction while being registered at a district high school (Parent Ex. BB at pp. 2-3; Dist. Ex. 23 at pp. 8-9).

The student has received diagnoses including: depression, anxiety, post-traumatic stress disorder (PTSD), a mood disorder, and a specific learning disability with impairment in mathematics (Parent Exs. AA at pp. 25-43, 126-163; BB; FFF; Dist. Ex. 23). The student has a history of suicidal ideations, self-harm, and multiple psychiatric hospitalizations (Parent Ex. AA at pp. 135, 143, 154, 158, 159, 161, 163; Dist. Ex. 23 at p. 4). The student also has a history of asthma, which has been described as being exacerbated by stress and anxiety, and has been reported as a reason for the student not being able to attend school for lengthy periods of time; the student has been prescribed medication to treat asthma and has received an asthma action plan (see e.g., Parent Ex. AA at pp. 24-43, 60-61, 113-14; Dist. Ex. 23 at pp. 2-3).

The student was the subject of a prior impartial hearing; the prior IHO, in a corrected December 5, 2017 decision, noted the district's concession that it failed to provide the student with a free appropriate public education (FAPE) for the 2013-14, 2014-15, 2015-16, and 2016-17 school years (Parent Ex. B at pp. 4, 5, 8).[1] The prior IHO also determined that it was "abundantly clear that this is a fragile student confronting several intense handicapping challenges that necessitate a combination of carefully integrated services; home instruction, tutoring, class assignment and counseling" (id. at p. 5). The prior IHO further found that the student was unable and unfit to be in a general education or classroom environment, and due to past and ongoing circumstances and hospitalizations, that the student was best serviced within the home, for the then, immediate short-term future (id.). The IHO took note of the various medical recommendations that the student required a therapeutic residential placement, which was "vigorously/aggressively" opposed by the student, and which the district was reluctant to recommend for the student (id. at pp. 5-6). The IHO ordered the district to "provide 800 sessions of tutorial services"; "to fund counseling services in the amount of 120 sessions"; and to pay for an evaluation and registration at the Huntington Learning Center (id. at p. 9).

As relevant to this appeal, a CSE convened on June 28, 2017 for the purposes of creating the student's IEP for the 2017-18 school year, the school year at issue in this appeal (Dist. Ex. 20). The resulting IEP shows that the CSE recommended that the student be placed in a 12:1+1 special class in a State approved nonpublic school for the 2017-18 school year (Dist. Ex. 20 at pp. 7, 10). The CSE also recommended that the student receive the related service of counseling, twice per week in 40-minute sessions, with one session being on a 1:1 basis and one being in a group setting (id. at p. 7).

In a letter to the district dated July 11, 2017, the parent notified the district of her "intent to home school [the student] for the fall 2017-18 school year" (Dist. Ex. 30 at p. 1).

[1] The prior IHO presided over two prehearing conferences in this matter that took place on April 27, 2018 and May 3, 2018 (Tr. pp. 1-319). At the May 3, 2018 conference, the attorney for the district made a motion for the prior IHO to recuse himself, and the IHO recused himself from this proceeding (Tr. pp. 208-319). A new IHO took over the matter at the September 2018 hearing and continued through to the end of the proceeding (Tr. pp. 320-1421).

In a form letter dated September 27, 2017, the district informed the parent that her individualized home instruction plan was in compliance with the applicable State regulation (Dist. Ex. 31).[2]

A. Due Process Complaint Notice

In a 15-page, 138 paragraph due process complaint notice dated February 16, 2018, the parent requested an impartial hearing asserting that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years (see Dist. Ex. 1).[3] The issues raised can generally be broken down into the following categories: alleged illegal policies, procedures, and practices by the district, including violations of section 504; the makeup and conduct of the June 2017 CSE; the evaluative information available to the June 2017 CSE; the recommended program and placement contained within the June 2017 IEP; and, the assigned public school site's ability to properly implement the June 2017 IEP (see id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 20, 2018, and continued on November 29, 2018 and March 7, 2019 with compliance date extensions being granted so the impartial hearing could proceed with the results of newly ordered independent evaluations and additional hearing dates (IHO Decision at p. 1; Tr. pp. 320-693). The parent filed a new due process complaint notice dated April 18, 2019 involving the same student for the period of "the 2017-2018 school year ("SY") from the date of the [February 16, 2018] complaint [] and for the 2018-2019 SY" (Parent Ex. SS at p. 1). On April 24, 2019, a prehearing telephone conference was held to discuss consolidation of the new due process complaint notice and to get a progress report on the independent evaluations being conducted (IHO Decision at p. 2; Tr. pp. 694-718). The hearing reconvened on November 13, 2019, wherein both parties made a joint request to consolidate the two due process complaint notices and a discussion took place regarding the student's receipt of ongoing counseling services ordered in the prior IHO decision (Tr. pp. 722-828).[4]

In an Order on Consolidation dated November 13, 2019, the IHO ordered that the February 16, 2018 and April 18, 2019 due process complaint notices were to be consolidated (Order on Consolidation at p. 4). The IHO further ordered that Manhattan Psychology Group (MPG) provide 1:1 psychological counseling services to the student, until the total amount of $24,000 was exhausted, and that the district could "either off-set these services with the bank of $24,000 for counseling services currently outstanding by a prior order or [it] can regard this as fresh services

[2] The individualized home instruction plan was not included in the hearing record.

[3] The due process complaint notice indicated that for the 2016-17 school year, any allegations that were covered by a prior due process complaint notice were not intended to be realleged and were submitted for background purposes (Dist. Ex. A at p. 1 n. 1).

[4] In a prior proceeding, an IHO ordered the district "to fund counseling services in the amount of 120 sessions at a rate not to exceed $200.00 per session. It is contemplated that these sessions will begin in the home and thereafter when student is capable of travel they may be scheduled more conveniently at the counselor's offices. The provider is to be a NYS certified counselor sufficient to meet [the district's] accepted standards." (Parent Ex. B at p. 9).

to be provided with a cap of $24,000" (id.). The IHO also noted that the counseling services shall be provided by a trained mental health counselor who can testify under subpoena at a future hearing date to inform the IHO of the student's current levels of performance and functioning as well as her social/emotional, behavioral and academic needs "in order to develop an appropriate educational program" for the student (id.).

The impartial hearing resumed on January 30, 2020 and was completed on April 9, 2020 after a total of 11 hearing dates (Tr. pp. 829-1421). In a decision dated June 17, 2020, the IHO found that the district "basically conceded a denial of FAPE for two of the three school years at issue," declining to defend FAPE for the 2016-17 and 2018-19 school years (IHO Decision at p. 8). The IHO noted that the district argued that it was not obligated to provide the student a FAPE for the 2017-18 school year since the parent elected to home school the student during that school year (id.).

Ultimately, the IHO determined that the parent had unilaterally removed the student from the district as evidenced by the parent's July 2017 letter, and as such, the district was not obligated to provide the student with a FAPE for the 2017-18 school year (IHO Decision at pp. 13-14). The IHO also found that the district's actions constituted a gross violation of the IDEA for the other two school years at issue—2016-17 and 2018-19 (IHO Decision at p. 14).

To remedy the district's denial of FAPE for the 2016-17 and 2018-19 school years, the IHO ordered: compensatory education services consisting of: 1,980 hours of direct 1:1 "Special Education Academic Instruction" to allow the student to pass the Test Assessing Secondary Completion (TASC); 1,560 hours of individualized counseling services; 520 hours of parent counseling and training; and 347 hours of BCBA supervision of both the academic instruction and counseling services (IHO Decision at p. 18). The IHO also ordered that the awarded compensatory educational services "shall remain in effect" until the student either finishes and uses all the hours provided, or until the student successfully completes and receives her high school equivalency degree (id.).

The IHO further ordered the district to fund an independent evaluation, to be performed by a provider chosen by the parent, consisting of MCMI-IV and MMPI testing, and an independent vocational assessment by a provider chosen by the parent (IHO Decision at p. 18).[5]

With respect to the bank of compensatory educational services awarded by the prior IHO and reaffirmed by this IHO in the November 13, 2019 consolidation order, the IHO ordered that those hours "shall still be in effect and should be provided in their totality" (IHO Decision at p. 18).

[5] While not defined in the hearing record, the Millon Clinical Multiaxial Inventory–IV (MCMI–IV) is a 195 item self-report instrument designed to help clinicians assess personality and psychopathology in adults age 18 years or older who are undergoing psychological or psychiatric assessment or treatment. The Minnesota Multiphasic Personality Inventory (MMPI) is a psychological test that assesses personality traits and psychopathology.

IV. Appeal for State-Level Review

The parent appeals, asserting multiple reasons why the IHO erred in finding that the district was not obligated to provide a FAPE to the student for the 2017-18 school year, and as a result, for not awarding all of the sought-after relief. The parent requests that an SRO find that the district failed to offer the student a FAPE for the 2017-18 school year and award the student all of the relief sought.

In an answer, the district generally responds to the parent's allegations with admissions and denials. The district also cross-appeals the IHO's failure to determine that equitable considerations favor the district. Specifically, the district points to the student's school refusal due to the student staying up all night "online gaming," and the "actions and inactions" of the parent that contributed to a loss of educational opportunity. The district requests an SRO find that equitable considerations favor the district thus precluding any award.

The district alternatively asserts that if an SRO finds that the student was denied a FAPE for the 2017-18 school year and the student is entitled to compensatory education, the SRO should affirm the IHO's compensatory education award in its entirety and deny the parents request for additional services.

In an answer to the district's cross appeal, the parent generally responds to the district's allegations with admissions and denials, and argues that the district failed to raise the issue of equities during the impartial hearing and as such, has waived the argument. The parent asserts that although the district initially raised an equities argument for the 2016-2017 and 2017-2018 school years during its opening argument, it never articulated the factual basis for its claim during the impartial hearing. The parent also asserts that the district did not raise any arguments concerning or examples of equitable factors concerning the 2018-19 school year. The parent further asserts that the district was repeatedly asked whether the district intended to present an equities defense and the scope of any such defense, so that the parent could respond with evidence to rebut such a defense, and the district stated that it was "not pursuing an equities defense," and the parent relied on this statement to her detriment with respect to not calling witnesses who could have testified as to equitable factors.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

2014]; 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 way of substantive content in an IEP'" (Walczak v. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[6]

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).

VI. Discussion

The first issue to be resolved is whether the IHO erred in determining that the July 2017 letter from the parent to the CSE was a removal of the student from the district and that the district was, therefore, not obligated to provide the student with a FAPE (IHO Decision at pp. 13-14).

Initially, a board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]).

In New York, "Solely for the purpose of the provision of education for students with disabilities…a student who is in a home instruction program submitted by his or her parent or person in parental relation for review pursuant to the regulations of the commissioner shall be deemed to be a student enrolled in and attending a nonpublic school eligible to receive services" provided that such student is entitled to attend the public schools without payment of tuition and has an individualized home instruction plan that has been determined by the superintendent of schools of the school district in which the home school is located to be in compliance with the regulations of the commissioner (Educ. Law §3602-c[2][c]).

Courts have been challenged to find a consistent course for addressing situations where an eligible student was parentally placed at a nonpublic school and the district of residence did not develop an IEP (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006] ["[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP"]; E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537 [E.D.N.Y. Nov. 26, 2012] [the "issue of the parents' intent [was] a question that inform[ed] the

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

balancing of the equities rather than whether the district had an obligation to the child under the IDEA"]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of-residence's obligations do not simply end because a child has been privately placed elsewhere"]).

In this instance, the district developed an IEP for the student for the 2017-18 school year and recommended placement in a 12:1+1 special class in a State approved nonpublic school (Dist. Ex. 20). With respect to the program recommendation, the parent raised a number of allegations regarding the June 2017 IEP; however, the bulk of the parent's due process complaint notice appeared to be that the district did not offer the student a residential placement and did not offer sufficient supports for home instruction (see Dist. Ex. 1 at pp. 8-14).[7] The parent also testified that the district never identified a nonpublic school that could implement the services recommended in the June 2017 IEP (Tr. at pp. 956-57).

The parent elected to home school the student and sent the district a notice to that effect dated July 11, 2017 (Dist. Ex. 30). On September 27, 2017, the district sent the parent a notice indicating that the parent's home instruction plan was in compliance with State regulation (Dist. Ex. 31). During that time the district continued to look for a nonpublic school to implement the June 2017 IEP (Parent Ex. II at pp. 5-20). Communications between the parent and district staff seeking to locate a school to implement the June 2017 IEP indicated that the parent expressed her desire for the student to be residentially placed, but also at times indicated a desire to have the student attend the district public school, to attend a nonpublic day school, or to provide homeschooling for the student (Tr. pp. 961-67; Parent Ex. II at pp. 5-6).

Under the circumstances presented, the district's position that it did not have to provide special education to the student is without merit. Even if the parent's election to home school the student expressed an intention to enroll the child in a nonpublic school without regard to any IEP (see E. Lyme Bd. of Educ., 790 F.3d at 451 n.9), the district was still the student's district of residence and was required to provide the student with an individualized educational services plan (Educ. Law §3602-c[2][c]). For the above reasons, the parent's assertion that the district denied the student a FAPE is supported by the hearing record and the IHO's decision on this point must be overturned.

A. Compensatory Education Services

Having found a denial of FAPE for the 2017-18 school year, the issue turns to that of remedy. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125 [2d Cir. [2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 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

[7] While the due process complaint notice indicates that the parent paid for an online home schooling program for the student and the parent initially requested reimbursement for that program; the parent has not requested reimbursement for that program on appeal or in her post-hearing brief (Dist. Ex. 1 at pp. 8, 14; see IHO Ex. I; Req. for Rev.).

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]), 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] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; 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, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; 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 E. Lyme, 790 F.3d at 456; 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]). Likewise, SROs have awarded compensatory 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. of City Sch. Dist. of Buffalo 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]). Accordingly, an award of compensatory education 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"]; 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. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than

[8] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

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"]).

As compensatory education for the IHO's determination that the district denied the student a FAPE for the 2016-17 and 2018-19 school years, the IHO awarded 1,980 hours of direct 1:1 instruction to allow the student to pass the TASC; 1,560 hours of individual counseling services; 520 hours of parent counseling and training; and 347 hours of BCBA supervision of both the academic instruction and counseling services (IHO Decision at p. 18). The IHO denied the parent's requests for family counseling, behavior therapy, transitional or vocational services, executive functioning training/coaching, adaptive physical education, and a program coordinator/case manager (id. at pp. 16-17).

The IHO computed the compensatory education award with the goal of the award being to get the student to the point that she could obtain a high school diploma or pass the TASC and receive a high school equivalency diploma (IHO Decision at p. 13). According to the student's psychologist, at the time of the hearing, the student's "current goal [wa]s to take and pass the TASC . . . rather than try to aim for a regular high school diploma" (Parent Ex. FFF at p. 12). Accordingly, the IHO ordered that the compensatory award would expire upon the student's completion of the awarded hours or successful completion of the TASC and receipt of a high school equivalency degree (IHO Decision at pp. 17, 18). The parent appeals from this portion of the IHO's decision, asserting that "it will not make [the student] whole and [is] inconsistent with the very purposes of the recommended services"; however, the parent's argument does not address the IHO's finding that the goal of the compensatory award was to get the student to the point where she could pass the TASC, a goal that was annunciated by the student's psychologist. Accordingly, there is no basis to depart from the IHO's determination on this point and the goal of a compensatory award for this student should aim to get her to the point where she can obtain either a high school diploma or a high school equivalency degree.

Turning to whether an increase in the awarded services is required to make up for the additional finding that the district did not offer the student a FAPE for the 2017-18 school year, the IHO explicitly noted that the compensatory award was only for the 2016-17 and 2018-19 school years (IHO Decision at pp. 13-14). The IHO ordered the district to provide the student with 1,980 hours of instruction based on two years of a denial of FAPE (id. at p. 16). Based on the IHO's calculation, with respect to the provision of special education instruction over a three-school year period, instead of the two years awarded, the student would have been owed 2,970 hours of compensatory special education instruction to make up for the lack of educational instruction. However, the parent only requested an award of 2,070 hours of instruction (IHO Ex. I at p. 31). The district does not challenge the IHO's initial hourly compensatory service award and asserts that if a denial of FAPE were found for the 2017-18 school year, the SRO should accept the IHO's ordered relief as is—or to rephrase—to not add any more hours of compensatory services for the additional year of denial of FAPE. Under these circumstances, an increase in the compensatory award from 1,980 to 2,070 hours of instruction by a special education teacher is warranted.

With respect to counseling, the IHO awarded 1,560 hours of counseling services to be delivered by the student's psychologist and her agency (IHO Decision at p. 16). The IHO's calculation was based on the school psychologist's testimony that the student should receive: "2340 hours of Counseling for 3 years/780 hours per year. I calculated this based on 8 hours per week of counseling provided by a licensed mental health professional" (Parent Ex. FFF at p. 13). However, the above calculation is not mathematically correct, even assuming that there were 52 weeks in a school year, 8 hours per week of counseling services would only add up to 416 hours per year and three years would then be 1,248 hours of counseling services. As the district does not appeal from the IHO's award of 1,560 hours of counseling services for the denial of FAPE for the 2016-17 and 2018-19 school year, I will not further address the amount of counseling services awarded by the IHO and will instead focus on computing an award for the district's failure to offer a FAPE for the 2017-18 school year. Pertinently, for the 2017-18 school year, the June 2017 IEP had recommended that the student receive one 40-minute session of 1:1 counseling per week and one 40-minute session of group counseling per week (Dist. Ex. 20 at p. 7). This equates to 72, 40-minute sessions of counseling, or 48 hours of counseling for the school year. However, half of that total, or 24 hours was recommended to be received in a group setting (id.). As determined by the IHO group counseling was not appropriate for the student (IHO Decision at p. 16). The parent has not appealed from this determination and has not requested group counseling on appeal, accordingly, all 48 hours of compensatory counseling services awarded for the denial of FAPE for the 2017-18 school year shall be provided in a 1:1 setting.[9]

The IHO awarded 520 hours of parent counseling and training and 347 hours of BCBA supervision for a two-year denial of FAPE based on the parent's request for 780 hours of parent counseling and training and 520 hours of BCBA supervision for a three-year denial of FAPE. Having found a denial of FAPE for the 2017-18 school year, there is no basis in the hearing record for not extrapolating out the IHO's decision to cover a three-year denial of FAPE. Accordingly, the parent is awarded an additional 260 hours of parent counseling and training and an additional 173 hours of BCBA supervision for the denial of FAPE for the 2017-18 school year.

The parent also appeals from the IHO's decision not to award behavior therapy for the student. The IHO declined to award behavior therapy finding that the request was speculative because it was based on the student potentially being diagnosed with autism (IHO Decision at p. 17). However, the student's psychologist's testimony indicated that the request for behavior therapy was not based on the student being diagnosed with autism, explaining that only the qualification of the person who delivered the service would change if the student received an autism diagnosis (Tr. pp. 1363-64; Parent Ex. FFF at pp. 7-8, 13-14). Nevertheless, the psychologist did not provide a sufficient explanation for the request for 5,096 hours of behavior therapy (see Parent Ex. FFF; IHO Ex. I). For instance, if the behavior therapy services the psychologist recommended for the student were computed on the basis she presented, it appears that the psychologist was recommending that the student receive behavior therapy services for 364 days per year (Parent Ex. FFF at pp. 13-14). However, the hearing record does not support a finding that the student required these services to such an extensive basis and a compensatory

[9] One final point on counseling, the parent appeals from the IHO's restriction of the compensatory award to the student's specific provider and agency. On this point, I agree, and instead direct that the award be provided by a qualified provider selected by the parent.

award is based on a 180-day school year. Additionally, while the student's psychologist indicated that she had developed a behavioral plan and that "[t]he goal of the behavioral services would be to work to distinguish the myriad of severely maladaptive behaviors that [the student] displays that undermine her academic and functional progress," there was little other information provided as to how this service would compensate for the district's denial of FAPE (see Parent Ex. FFF). Finally, it appears that behavioral services would overlap with some of the other compensatory relief awarded, particularly the parent counseling and training. Based on the above, the hearing record supports an award of two hours per school day of compensatory behavior therapy over the course of three school years, consisting of a total of 1,080 hours of compensatory behavior therapy in addition to the already awarded compensatory education services.

As noted above, the district does not challenge the IHO's compensatory award, and while the parent asserts that the IHO should have provided other additional services, a review of the hearing record supports the IHO's determinations not to award those other additional services. For example, the parent requests 156 hours of transition services. The June 2019 neuropsychological evaluation that the parent cites to in support of her request for transition services indicates that the student needs transition services "in order to establish coping skills and a modicum of independent functioning in her everyday life, to raise her level of personal responsibility, to expand her independent living skills and to improve her interpersonal presentation in order to prepare her for adulthood" (Parent Ex. BB at p. 27). In her affidavit, the student's psychologist indicated that the request for transition services was "focused on interagency applications and coordination, college applications, independent living applications and similar activities" and that counseling services were intended to "improve [the student's] coping skills for mood and relationship stressors" (Parent Ex. FFF at pp. 10, 11, 14). Accordingly, while the district should certainly be considering transition services for the student on her next IEP to the extent that it has not already done so (see 8 NYCRR 200.1[fff]; 200.4[d][2][ix]); the hearing record does not support awarding transition services in addition to the compensatory services already awarded to the student. Further, I agree with the IHO that, considering the relief that is being awarded, the remaining requested relief items delineated by the parent—adapted physical education, vocational training, executive functioning training, family counseling, leisure activities, and additional program coordination—are in excess of what would be required to make up for the district's denial of a FAPE to the student (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016], quoting Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [noting that the '"ultimate award [of compensatory education] 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"']).

B. Equitable Factors

The district asserts that the IHO erred in failing to find that equitable considerations favor a denial or reduction in any award. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect

to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Having conceded that it did not offer the student a FAPE for either the 2016-17 or 2018-19 school year, and having not provided the student with special education or related services during the 2017-18 school year, as determined in this decision, the district appears to argue that the student's deficits are attributable to the parent's actions rather than the district's denial of FAPE. However, a review of the hearing record does not demonstrate that the parent was either uncooperative or prevented or otherwise impeded the district's ability to provide the student with a FAPE. Accordingly, equitable considerations do not weigh in favor of reducing or denying the parent's requested relief.

VII. Conclusion

Based on the above, I find that, contrary to the IHO's determinations, the parent did not remove the student from the district such that the district had no obligation to provide special education instruction and related services; the district failed to provide the student with a FAPE for the 2017-18 school year; and as a result, the student should be awarded 2,070 hours of compensatory educational services of 1:1 special education instruction from a special education teacher and 48 hours of 1:1 counseling to address the student's deficits and to make up for lost instruction time as a result. In addition, the parent is awarded an additional 260 hours of parent counseling and training and an additional 173 hours of BCBA supervision for the denial of FAPE for the 2017-18 school year, and the hearing record supports an award of two hours per school day of compensatory behavior therapy over the course of three school years, consisting of a total of 1,080 hours of compensatory behavior therapy in addition to the already awarded compensatory education services.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.[10]

[10] The parent's request for review includes a number of other claims including: failure to fund interim counseling services; failure to offer a timely IEP and placement for the 2017-18 school year; pendency rights under a prior impartial hearing; inappropriate July 2017 IEP and non-public school day program; numerous procedural violations that deprived the student of educational benefit and excluded the parent from the process; a request for conversion of the award into tuition funding for a day or residential placement if the services were unsuccessful in facilitating the student's willingness to engage with a school-based program; failure to deem admitted all unrebutted allegations and evidence; shifting the burden of proof to the parent regarding denial of FAPE; failure to credit evidence or develop the hearing record; violation of section 504 of the Rehabilitation Act of 1973; error

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 17, 2020 is modified by reversing that portion which found the parent had disenrolled the student from the district; and,

IT IS FURTHER ORDERED that that the IHO's decision dated June 17, 2020 is modified by reversing that portion which found that the district offered the student a FAPE for the 2017-18 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated June 17, 2020 is modified so that the award of compensatory education services is increased from 1,980 hours to 2,070 hours of 1:1 special education instruction from a special education teacher; and,

IT IS FURTHER ORDERED that the IHO's decision dated June 17, 2020 is modified so that the award of 1:1 counseling services is increased from 1,560 hours to 1,608 hours, with such services to be provided by a qualified provider of the parent's choosing; and,

IT IS FURTHER ORDERED that the district shall provide the parent with an additional 260 hours of parent counseling and training; and,

IT IS FURTHER ORDERED that the district shall provide the parent with an additional 173 hours of BCBA supervision; and,

IT IS FURTHER ORDERED that the district shall provide the student with two hours per school day of compensatory behavior therapy over the course of three school years, consisting of a total of 1,080 hours of compensatory behavior therapy in addition to the already awarded compensatory education services.

Dated: **Albany, New York**
March 4, 2021

STEVEN KROLAK
STATE REVIEW OFFICER

in finding that the parent's testimony lacked credibility; and a failure to award car service transportation necessary to implement the award. I have considered these claims and, to the extent the claims are not otherwise determined herein, find they are either without merit or do not provide a sufficient basis for changing the relief already awarded; thus these claims are denied.