The University of the State of New York

The State Education Department
State Review Officer
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No. 21-032

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:
Law Office of Courtney L. Haas, LLC, attorney for petitioner, by Courtney L. Haas, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 the decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services and other relief. 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[a]). 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 this case, the hearing record contains little, if any, evidence concerning the special education programming the student received prior to the 2018-19 school year, other than noting that he began receiving special education services through the Early Intervention (EI) program, presented with "global delays," and was eventually diagnosed as having an autism spectrum disorder (see Parent Ex. B at p. 1; see generally Tr. pp. 1-46; Parent Exs. A-H). According to the evidence in the hearing record, the student was evaluated in the areas of speech-language, occupational therapy (OT), and physical therapy (PT) in or around October 2018 as "part of an impartial hearing process and a mandated triennial review" (Parent Exs. D at p. 1; E at p. 1; F at p. 1). The student also underwent a neuropsychological evaluation over the course of three nonconsecutive days in October 2018, November 2018, and April 2019 (April 2019

neuropsychological evaluation) (see Parent Ex. B at p. 1). In addition, the district completed a functional behavior assessment (FBA) of the student in October 2018 (see Parent Ex. C at p. 1). Based upon the reports from these evaluations, it appears that, during the 2018-19 school year, the student attended a district public school in either a 12:1+1 or 12:1+4 special class placement with the assistance of a full-time, 1:1 paraprofessional (or "aide") (Parent Exs. B at pp. 1-2; D at p. 1; E at p. 1; F at p. 1). The reports further reflect that the student received the following as related services: two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of occupational therapy (OT), (see Parent Exs. D at p. 1; E at p. 1; F at p. 1).

On May 31, 2019, a CSE convened to conduct the student's annual review and developed an IEP for the student for the 2019-20 school year (see Parent Ex. G at pp. 1, 21).[1] Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2019 CSE recommended a 12-month school year program in a 12:1+(3:1) special class placement for instruction in English language arts (ELA), mathematics, social studies, sciences, health, and as a special class for activities of daily living (ADL) skills (id. at pp. 15-17). The May 2019 CSE also recommended the following related services: one 30-minute session per week of individual OT, two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, and one 60-minute session per month of parent counseling and training (id. at pp. 15-16). In addition, the May 2019 CSE recommended the services of a full-time, individual health paraprofessional (for seizures); the services of a full-time, individual paraprofessional for transportation; and the provision of assistive technology devices or services (i.e., the daily use of a static display, speech generating device in school) (id. at p. 16).

A. Due Process Complaint Notice

By due process complaint notice dated December 10, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "for the entirety of his education" (Parent Ex. A at pp. 1-2).[2] More specifically, the parent asserted that the district failed to advise her of "her rights in her native language," which denied the parent the opportunity to meaningfully participate in the student's special education planning (id. at p. 2). The parent further asserted that the district failed to provide her with the student's educational records translated into her native language, which also deprived the parent of the opportunity to meaningfully participate in the student's "educational programming and progress monitoring" (id.). Next, the parent alleged that, despite the student's "minimal, if any improvement in skill

[1] If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and otherwise remains 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]). According to the evidence in the hearing record, the student is expected to turn 21 years old in July 2021, and thus, under State law, would remain eligible for July and August special education programming through August 31, 2021—or until the termination of the summer program, whichever occurs first (see Parent Ex. G at p. 1; Educ. Law § 4402[5][a]; see also Educ. Law § 3202[1]).

[2] In a footnote, the parent indicated that she had not been provided with the student's records, thus, "[a]ll claims appl[ied] with equal force to all IEPs developed" for the student since he "became eligible for services" under the IDEA and as a resident of the district (Parent Ex. A at p. 2 n.1).

acquisition/behavior regulation during the course of his education," the district failed to conduct a neuropsychological evaluation or related service evaluations (id.). Similarly, the parent contended that the district failed to conduct an assistive technology evaluation of the student (id.). In addition, the parent alleged that the district, "after getting access to comprehensive evaluations," ignored evidence demonstrating that the student required a "more intensive program" (id.).

With regard to the student's "most recent IEP," the parent alleged that the district failed to "appropriately explain and identify the nature of [the student's] '[m]ultiple [d]isabilities'" within the present levels of performance, and failed to specifically mention that the student had been diagnosed as having autism and presented with "profound [a]utism" (Parent Ex. A at p. 3). More generally, the parent indicated that the district failed to include "appropriate evidence based specially designed instruction in all IEPs," and the annual goals in the "IEPs" failed to "contain enough specificity to guide instruction and accurately monitor progress" and failed to address "all areas of identified need" (id.). The parent also asserted that the district failed to include "appropriate behavior modification therapy" and "sufficient 1:1 instruction from a qualified special education teacher in order to facilitate skill acquisition in all of his IEPs" (id.). Next, the parent contended that the district failed to provide the student with sufficient related services, including speech-language therapy (and the absence of assistive technology devices and supports for his communication needs both at school and at home), physical therapy (PT), and intensive occupational therapy (OT) (id. at pp. 3-4). As a final point, the parent alleged that the district, given the student's lack of meaningful progress and regression, failed to convene a CSE meeting to recommend a "more supportive program" (id. at p. 4).

As relief for the alleged violations, the parent initially requested a finding that the district failed to offer the student a FAPE "for the entirety of his education, including those otherwise outside the statute of limitations" (Parent Ex. A at p. 4). In addition, the parent sought a finding that the alleged violations "significantly impeded" her opportunity to participate in the decision-making process and caused a deprivation of educational benefits "for the entirety of [the student's] education, including those otherwise outside the statute of limitations" (id.). The parent also requested an order directing the district to convene a CSE meeting within "five school days of receipt" of the evaluations and "develop an IEP" that included a recommendation for a State-approved nonpublic school (id. at p. 5). In addition, the parent requested compensatory educational services to include "remedial special education instruction, behavior modification therapy, counseling, [OT], [PT] and speech[-]language therapy and parent training," which would be provided by parent-selected, independent providers at "market rate" (id.). Finally, the parent requested that the district issue or fund metrocards for the student and the parent to access the compensatory educational services (id.).

B. Impartial Hearing Officer Decision

On June 10, 2020, the parties proceeded to an impartial hearing, which concluded on July 16, 2020, after a total of two days of proceedings (see Tr. pp. 1, 9, 46). When the parties and the IHO initially met in June 2020, the parent's attorney advised that the parent was no longer seeking a neuropsychological evaluation as part of the relief, and then further clarified that the "majority" of the parent's requested relief was "programmatic in nature" (Tr. pp. 1, 3). At that time, both the parent and the district informed the IHO of their intentions to each present two witnesses at the impartial hearing (see Tr. pp. 3-5).

When the parties and the IHO resumed the impartial hearing on July 16, 2020, the IHO entered the parent's documentary evidence into the hearing record without objection by the district (see Tr. pp. 12-13; see generally Parent Exs. A-G).[3] The district did not present any documentary or testimonial evidence at the July 2020 impartial hearing (see Tr. pp. 13-14). When the IHO asked for the district's position concerning the allegations in the due process complaint notice, the district representative asked for information regarding "what the [p]arent [was] seeking in terms of relief," noting that at least one claim was for an alleged failure to evaluate the student but that the hearing record contained evaluations from 2018 and, more recently, included an April 2019 neuropsychological evaluation of the student (Tr. pp. 15-16). As a result, the district representative stated that she was "not sure what the allegations even [were] and what the [p]arent [was] seeking at th[at] point" (Tr. p. 16). She further stated that if the parent's attorney could "tell us what that [was]," she would "see what [the district's] position [was] to the relief being sought" (Tr. p. 16).

The IHO indicated, however, that the present matter had been "pending for quite some time"—since December 2019, when the parent filed the due process compliant notice—and therefore, the district had had "plenty of time to discuss with counsel for the [p]arent the allegations contained in the due process complaint notice" (Tr. pp. 16-17). Consequently, the IHO stated that she was "not going to now allow [the district representative] to ask questions about information [that was] contained in the due process complaint when [the district representative] had many months to do so" (Tr. p. 17). The IHO then posed the same question to the district representative about the district's position, and the district representative responded: "I don't have a position" (Tr. p. 17). The district representative also declined to present an opening statement (Tr. p. 18). At that point, the parent's attorney gave an opening statement, which included a statement of the relief requested as the following: "an appropriate program for the current school year based on the recommendations of the neuropsychological evaluation" and more specifically, a "24-hour based program that incorporate[d] ABA, applied behavior analysis"; an order directing the district to recommend a nonpublic school; and finally, given the "recommendation for what would be a residential program, the [p]arent [was] requesting a minimum of 20 hours a week of ABA therapy at home" (Tr. pp. 18-19). In addition, the parent's attorney stated that the parent "would also like the [IHO] to order the CSE to consider a residential program so that both options c[ould] be explored" (Tr. p. 19). Next, the parent's attorney stated that the parent sought "compensatory relief" consisting of an "additional three years" of eligibility whereby the student would continue to attend "whatever program end[ed] up being agreed upon, that being the previously mentioned potential [nonpublic school] placement with ABA at home or a residential program should the parent find one that they agree[d] [was] appropriate for the student" (Tr. pp. 19-20). As a final request, the parent's attorney sought a "minimum of 100 hours of parent training" (Tr. p. 20). The parent was the only witness who testified at the impartial hearing, with the district representative conducting a cross-examination (see Tr. pp. 20-41).[4]

[3] An interpreter was present at the July 2020 impartial hearing, and translated for the parent into her native language; there was no interpreter at the June 2020 impartial hearing date, but the parent was not in attendance (see Tr. pp. 1, 9, 11, 14-15).

[4] Prior to the parent's testimony, the parent's attorney indicated that although the parent had access to the documentary evidence, the parent did not read in English and therefore, the parent's attorney would not be "referencing these documents for her to look at" (Tr. pp. 21-22).

After the conclusion of the impartial hearing in July 2020, the parent's attorney submitted a closing brief to the IHO, which was entered into the hearing record as evidence (see generally Parent Ex. H).[5] In the closing brief, the parent requested the following as relief: placement in an "appropriate approved nonpublic school or residential facility and compensatory education beyond the age of 21"; an appropriate 12-month school year program for the 2020-21 school year; an order directing the district to place the student in an "appropriate NY State-approved nonpublic school" and to provide, "at minimum, 20 hours per week of home-based, after-school ABA," as either a "necessary component of an appropriate" program for the student or as "compensatory additional services" for the district's failure to offer the student a FAPE and "for the remainder of the 2020-21 school year"; an order directing the CSE to convene to "consider any and all appropriate residential placement options" for the student; age-extended eligibility for the student through July 31, 2024 (i.e., three additional school years) to remedy the district's gross violations of the IDEA; and 100 hours of parent counseling and training as compensatory educational services (id. at pp. 1, 8-18). The parent also requested findings that the district failed to offer the student a FAPE—and deprived the parent of her "independent right" that the student receive a FAPE—"for at least the two years prior to the filing of the complaint and up to the total 16 years" of the student's education (id. at p. 17).

In a decision dated November 20, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year (see IHO Decision at pp. 8-9, 15). The IHO declined to find a "blanket denial of a FAPE for the student's entire school career"—as alleged by the parent—based upon the evidence in the hearing record (id. at pp. 9-10). According to the IHO, the district had offered a residential placement for the student in the past, and the parent rejected that offer, noting further that the parent now sought a residential placement, in part, as relief (id. at p. 10). In addition, the IHO indicated that the parent only "began considering a residential program" for the student "last year" (id.). As a result, the IHO found that, notwithstanding the district's "failure to present evidence," the hearing record did not contain evidence to support a conclusion that the district failed to offer the student a FAPE "for his entire academic career" (id.).

Turning to the requested relief, the IHO initially addressed parent's request to order a CSE to "immediately place the student in an appropriate, [State-]approved non-public school" (IHO Decision at pp. 10-13). Finding that it was "inappropriate for [an IHO] to step into the shoes of the CSE team," the IHO denied this request, but otherwise ordered a CSE to convene within 10 business days from the receipt of the decision to "consider mandating the student's immediate placement in a nonpublic school or residential program" in light of the evaluative information contained in, and consistent with, recommendations in the April 2019 neuropsychological evaluation report (id. at pp. 13-14). Given the student's behavior needs, the IHO also "strongly recommend[ed] that a behavior modification program be considered," and that the behavior modification program "be embedded in his program and placement" (id. at p. 14). The IHO advised, however, that as "several behavior modification programs [] could be used to decrease the student's maladaptive behavior," it was not appropriate to "recommend ABA as the sole methodology to address the student's behavior" (id.). The IHO further noted that since the student was not receiving ABA "at th[at] time," and the student's "program or placement" was yet

[5] Although the district representative indicated that she would also submit a closing brief to the IHO, the hearing record does not include a district closing brief (see Tr. pp. 42-44; see generally Tr. pp. 1-46; Parent Exs. A-H).

unknown, a recommendation for ABA was "premature and m[ight] not comport with the program or be utilized at the placement the student [was] ultimately assigned" (id.). Consequently, the IHO denied the parent's request for ABA services (id.).

Next, the IHO addressed the parent's requests for the district to fund 100 hours of parent counseling and training services (by a parent-selected provider at "market rate"), as well as transportation to access the requested services (via metrocards) (IHO Decision at p. 14). Noting that the evidence in the hearing record did not specify the "subject matter of the training and counseling, i.e., ABA counseling or counseling related to the diagnosis of severe autism with intellectual impairment," the IHO opined that, in light of the parent's other requested relief, "it [was] reasonable to assume that the parent s[ought] ABA counseling and training" (id.). However, as the IHO had previously noted, it was premature at that time to recommend ABA (id.).

In summary, the IHO concluded that the district failed to offer the student a FAPE for the 2019-20 school year and ordered the district to convene a CSE meeting within 10 business days to "develop an appropriate IEP" for the student and to consider an immediate placement in a State-approved nonpublic school or residential placement that used a behavior modification program (see IHO Decision at p. 15). The IHO denied "[a]ll other requests for relief" (id.).

IV. Appeal for State-Level Review

The parent appeals, and initially argues that although the IHO properly recited the parent's allegation that the district failed to offer the student a FAPE for his entire academic career, the IHO erred by omitting allegations that the district failed to offer the student a FAPE and "deprived [her] of her independent rights under the IDEA for at least the two years prior to" the due process complaint notice—and up to a total of 16 years of the student's education—and thus, committed gross violations of the IDEA. Next, the parent contends that the IHO misstated her requests for relief within that portion of the decision entitled "'Parent's Position,'" but thereafter correctly stated the requests for relief in the section of the decision entitled "'Requested Relief.'" The parent clarified that, by the conclusion of the impartial hearing, she no longer sought some of the compensatory educational services listed in the due process complaint notice, to wit, in the "'areas of behavior modification therapy, counseling, [OT], [PT], [and] speech[-]language therapy,'" and she also no longer required the issuance of metro cards to access an award of those services. In addition, the parent argues that the IHO misrepresented the fact that the district "affirmatively took no position" at the impartial hearing with regard to the allegations in the due process complaint notice, and instead, the IHO indicated in the decision that the district "'did not indicate its position as to the allegations.'" As such, the parent asserts that the district's actions of declining to state its position and declining to present any testimonial and documentary evidence at the impartial hearing resulted in a "concession of all matters on which it had the burden of proof." The parent further asserts that the district's actions at the impartial hearing led her to seek specific findings as set forth in the closing brief to the IHO, including that the CSE failed to provide the parent with notices of her due process rights or IEPs in the parent's native language and failed to provide interpreter services at CSE meetings or "in phone calls" with the parent; that the district failed to complete needed evaluations; that the student's program was not appropriate for the student ("all relevant school years"); the student failed to make "any meaningful progress, and has regressed" in the district's programs; the CSE failed to address the student's need for a "more supportive program given his regression and lack of progress" ("at all relevant times"); the CSE failed to

provide the student with a "more intensive program" during the 2019-20 school year notwithstanding the receipt of evaluative information; the student's 2019-20 IEP was "substantively deficient in the ways specified in the complaint"; and the district failed to offer the student a FAPE "for the period at issue." The parent argues that the IHO ignored the aforementioned requested relief, which had been "made in light of the [district's] concession/failure to present a case and based on the record made by the [p]arent," and failed to make findings on the relief sought.

Next, the parent asserts that, although the IHO properly found that the district failed to offer the student a FAPE for the 2019-20 school year, the IHO erred by declining to find that the district failed to offer the student a FAPE for "any other school year raised" in the due process complaint notice and as discussed in the closing brief to the IHO. In addition, the parent argues that the IHO failed to address whether the district committed gross violations of the IDEA. The parent argues that by failing to address these issues, the IHO "erroneously failed to apply the law and to properly determine the consequences of the [district's] total failure to answer the [p]arent's allegations and satisfy its burden of proof," and ignored the district's failure to sustain its burden of proof "as to all matters concerning its provision of a FAPE, within or outside of the statutory period." According to the parent, the IHO also improperly shifted the burden of proof to the parent by "crediting evidence" that she had previously rejected the district's offer of a "residential program 'several years ago,'" and had not considered a residential placement for the student "'until last year.'"

Next, the parent contends that the IHO erred by failing to order a CSE to "immediately place" the student in an "approved nonpublic school." The parent further contends that the IHO erred by failing to award ABA services, as recommended in the April 2019 neuropsychological evaluation report. Finally, the parent asserts that the IHO erred by failing to award 100 hours of parent counseling and training services as compensatory educational services.

As relief on appeal, the parent seeks an order reversing many, if not all, of the IHO's findings and directing the district, in part, to place the student in an "appropriate, approved [nonpublic school] program" in conjunction with a minimum of 20 hours of home-based, after-school ABA per week until such time as an appropriate residential program can be located. The parent also seeks findings that the district failed to offer the student a FAPE and deprived the parent of "her independent right" for the student to receive a FAPE for at "least the two years prior to the filing of the complaint and up to the total 16 years" of the student's education, and relatedly, that the district committed gross violations of the IDEA, which entitles the student to compensatory educational services in the form of extended age-eligibility until July 2024. The parent also seeks an order directing the district to fund a minimum of 100 hours of parent counseling and training services.

In an answer, the district generally argues to uphold the IHO's decision in its entirety, but alternatively asserts that, if necessary, the case should be remanded to the IHO for further administrative proceedings. As support for its position, the district argues, in part, that although the district did not present any testimonial or documentary evidence at the impartial hearing, the district did not "affirmatively concede FAPE" and only responded to the IHO that the district had no position after the IHO did not allow the district representative to "obtain clarification" about the "nature of the [p]arent's requested relief." In addition, the district asserts that the parent raised

the request for extended age-eligibility for the first time during opening statements at the impartial hearing, and improperly raised other allegations—namely, a gross violation of the IDEA—for the first time in her closing brief submitted to the IHO. As a final point, the district argues that the parent is not entitled to a default judgment for all of the relief sought, including an order directing the district to place the student in a particular type of program, to provide the student with home-based ABA services in conjunction with either a State-approved nonpublic school or otherwise, awarding extended age-eligibility, or awarding 100 hours of parent counseling and training services.

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]

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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see Gagliardo, 489 F.3d at 111; Cerra, 427

[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).

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).

VI. Discussion

As the crux of this appeal, the parent asks the undersigned to make additional findings that the district failed to offer the student a FAPE, to construe those additional FAPE findings as gross violations of the IDEA, and to award compensatory educational services—i.e., extended age-eligibility and 100 hours of parent counseling and training—as well as the prospective placement of the student, to remedy such gross violations. For reasons discussed below, the parent's requested relief must be denied.

A. Additional FAPE Findings

Here, the parent's arguments concerning the IHO's alleged failure to address certain issues especially when the district did not present any evidence at the impartial hearing—such as whether the district committed a gross violation of the IDEA by depriving her of her independent right for the student to receive a FAPE for at least two years and up to 16 years; whether district failed to offer the student a FAPE based upon the absence of translation and interpretation services, necessary evaluations, recommending inappropriate district programs, and the student's lack of progress; and whether the district committed a gross violation by failing to offer the student a FAPE for school years outside of the statute of limitations—are just another way of asserting that the IHO should have issued a default judgment against the district, which can only be plausibly grounded in the State's statute governing the burden of proof in IDEA due process hearings (Educ. Law § 4404[1][c]). However, default judgments are disfavored by the federal courts (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]; see also G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). The IDEA itself is clear that 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]). Whether a parent is seeking tuition reimbursement or compensatory relief, administrative hearing officers should not be rendering default judgments—or more significantly, default judgement-type relief—based on an absence of evidence regarding the student (see Application of a Student with a Disability, Appeal No. 20-203; Application of a Student with a Disability, Appeal No. 20-167).

VII. Relief

Nevertheless, even if additional FAPE findings were made in the parent's favor as requested on appeal, and assuming further that those additional FAPE findings constituted gross violations of the IDEA, the parent's request for compensatory educational services consisting of a

prospective placement and three years of extended-age eligibility, under the circumstances of this case, must still be denied.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; 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]). 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 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"]).

Compensatory education may also, under certain circumstances, 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]). 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. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; 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]).

The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza, 538 F.3d at 109 n.2

[emphasis added]; see French, 476 Fed. App'x at 471 [noting that "[a] disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). State law does not require school districts to provide students with a free public education past the age of 21 (Educ. Law § 3202[1]), yet 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]).

Having reviewed some relevant authority on this type of remedy, a distinction exists between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 576 [E.D. Pa. 2009] [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief], aff'd, 612 F.3d 712 [3d Cir. 2010]; Burr, 863 F.2d at 1078 [same]; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]).[7]

This type of relief, if interpreted broadly to include an extension of the procedural due process entitlements set forth in the IDEA, including pendency, could result in many more years of eligibility than intended (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 17-021).[8] However, there is a difference between basing relief "on considerations enunciated under a legislated obligation and actually invoking the statutory provision" (Cosgrove, 175 F Supp 2d at 389). Thus, compensatory education is not a full extension of the IDEA itself and does not, for example, continue a student's stay-put rights (id. at 390).[9] This logic would appear to apply further to preclude the parent's access to the due process protections of the IDEA to challenge IEPs developed by a CSE during the extension of eligibility. Otherwise, the extension of eligibility could result in potentially perpetual challenges to IEPs developed during the period of extension and additional awards of compensatory education. In other words, an extension of the student's eligibility must be viewed as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review, and the parent would then assume the risk that unforeseen

[7] At least one district court has found it improper to award extended eligibility under the IDEA as a component of compensatory education; however, in that case the IHO had ordered the district to award the student a diploma making an award of extended eligibility redundant (see Dracut Sch. Comm. v. Bur. of Special Educ. Appeals, 737 F. Supp. 2d 35, 53-55 [D. Mass. 2010]).

[8] The Third Circuit in Ferren C. acknowledged concerns that, by extending the district's obligations to provide an IEP beyond the student's 21st birthday, the district could be subjected to ongoing litigation "as challenges are made to the adequacy of the[] IEPs" developed after the student's 21st birthday" (612 F.3d 712, 720 [3d Cir. 2010]).

[9] The Court in Cosgrove also observed that, under the auspices of an extended eligibility award that "extend[ed] the IDEA in toto," a district might have incentive to utilize the CSE procedures to escape liability for nonpublic school tuition by recommending a placement on an IEP other than the nonpublic school preferred by the parent (Cosgrove, 175 F Supp 2d at 390).

future events could render the relief undesirable. As such, the parent cannot return to the due process hearing system to allege new faults by the district during a period of a student's extended eligibility.

Taking these limits into account, an award of extended eligibility may be an appropriate form of relief in a case where the district committed a gross violation of the IDEA (see Cosgrove, 175 F Supp 2d at 387). Having examined what aspects of special education eligibility the remedy should not include, it remains to be examined what aspects of a FAPE the remedy may extend. Where an extension of eligibility has been awarded, the components of such relief may include: the district's obligations to evaluate the student and convene a CSE at least annually to develop IEPs for the student (Ferren C., 595 F. Supp. 2d at 581; Millay v. Surry Sch. Dep't, 2011 WL 1122132, at *16 [D. Me. Mar. 24, 2011], report and recommendation adopted, 2011 WL 1989923 [D. Me. May 23, 2011]); and/or to provide access to credit-bearing instruction and a chance to earn a diploma (M.W. v. New York City Dep't of Educ., 2015 WL 5025368, at *5 [S.D.N.Y. Aug. 25, 2015]).

As discussed above, while the parent in this matter originally sought a combination of compensatory educational services, prospective placement, and extended eligibility, at the close of the hearing, the parent mostly narrowed her request to prospective placement of the student at an approved nonpublic school and extended eligibility (Parent Exs. A; H). Of particular import to this request is that overall, the continuation of the types of programs and services available under the IDEA to a student over the age of 21 may become fraught with challenges related to the student's age, not the least of which is that the student will have exceeded the age of compulsory school-age attendance under State law (see N.Y. Educ. Law § 3205[1][a] [requiring students aged 6 through 16 to attend "full time instruction"]; see also N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]).[10] In this instance, a second, and perhaps more complicating challenge relates to the parent's request for an order directing the student's placement in a State-approved nonpublic school or a residential facility for the duration of three years of extended-age eligibility. Moreover, the hearing record is devoid of evidence that the student has been accepted for attendance by a State-approved nonpublic school or by a residential facility, and on appeal, the parent offers no information or evidence regarding what State-approved nonpublic school or residential facility she would like the student to attend. Additionally, there is no evidence in the hearing record that there are any approved nonpublic schools available that are authorized to accept students past the age of 21 and the parent points to no authority that allows either an IHO or an SRO to order such an institution to educate students beyond the age of 21. Therefore, even if an order directing the student's prospective placement at either a State-approved nonpublic school or in a residential

[10] Although, as noted above, the student is eligible for special education programming through the end of the 2021 summer program (see Parent Ex. G at p. 1; Educ. Law § 4402[5][a]; see also Educ. Law § 3202[1]), guidance provides that "To ensure that 21-year-old students have the chance to earn their high school diploma and fully prepare for the transition to their planned postsecondary experiences, the Board of Regents and the State Education Department are strongly encouraging schools and school districts to allow those students who will age out of school the opportunity to return for summer school and, if necessary, attend school in the 2021-2022 school year, in order to complete their education and earn a diploma, credential, or endorsement." ("Providing Over-Age Students the Opportunity to Return to School in the 2021-22 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [April 13, 2021], available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/memo-over-age-students.pdf).

facility did not otherwise have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]), the relief the parent is seeking runs a substantial risk of not being able to be implemented.

Further, at this point, the student's final year of eligibility is nearly over, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2020-21 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. Accordingly, there is no reason to grant the parent's requests for a prospective placement or for extended-age eligibility.

Ultimately, however, while a review of the evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2019-20 school year, the evidence also reveals that the IHO erred by declining, in part, to award home-based ABA services to remedy this violation. Notably, the April 2019 neuropsychological evaluation report included a recommendation for the student to receive school-based and home-based ABA services until an appropriate program was located for the student to attend (see Parent Ex. B at p. 4). The IHO declined to award home-based ABA services because the student had no history of receiving ABA services and the IHO thought it would be premature to award a particular methodological approach for services that may not comport with the program that was eventually located for the student (see IHO Decision at pp. 13-14). At this juncture, since neither party suggests that a CSE convened to consider either a State-approved nonpublic school or a residential facility for the student, as ordered by the IHO; that the student is now attending such an institution; or that it is likely that the student will begin attending either a State-approved nonpublic school or a residential facility for the remainder of the 2020-21 school year, the evidence in the hearing record supports an award of compensatory educational services to remedy the denial of FAPE for the 2019-20 school year. Such services will be computed based on 20 hours per week of individual, home-based ABA services and may be provided to the student beginning as soon as practicable and through the conclusion of the 2021-22 school year. In addition, the district shall provide the parent with compensatory parent counseling and training computed on a basis of two 60-minute sessions per month for the denial of FAPE for the 2019-20 school year. The parent counseling and training services should be provided in conjunction with the home-based ABA services. Further, the district shall issue the parent and student metrocards, if necessary, to receive such services as further compensatory educational services.

As a final point, the parent is advised that although the student's eligibility for special education and related services will expire in or around August 2021, sufficient time remains for

her to exercise, if necessary, her due process rights concerning the student's special education and related services the CSE recommended for the 2020-21 school year, unless she has already done so. In addition, the parent should work with the CSE to begin the student's transition to receive services through other State agencies, such as the Office for People with Developmental Disabilities (OPWDD), Adult Career and Continuing Education Services (ACCES), or Adult Career and Continuing Education Services—Vocational Rehabilitation (ACCES-VR).

VIII. Conclusion

In summary, the parent's requests for an order for prospective placement of the student in either a State-approved nonpublic school or in a residential facility and for three years of extended age-eligibility within such placement, are denied.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 20, 2020, is modified herein by ordering the district to provide the student with 840 hours of individual home-based ABA services consistent with this decision; and,

IT IS FURTHER ORDERED that the IHO's decision is modified herein by ordering the district to provide the parent with 24 hours of parent counseling and training; and

IT IS FURTHER ORDERED that the district shall issue the parent and student metrocards to access the compensatory services ordered herein and that the awarded compensatory education services shall expire two years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
June 16 , 2021

STEVEN KROLAK
STATE REVIEW OFFICER