The University of the State of New York

The State Education Department
State Review Officer
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No. 21-198

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Theresa Crotty, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Mark Gutman, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that that the district's failure to offer an appropriate educational program to respondent's (the parent's) son for the 2019-20 and 2020-21 school years was a gross violation of the IDEA and ordered extended age-eligibility for two additional school years. The appeal must be sustained.

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 has received diagnoses of autism with a severe language impairment and delays in receptive and expressive social communication, severe intellectual disability, obsessive compulsive behavior, impulse control disorder, adjustment disorder with anxiety, transient alteration of awareness, and disruptive mood dysregulation disorder (Dist. Exs. 2 at p. 1; 17 at pp. 1-2).[1] The student is "predominately nonverbal" with both English and Spanish spoken in the

[1] The hearing record contains several duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

home, but the student is "most comfortable" with English (Parent Ex. D at p. 3; Dist. Ex. 9 at p. 1).

The student was the subject of a prior impartial hearing ("prior proceeding") (see Parent Ex. L). In particular, the parent previously filed a due process complaint notice on or about January 9, 2019, alleging a denial of a free appropriate public education (FAPE) for "multiple school years" (id. at p. 4).

A CSE convened on March 19, 2019 to formulate the student's IEP with a projected implementation date of March 20, 2019 (see generally Dist. Ex. 2). The student's cognitive functioning was reported to be in the moderate to severe intellectual disability range with instructional/functional levels at the kindergarten level in reading and at the pre-kindergarten level in math (id. at pp. 2, 21). The CSE found the student eligible for special education as a student with autism (id. at p. 1).[2] The CSE indicated that the student would benefit from the support of a 1:1 crisis paraprofessional at all times to manage his behaviors and recommended a behavioral intervention plan (BIP) (id. at pp. 8, 17). The CSE further recommended that the student attend a 6:1+2 special class placement for math, English language arts (ELA), social studies, science, art, and health, and adapted physical education in a State-approved nonpublic school (id. at pp. 15-16, 21). The March 2019 CSE also recommended related services consisting of two 30-minute sessions per week of individual counseling, three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group speech-language therapy, and one 60-minute session per month of group parent counseling and training (id. at pp. 16). A dynamic display speech generating device was also recommended for the student (id. at p. 17). Special transportation was recommended in the form of a transportation paraprofessional, air-conditioned bus, limited-time travel of no more than 60 minutes, and two large seats (id. at pp. 17, 20). The student was deemed eligible for 12-month services consisting of the same program and related services as during the school year (id. at p. 17). The student began attending Hawthorne Country Day School (Hawthorne) in or around March 2019 (Dist. Ex. 4 at p. 1).[3, 4]

The parties entered into an agreement to resolve the parent's claims in the prior proceeding, which was memorialized by the IHO in that matter in an order dated April 23, 2019 (see generally Parent Ex. L). Pursuant to the parties' agreement, the IHO ordered the district to conduct evaluations, including a speech-language evaluation, an OT evaluation, and an assistive technology evaluation, and to fund an independent neuropsychological evaluation, and an independent functional behavioral assessment (FBA), along with a BIP (id. at p. 2). In addition, the parties agreed and the IHO ordered that the student should be deemed eligible for special education for an extended period of time until the age of 22 (id.). Based on the parties' agreement,

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] Hawthorne has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] According to the parent, the student did not attend school for the one year prior to attending Hawthorne in March 2019 (Dist. Exs. 4 at pp. 1-2; 11 at p. 5).

the IHO also ordered that the student receive 30 hours per week of home-based applied behavior analysis (ABA) services with two hours per month of supervision by a Board Certified Behavior Analyst (BCBA) for a period of 38 weeks, as well as two hours per month of parent counseling and training for a period of 10 weeks, placement in a State-approved nonpublic school,[5] transportation on a minibus with a paraprofessional, and three 30-minute sessions per week of individual OT, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group of two, and a crisis paraprofessional for a period of 38 weeks (id. at pp. 5-6). The IHO provided that, upon completion of the ordered evaluations, the CSE should convene to consider the evaluations and relevant information and produce a new IEP for the 2019-20 school year (id. at p. 6).

Thereafter, between May and July 2019, the district conducted a social history update, an OT evaluation, and a speech-language evaluation (Dist. Exs. 4; 8-9).[6] An independent neuropsychological evaluation, which was conducted on March 5, 2019, was memorialized in a report dated May 16, 2019 (Parent Ex. D). In addition, an independent FBA and BIP were conducted in May 2019 (Dist. Exs. 6-7).

On July 26, 2019, a CSE reconvened for an updated evaluation review (see generally Dist. Ex. 11). The July 2019 CSE continued to recommend a 12-month program including a 6:1+2 special class placement in a State-approved nonpublic school with "therapeutic services to address deficits in receptive and expressive language delays; attention, problem solving, executive functioning, grammar skills, community navigation skills, [independent activities of daily living] IADL skills, visual perceptual skills, self-regulating skills; . . . gross motor delays and impairments; and [to] strengthen[] [the student's] social-emotional development" (id. at pp. 8, 18-20, 24). The July 2019 CSE agreed to discontinue the student's counseling as he was unable "to engage in 'meaningful' counseling" (id. at p. 6). The July 2019 CSE recommended three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of group parent counseling and training, together with assistive technology, a BIP, a behavioral support paraprofessional, special transportation, and a transportation paraprofessional (id. at pp. 9, 19, 23, 24-25). The IEP reported that the family was happy with the student's day program at Hawthorne (id. at p. 26).

The student continued at Hawthorne for the 2019-20 school year (see Tr. pp. 49-51; Dist. Ex. 13). In addition, the student received home-based ABA services through February 2020 pursuant to the agreement and order arising from the prior proceeding (see Parent Ex. H at p. 1; Dist. Ex. 15). During school closures related to the COVID-19 pandemic beginning in March 2020, the student received remote instruction (see Tr. pp. 49-51).

The agency that delivered the student's home-based ABA services reached out to the district on several occasions between February and May 2020 to request a CSE convene and

[5] The IHO decision provided that, if the district did not locate a State-approved nonpublic school by March 31, 2019, the student would "continue with his home and clinical-based ABA services under BCBA supervision and parent training for the remainder of the 2018-2019 12-month school year" (Parent Ex. L at pp. 5-6).

[6] The hearing record also indicates that the district completed an assistive technology evaluation of the student in June 2020 (see Dist. Ex. 12); however, a copy of the evaluation was not included in the hearing record.

consider "additional hours" of home ABA services (Parent Ex. H at pp. 1-14). In addition, in letters dated April 24, 2020 and addressed "To Whom It May Concern," the student's doctor and nurse practitioner recommended that the student continue to receive ABA services (Dist. Ex. 17).

A CSE convened on May 18, 2020 to conduct the student's annual review and developed an IEP with a projected implementation date of May 19, 2020 (see generally Dist. Ex. 18). The May 2020 CSE recommended the same program, related services, supplementary aids and services, assistive technology, and 12-month services as the July 2019 CSE (compare Dist. Ex. 11 at pp. 18-19, 23-25 with Dist. Ex. 18 at pp. 18-19, 23-24). The May 2020 CSE modified the special transportation accommodations/services and recommended transportation to the closest safe curb location together with a 1:1 transportation paraprofessional (compare Dist. Ex. 11 at p. 23, with Dist. Ex. 18 at p. 22). According to the May 2020 IEP, the parent expressed to the CSE that the student continued to require home-based ABA services and that he had shown a regression of skills since those services expired (Dist. Ex. 18 at p. 24).

After the May 2020 CSE meeting, the parent and the agency that had been delivering the student's home-based ABA services continued to communicate with the district and requested that the CSE reconvene to amend the student's special transportation recommendations and to allow the BCBA who conducted the independent FBA and BIP to attend the meeting and share with the CSE the importance of home-based ABA services for the student (Parent Ex. H at pp. 15-37; see Dist. Exs. 6-7).

The student continued to attend Hawthorne for the 2020-21 school year (see Tr. pp. 49-50; Parent Ex. A at p. 1). The student turned 21 years old during fall 2020 (see Parent Ex. A at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 15, 2020, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (see Parent Ex. A).

The parent alleged that, after the student stopped receiving home-based ABA services in February 2020, the student's behaviors regressed, and that the district "inappropriate[ly] discontinued" the services (Parent Ex. A at pp. 5-6). The parent also alleged that, in addition to the disruption caused by the discontinuation of the home-based ABA services, the COVID-19 pandemic disrupted the student's schedule, and the district failed to develop a plan to assist student during remote learning and further failed to provide related services for several weeks after the pandemic began in March 2020 (id. at pp. 4-5, 8).

In connection with the 2020-21 school year, the parent made numerous allegations pertaining to the May 2020 IEP including that the CSE failed to recommend home-based ABA therapy, limited travel time for special transportation, sufficient parent counseling and training, an appropriate post-secondary transition plan for the student, and appropriate annual goals to address the student's daily living activities, socialization skills, meal preparation, housekeeping, community awareness, and safety skills (Parent Ex. A at pp. 5-8). Additionally, the parent argued that the district failed to provide speech-language therapy to the student for the first two months of the 2020-21 school year (id. at p. 8). The parent also alleged that the district failed to reconvene

the CSE to further discuss home-based ABA services despite the parent's request and failed to provide notices to the parent in her native language of Spanish which she alleged denied her the right to meaningfully participate in the CSE process (id. at pp. 6-7). Lastly, the parent argued that, considering the district's "historical failure to timely appoint an [IHO]," any such failure in this matter would deny the student a FAPE and impede the parent's ability to access her due process rights (id. at pp. 8, 10).

The parent sought pendency in the form of home-based ABA services pursuant to the April 23, 2019 order from the prior proceeding (Parent Ex. A at p. 2).[7] Additionally, the parent sought a finding that district denied the student a FAPE for 2019-20 and 2020-21 school years (id. at p. 8). As relief, the parent requested an order directing the CSE to amend the student's IEP to include 30 hours per week of home-based ABA with BCBA supervision for two hours per month and two 60-minute sessions per month of parent counseling and training (id. at p. 9). The parent also requested compensatory education services consisting of 30 hours per week of home-based ABA instruction, two hours per month of BCBA supervision, and one 60-minute session per month of parent counseling and training (id.). In addition, the parent sought a transition coach to assist with securing a day program for the student together with the development of a transition plan (id.). The parent requested that all notices to the parent be provided in Spanish and a Spanish interpreter be present at all meetings (id.). In connection with special transportation, the parent requested that the district provide limited time travel and an air-conditioned bus (id.). Finally, the parent sought extended age-eligibility for the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 6, 2021 and concluded on July 19, 2021 after five days of proceedings (Tr. pp. 1-82). In a decision dated August 30, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years and awarded extended age-eligibility for two years, as well as compensatory education services (IHO Decision at pp. 5-8).[8]

[7] At the time the first hearing date commenced, the parties indicated that pendency was no longer at issue (Tr. p. 3). In the request for review, the district indicates that, on June 16, 2021 the parent asserted, and the district did not contest, that pendency was at Hawthorne pursuant to the unappealed IHO decision dated April 23, 2019 (Req. for Rev. at ¶ 9).

[8] On January 28, 2021, the parent filed a State administrative complaint with the Commissioner of Education alleging that the district failed to immediately appoint an IHO after the filing of the December 15, 2020 due process complaint notice (see generally Parent Ex. M). In a letter dated March 25, 2021, the New York State Education Department (NYSED) Office of Special Education, Special Education Quality Assurance determined that an IHO was not timely appointed (id. at pp. 21, 24). In the same letter, the NYSED Office of Special Education, Special Education Quality Assurance stated that the district's noncompliance with the appointment of an IHO was being addressed in accordance with the district's Compliance Assurance Plan issued on May 3, 2019, for addressing due process complaints (id. at p. 21). The letter indicated that "[i]n May 2019, the NYSED in accordance with its oversight and monitoring responsibilities under IDEA, placed [the district] under a Compliance Assurance Plan (CAP). This CAP requires [the district] to implement systemic corrective action addressing due process issues, including increasing the availability of less-adversarial resolution methods such as mediation and IEP facilitation, revise its compensation policy for impartial hearing officers, change its IHO appointment process, and resolve [the district impartial hearing office's] significant delays in inputting data, to

The IHO found that, although the district entered evidence into the hearing record and cross-examined the parent's witnesses, it failed to present any witnesses to defend the recommended program and services and, therefore, failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 1, 4-5, 7). Also, the IHO found that the district failed to present any evidence with respect to the parent's request for compensatory education services and that the evidence presented by the parent showed that the compensatory relief sought by the parent was appropriate to "address the denial of FAPE for the two school years at issue and to meet the student's significant educational needs going forward" (id. at p. 6).

Further, the IHO held that district's failure to recommend ABA services for two school years when the district knew the student required the services was a gross violation of FAPE and granted the parent's request for extended age-eligibility (IHO Decision at p. 6). The IHO held that it was undisputed "that the student require[d] a significant amount of support and that ABA services [we]re appropriate to meet the student's educational needs" (id.). Accordingly, the IHO required that the district provide "on-going services to the student which shall include 30 hours per week of home-based [ABA] therapy," two hours per week of BCBA supervision, and two hours per week of parent counseling and training (id. at pp. 6-7).

Based on all of the foregoing, the IHO ordered the district to fund 1,800 hours of compensatory home-based ABA therapy, 30 hours of compensatory BCBA supervision, and 30 hours of compensatory parent counseling and training (IHO Decision at p. 7). The IHO ordered the district to fund/reimburse the parent for transportation to and from the ordered compensatory services (id.). The IHO also ordered the district to provide all notices to the parent in Spanish (id. at pp. 6, 8). In addition, the IHO ordered the district to develop an IEP with limited time travel of 60 minutes and a climate-controlled bus (id. at p. 8). Finally, the IHO ordered extended age-eligibility for the 2022-23 and 2023-24 school years (id. at pp. 6, 8).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the district's violation of FAPE was a gross violation and in ordering two years of extended eligibility through the 2022-23 and 2023-24 school years.

The district claims that the IHO erred in finding that the district's failure to provide home-based ABA services during the two years in question was a gross violation of the IDEA. Additionally, the district argues that the IEPs developed for the student in July 2019 and May 2020 recommended the use of "applied behavior principles" and, therefore, the IHO erred in finding that the CSEs did not recommend ABA services for two years, let alone that such purported failures constituted a gross violation of the IDEA. It is the district's contention that, given the award of compensatory education services by the IHO together with the prior IHO's award of one year of extended age-eligibility, the award of two years of additional extended eligibility was not warranted.

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ensure that its due process system provides timely and meaningful due process to parents of students with disabilities" (id. at pp. 23-24).

Further, the district asserts that it was error for the IHO to award extended age-eligibility for the same number of years that he determined that the student was not provided a FAPE, which was in effect a "rote hour-by-hour analysis" that was not legally appropriate. The district contends that the extended eligibility award could extend the student's due process entitlements under the IDEA for many years, which may no longer be appropriate for the student who has become an adult. Finally, the district argues that the IHO's award of extended eligibility is "beyond the equitable purposes of compensatory educational services."

The parent answers, generally denying those allegations contained in the request for review and arguing that the IHO's decision should be upheld in its entirety. In addition, the parent requests a dismissal of the district's request for review on procedural grounds because the district's verification was verified by its attorney and not a party.[9]

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

[9] Contrary to the parent's assertion, the district's request for review—as verified by the district's attorney—complies with practice regulations. State regulation requires that when an appeal is taken by the "trustees, the board of trustees, or the board of education of a school district, [the request for review] shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such trustees or board authorizing the commencement of such appeal on behalf of such trustees or board" (8 NYCRR 279.7[b]). I note that although dicta in Application of a Student with a Disability, Appeal No. 21-118, an earlier decision issued by the undersigned, erroneously asserted a different standard, this was an inadvertent misstatement of the underlying applicable practice requirement, the plain meaning of which remains controlling in this and all other matters pending before the Office of State Review.

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]).[10]

[10] 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

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 district contends that the IHO erred by extending the student's age-eligibility through the 2022-23 and 2023-24 school years as a remedy for what the IHO characterized as a gross violation of the IDEA.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may, 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]).[11]

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]). 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

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).

[11] In addition, 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]).

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"]).

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]).

Review of some relevant authority on this type of remedy reveals a distinction 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]).[12]

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).[13] 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

[12] 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]).

[13] The Third Circuit 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 (Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 720 [3d Cir. 2010]).

stay-put rights (id. at 390).[14] 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, the 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 must be viewed as having assumed the risk that unforeseen future events could render the relief undesirable. As such, the parent would not be allowed to return to the due process hearing system to allege new faults by the district during the period of the student's extended eligibility.[15]

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 such a remedy should not include, it remains to be examined what aspects of a FAPE may be extended. 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 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], 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]).

On appeal, the district does not challenge the IHO's determination that the district denied the student a FAPE for the 2019-20 and the 2020-21 school years or the IHO's award of 1,800 hours of home-based ABA services, 30 hours of BCBA supervision, or 30 hours of parent counseling and training as compensatory education, or the order requiring the CSE to develop an IEP with limited-time travel of no more than 60 minutes and a climate-controlled bus, or requiring the district to provide all notices to the parent in Spanish. As such, those determinations have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Under these circumstances—where the district has chosen not to challenge the IHO's award of compensatory education services for a student who is no longer statutorily eligible for special education under the IDEA—there is little basis for a modification of the IHO's finding that there was a gross violation of the IDEA, which was a prerequisite of the IHO's award of compensatory education services, as well as for the award of extended eligibility. In any event, the IHO's award of extended eligibility is subject to reversal

[14] 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 (175 F Supp 2d at 390).

[15] 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]).

on other grounds and, therefore, it is not necessary to engage in an analysis of whether the district's underlying denial of a FAPE constituted a gross violation of the IDEA.

Here, neither the parent nor the IHO detailed what an award of extended eligibility should include for the student or how such an award would provide the educational benefits that likely would have accrued from the special education services the school district should have supplied in the first place (Reid, 401 F.3d at 524). Given that the student largely received a program and services pursuant to IEPs during the years in question, this is not an instance where the student did not have an IEP in place with annual goals and a program and services through which to implement such goals (see Dist. Exs. 11; 18). The crux of the parent's allegations in this matter related to the lack of recommendations for home-based ABA services on the student's IEPs (see Parent Ex. A), and the award of compensatory services aligns with this violation. Indeed, the BCBA who conducted the May 2019 independent FBA and BIP of the student recommended that, "[i]n order to get [the student] to the point at which he would have been had he received [home-based ABA] services as part of his educational program during the entire 2019-2020 and 2020-2021 school years," the student would require "a bank of compensatory hours equal to 30 hours per week of 1:1 homebased SETSS/ABA for ABA, 2 hours per month of BCBA/LBA supervision, and 2 hours per month of parent training for the respective school years and weeks [the student] did not receive these services" (Tr. pp. 63-64; Parent Ex. Q at ¶¶ 45-46; see Dist. Exs. 6-7). The IHO awarded such a bank of compensatory services (see IHO Decision at p. 7).

In her post-hearing brief to the IHO, the parent opined that extended eligibility was an appropriate remedy "[s]ince it [wa]s incredibly unlikely that [the student] w[ould] be able to use all of his compensatory services, as well as attend his full time educational program over the next year" (Parent Post-Hr'g Brief at p. 14).[16] Thus, the parent appeared to request the extended eligibility less as an extension of the statutory entitlement of an eligible student and more as a timeframe in which the student could use the bank of compensatory education services. An extension of eligibility is unnecessary for the purposes of allowing a student to use awarded compensatory education services. Instead, an IHO may specify a number of years within which a student may use a compensatory award. An expiration date on the ability of the student to use compensatory education services would not come with any attendant responsibilities on the part of the district to evaluate the student, convene a CSE, recommend a placement, or engage in any of the other procedures required by statute and regulation.

Based on the BCBA's testimony, the evidence supports a finding that, if the student receives the compensatory ABA services, he will likely achieve the level of educational benefits he would have if the home-based ABA services were included on the IEPs, and there is no support in the hearing record for the IHO's award of extended eligibility in addition to the compensatory education services. Simply stated, an award of extended age-eligibility, under these circumstances, would go beyond the equitable purposes of compensatory educational services, and thus, the IHO erred in awarding this type of relief.

[16] As noted above, the student continued to be eligible for special education during the 2020-21 school year (as well as part of the 2021-22 extended school year) pursuant to the order of the IHO in the prior matter extending eligibility until the student turned 22 which would not occur until fall 2021 (see Parent Ex. L; see also Parent Exhibit A).

VII. Conclusion

Having found that the evidence in the hearing record does not support the IHO's award of extended-age eligibility, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 30, 2021, is modified by reversing that portion which ordered the district to extend the student's eligibility under the IDEA through the 2022-23 and 2023-24 school years.

Dated: Albany, New York
November 26, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER