The University of the State of New York

The State Education Department
State Review Officer
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No. 15-061

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:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her request for compensatory educational services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, the evidence in the hearing record indicates that the student began receiving home instruction provided by the district in May 2011 (see Joint Ex. a at p. 2). Despite conducting CSE meetings and developing IEPs for the student in May 2011 (Parent Ex. YY), August 2012 (Parent Ex. AAA), February 2013 (Dist. Ex. 1), May 2013 (Dist. Ex. 2), June 2013 (Parent Ex. BBB), and April 2014 (Parent Ex. CCC), the student continued to receive home instruction provided by the district during the 2013-14 and 2014-15 school years as a result of the district's inability to locate either an appropriate placement in a State-approved nonpublic school or within a district public school setting (see Feb. 10, 2015 Tr. pp. 229-34; Feb. 25, 2015 Tr. pp. 352-54; Mar. 27, 2015 Tr. pp. 546-49; Dist. Ex. 8 at p. 6; Parent Exs. P-Q; T at p. 1; U-Y; AA-

BB; JJ; Joint Ex. a at p. 2).[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

A. Due Process Complaint Notice

In a due process complaint notice dated November 11, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years based upon procedural and substantive violations (see Parent Ex. A at pp. 2, 8-14). As a remedy for the district's failure to offer the student a FAPE and as relevant to this appeal, the parent requested that the district fund the student's attendance at the Fusion Academy for a "number of hours sufficient" to compensate the student for the failure to offer a FAPE and to provide the student with a FAPE "going forward" (id. at p. 15).

B. Impartial Hearing Officer Decision

On January 30, 2015, the parties proceeded to an impartial hearing, which concluded on March 27, 2015, after eight days of proceedings (see Jan. 30, 2015 Tr. p. 1-Mar. 27, 2015 Tr. p. 566). In a decision dated May 4, 2015, the IHO found that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (see IHO Decision at pp. 5-15). Although the IHO found that the district failed to offer the student a FAPE for both school years, the IHO also concluded it was not appropriate to order "compensatory academic education" services (id. at p. 16). Specifically, the IHO noted that the student was not able to "handle a large course load and there would be no point in adding to his load" (id.). The IHO also determined that due to the "difficulties and history, at this point" the student required a school reentry approach that "eased" him back into a school setting and that "encourage[d] his trust" and met his "interests" (id.). According to the IHO, such a plan included developing the student's ability to "navigate his own life, to become independent, to participate in non-preferred activities and to participate with individuals who [were] not using his preferred approach" (id.). The IHO further noted that these skills required "time and a careful approach," and could not be "inculcated into the [s]tudent instantly" (id.).

Next, the IHO rejected the parent's request for a program that included "one to one tutoring at [the] Fusion Academy, music therapy, adaptive martial arts . . . , as well as tutoring and a vocational assessment" (IHO Decision at pp. 16-17). The IHO explained that the "one to one instruction in a school setting" at the Fusion Academy—together with the socialization opportunities—offered "little more" than the same "one to one instruction" the student currently received (id.). The IHO also determined that the Fusion Academy would be no more "likely to provide instructors that me[t] the [s]tudent's preferences" than the instructors provided by the district (id. at p. 17). In addition, the IHO noted that while the student experienced success at the Fusion Academy in his "music tutoring class," the hearing record lacked evidence that the student

[1] In addition to receiving the home instruction services provided by the district, the student also attended the Fusion Academy from January 2013 through December 2013 two days per week as part of a stipulated settlement with the district arising out of a previous school year (see Mar. 23, 2015 Tr. pp. 370-76; Parent Ex. VVV at pp. 1-3). The Commissioner of Education has not approved the Fusion Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

took "academic courses" at the Fusion Academy or that he experienced success in "non-preferred courses" (id.). Next, the IHO indicated that the "other programs" the parent requested as relief—including "music therapy class and the adaptive martial arts program"—appeared to be "more closely related to preferred activities than to education or related services" (id.). With regard to the parent's request to provide the student's related services at home, the IHO suggested that the student receive related services outside of the home environment (id.).

In light of the foregoing and in consideration of the evidence in the hearing record, the IHO crafted a variety of equitable relief in this case (see IHO Decision at pp. 7-25). In particular, the IHO ordered the district to conduct a Level I vocational assessment of the student and to fund a Level II vocational assessment of the student (id. at pp. 21-22). The IHO also ordered the district to convene a CSE meeting within two weeks of the date of the decision to develop a new IEP for the student (id. at p. 22). The IHO directed the CSE to include "all mandated individuals"—including the student's "current home instruction teachers"—and to develop a "home instruction program" that included "one to one instruction for four hours per day" (to the extent it tolerated by the student) with breaks that ranged from five minutes to one hour, as needed (id.). The IHO further ordered the CSE to offer a "portion" of the student's instruction at a public high school that had an elevator and air conditioning and for the "remainder" of the student's instruction to be provided at home or "in another agreed-upon location (such as the public library)" (id.). With regard to the schedule of the student's instruction, the IHO ordered the CSE to consider the student's difficulty with mobility in the morning and his ability to function more optimally as the day progressed, explaining further that the instruction should commence with 1.5 hours per day and gradually increase to 4 hours per day—but only to the extent that the student could tolerate the increased length of time for instruction (id.).

Next, the IHO ordered the CSE upon reconvening to include a "variety of teaching characteristics" the student required in the management needs section of the IEP—including the use of a modulated tone; a patient, slow-paced approach; clarity and precision; a gentle manner; a non-judgmental manner; and other necessary characteristics as conveyed by the current home instruction teacher and the parent (IHO Decision at p. 22). In addition, the IHO indicated that the district "shall direct the home instructors to this information on the IEP" (id.). With respect to the newly developed IEP, the IHO directed the CSE to include a "variety" of annual goals pertaining to the student's social/emotional needs for the home instructors to work on with the student, and further, if a home instructor could not "elicit a cooperative work pattern" with the student, the district "shall engage a new instructor" (id. at pp. 22-23). The IHO also directed the CSE to include annual goals with related short-term objectives to improve the student's ability to learn in a "group larger than one," noting that the annual goals and short-term objectives should provide for a "slow incremental increase over time to increase the student's tolerance for learning in a group as well as learning non-preferred subjects" (id. at p. 23). The IHO also ordered the CSE to include annual goals in the IEP to gradually transition the student from "home-based instruction to an in-school setting" (id.). With respect to transition goals, the IHO directed that the CSE to include "needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, if appropriate, [the] acquisition of daily living skills and [a] functional vocational evaluation" (id.). The IHO also directed the CSE to develop the transition goals based upon vocational assessments of the student (id.).

Next, the IHO directed the CSE to consider whether a functional behavioral assessment (FBA) was needed to understand the student's behavior, and if needed, to develop a behavioral intervention plan (BIP) that set forth strategies to meet the student's specific needs (IHO Decision at p. 23). The IHO indicated that any such BIP must be "specific to the [s]tudent" and based upon an "understanding of his particular needs and strategies that have proven to be successful" with the student (id.). The IHO also directed the CSE to consider whether the student required vision therapy (id.).

Turning to the provision of related services, the IHO ordered the district to locate appropriate providers, that all or a portion of the related services should be provided to the student in a public high school with an elevator and air conditioning, and that the student receive the related services in a "quiet, stress free environment" (IHO Decision at pp. 23-24). The IHO also directed that the related services providers use "techniques that [were] necessary to create a rapport" with the student (including a modulated tone; a patient, slow-paced approach; clarity and precision; a gentle manner; a non-judgmental manner; and other characteristics conveyed by the student's current home instruction teacher and parent) (id. at p. 24). The IHO further directed the district to "replace" any related services provider the student could not successfully work with (id.). In addition, the IHO ordered the district to continue to seek a "non-public placement if the [p]arent so desire[d]" and for the district to apply to "such schools frequently and repeatedly" (id.).

Finally, the IHO ordered the district to provide the student with the following compensatory educational services: 128 hours of speech-language therapy, 128 hours of counseling services, 191 hours of OT services, 78 hours of PT services, 191 hours of adapted physical education, and 172 hours of transition services (see IHO Decision at p. 24). The IHO also ordered the district to work with the parent to find suitable providers for the related services, the adapted physical education services, and the transition services, and that the district provide all of these services "according to a schedule and in location" requested by the parent (id.). Finally, the IHO noted that due to the "large number of hours ordered," these services shall be available to the student from the date of the decision and "continuing through August 2017" (id. at pp. 24-25).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in denying the request for compensatory educational services at the Fusion Academy. The parent contends that although the IHO ordered the district, in part, to formulate a new IEP for the student with an appropriate educational program "going forward," this relief did not compensate the student for the district's failure to offer the student a FAPE for the 2013-14 and 2014-15 school years. Therefore, the parent asserts that the student is entitled to compensatory academic educational services, and seeks an order directing the district to fund 13 semester-length credit bearing courses at the Fusion Academy as a remedy for the district's failure to offer the student a FAPE for the 2013-14 and 2014-15 school years.[2]

[2] The parent affirmatively asserts in the petition that she does not appeal the remaining relief ordered by the IHO in the decision (see Pet. ¶¶ 69, 71-75).

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.[3]

V. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during

[3] The district does not appeal the IHO's findings that it failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, and similar to the parent, the district does not appeal the remaining relief ordered by the IHO in the decision; as such, the IHO's determinations are final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 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]).

home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding 10 months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of compensatory educational services or additional services 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 [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 Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

VI. Discussion

A. Fusion Academy

On this point, the parent argues that the district's provision of home instruction did not allow the student the opportunity to earn an "appropriate number of academic high school credits." Consequently, in order to put the student in a position he would have occupied had the district complied with its obligations under the IDEA, the parent requests an order directing the district to fund compensatory academic educational services at the Fusion Academy to provide the student with the opportunity to earn the appropriate number of academic high school credits—to wit, 13 semester-length credit bearing courses at the Fusion Academy. The district contends that the IHO properly denied the parent's requested relief because the Fusion Academy would provide the student with instruction similar to the instruction he already received through home instruction. The district also contends that the IHO properly awarded continued home instruction with a gradual reintegration of the student into an appropriate school setting. Alternatively, the district asserts that because the student was not unilaterally placed at the Fusion Academy, the parent's request for compensatory academic educational services essentially seeks an order of direct payment for a unilateral placement for a future violation of FAPE, which must be dismissed.

pon review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, properly denied the parent's request for compensatory academic educational services at the Fusion Academy as equitable relief for the district's failure to offer the student a FAPE for the 2013-14 and 2014-15 school years (see IHO Decision at pp. 28-35). According to a January 2014 psychoeducational evaluation report, the student demonstrated skills in the low average range of intellectual functioning, and successfully passed two Regents examinations through the home instruction services provided by the district (see Parent Exs. II at p. 2; JJ; RR; CCC at p. 1). Additionally, the student performed within the "low range" for all adapted domains, including communication skills, daily living skills, and socialization skills (see Parent Ex. II at p. 3). Further, according to a February 2014 neuropsychological evaluation report, the evaluator noted that although the student's "anxiety, rigidity, and difficulty with frustration tolerance" warranted a continuation of home instruction, the evaluator also noted that the student "w[ould] have to learn to be more tolerant and flexible in dealing with various situations throughout his life and he w[ould] need to practice this around others, particularly of the same age" (Parent Ex. KK at p. 6) Behaviorally, the student demonstrated task avoidance and "shutting down" when faced with non-preferred activities and situations (see Parent Ex. KK at p. 7).

The evidence in the hearing record also shows that in addition to receiving home instruction provided by the district, the student attended the Fusion Academy for two days per week from January 2013 through December 2013, where, according to the parent, the student received one-to-one instruction in non-credit bearing courses preferred by the student, including music theory, clinical work and production, art, computer, and mathematics (see Mar. 23, 2015 Tr. pp. 368-76; Parent Ex. VVV at pp. 1-3). The evidence in the hearing record also demonstrates, however, that the student did not take credit-bearing courses at the Fusion Academy, and furthermore, that the student passed two Regents exams related to the home instruction he received from the district (see Mar. 23, 2015 Tr. p. 293; Parent Ex. RR). In addition, the student continued to earn academic high school credits while receiving home instruction (see Mar. 27, 2015 Tr. p. 534; Parent Ex. AAAA). Therefore, in light of the evidence demonstrating that the student continued to

successfully pass credit-bearing courses and Regents examinations through the home instruction services provided by the district, and that the student's home instruction would continue to provide the student with instruction in his core academic classes (and according to the parent, the Fusion Academy would add additional classes and socialization opportunities for the student), the evidence in the hearing record does not support the parent's request for compensatory academic educational services at the Fusion Academy.[4] The IHO's decision not to award compensatory education at the Fusion Academy in the form of credit bearing academic instruction is also supported by the evidence given that the student's difficulties, as further discussed below, stem from interfering behaviors that tend to manifest during non-preferred activities, but the student's positive reaction to the previous instruction at the Fusion Academy was achieved by permitting him to focus on preferred activities that were non-credit bearing. The evidence does not show that the strategies at the Fusion Academy were specially designed to assist the student in overcoming the interfering behaviors that prevent him from making progress in non-preferred activities.

Next, to the extent that the parent's request for compensatory academic educational services at the Fusion Academy could be interpreted as a request to prospectively place the student at the Fusion Academy, generally, an award of prospective funding must be predicated upon proof of a lack of financial resources; moreover, the retroactive direct payment of tuition (as opposed to reimbursement) is only available as a remedy when a student has been enrolled in an appropriate private school, but the parents—due to a lack of financial resources—have not made tuition payments although legally obligated to do so (Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). This case is unlike Mr. & Mrs. A., or the principles enunciated in Burlington in which the student in question actually attended a nonpublic school program, because the student was not actually enrolled at the Fusion Academy for either the 2013-14 or 2014-15 school years. Therefore, this type of relief can only be properly characterized as an unrealized prospective unilateral placement.[5] Moreover, even if the parent sought prospective placement of the student for school years that have both since expired, such relief, at this juncture, is no longer meaningful and may no longer appropriately address the current needs of the student,

[4] In developing the student's IEPs, the district must continue to provide the student with an opportunity to earn high school credits and to the extent practicable make progress commensurate with his ability. Moreover, while I agree with the IHO's careful assessment of the speed at which the student can be reintroduced to school environment, as the student begins to attend school for longer periods, the district should, aside from offering appropriate IEPs going forward, exercise its discretion in freely providing the student with as many opportunities to make up the high school credits he has not yet earned as the student can reasonably take advantage of.

[5] Even assuming for the sake of argument that this case involved the student's unilateral placement at the Fusion Academy, the parent did not sustain her burden to establish that the Fusion Academy was an appropriate unilateral placement, as the hearing record failed to contain sufficient evidence upon which to make that determination (see generally Jan. 30, 2015 Tr. pp. 1- Mar. 27, 2015 Tr. p. 566; Dist. Exs. 1-5; 7-26; Parent Exs. A-D; F-G; I-Z; AA-TT; YY-ZZ; AAA-EEE; GGG; LLL; NNN; QQQ-ZZZ; AAAA; Joint Ex. a; IHO Exs. I-II). Moreover, as recently explained, while a school district may be required to reimburse parents for the costs of a student's tuition at a non-State approved nonpublic school as a remedy for the district's failure to offer the student a FAPE, a school district may not be compelled to place a student in a non-State approved nonpublic school in order to provide the student with a FAPE (see Z.H. v. New York City Dep't of Educ., 2015 WL 3414965 at *4-*6 [S.D.N.Y. May 28, 2015] [noting the State's "comprehensive regime" for approving nonpublic schools for student placement by a school district]).

which the CSE—pursuant to both the IHO's order and its legal obligations—should have already determined for the 2015-16 school year.[6]

B. Consideration of Special Factors—Interfering Behaviors

Given the well-documented task avoidance behaviors the student exhibits when confronted with either a non-preferred activity—such as instruction or interactions with an adult or a peer he does not like—as well as the behaviors of others that may enable the student to continue to avoid, delay, or otherwise prevent his engagement with non-preferred activities, it is especially imperative that the district conduct an FBA and develop a BIP for the student in order to effectuate the student's gradual transition out of his current one-to-one home instruction setting and into a school-based, group learning setting. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special

[6] With respect to the placement options available for the student, the IHO's orders do not preclude the parties from discussing and agreeing to alternative settings, which may otherwise be appropriate, such as a deferral to the CBST for a day treatment program, creating an in-district placement and program, or a residential placement. Given the student's needs related to his ADL skills and his behavior, the student may benefit from a more structured environment, such as in a residential placement, which may provide a setting more suitable to helping the student address his needs related to task avoidance and participating in non-preferred activities. A residential placement would also eliminate the student's special transportation needs. Furthermore, a residential placement may also provide the parties with an opportunity to place the student in an environment with a setting proven effective for the student in the past—namely, a small student-to-teacher ratio with a highly structured environment where data driven, positive reinforcement is used.

factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity

and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[7] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, the evidence in the hearing record established that the student demonstrated a pervasive and complex history of behaviors that impeded his learning. For example, the parent, as well as educators and evaluators, described the student's tendency to withdraw, his refusal to do homework and testing, his task avoidance, shutting down, leaving the learning or testing environment, and exhibiting increased emotional anxiety (see Dist. Exs. 1 at pp. 1-3; 2 at pp. 1-4; 8 at pp. 6-7; 16 at pp. 1-3; 17 at pp. 1-2; 18 at pp. 1-3; 19 at pp. 1-2; Parent Exs. W-X; II at pp. 1-5; JJ; KK at pp. 6-7; MM at pp. 1-8; NN at pp. 1-3; OO-PP; AAA at pp. 1-2; BBB at pp. 1-4; CCC at pp. 1-5). Moreover, the evidence in the hearing record shows that prior to receiving home instruction services in May 2011, the student primarily received special education and related services through his attendance at nonpublic schools (both State-approved and nonpublic schools selected by the parent), but that regardless of the setting, the student experienced anxiety, low frustration tolerance, refusal and avoidance of tasks outside of his interest areas, and withdrawal (see Mar. 23, 2015 Tr. pp. 301-13).[8] To address the student's behavior needs, the evidence in the hearing record indicates that the district conducted an FBA of the student and developed a BIP for the student in December 2012 (see generally Dist. Ex. 23; Parent Ex. V). According to the December 2012 FBA, the student engaged in task avoidant behaviors (verbal out-bursts, perseverations, and off-topic comments) that impeded his learning (see Parent Ex. V at p. 1). The December 2012 FBA detailed the contextual factors that contributed to the student's behaviors (instruction in English language arts and reading), and provided a hypothesis as to why the student engaged in the behaviors that impeded learning (escape) (id.). However, other than reporting the frequency and duration of the student's perseverative behavior, the December 2012 FBA failed to

[7] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

[8] Additionally, according to one of the student's home instructors, the student was "in desperate need of an academic program providing structure, routines, and a reward system;" and more recently, the April 2014 CSE recommended management needs which included "rewards/token economy," "structured routine," and positive behavioral interventions and supports to address the student's needs (Parent Exs. X; CCC at p. 5).

report the duration of each of the student's interfering behaviors (id.). Without a baseline measure of each of the student's interfering behaviors—that is, the frequency, duration, intensity, and latency of the targeted behaviors—the December 2012 BIP failed to adequately detail intervention strategies to be used to alter antecedents to prevent occurrence of the behavior, teach alternative and adaptive behaviors, and provide consequences for targeted inappropriate behaviors (compare Parent Ex. V at p. 1, with Dist. Ex. 23).

Therefore, given the student's history of interfering behaviors, the evidence in the hearing record supports a modification of the IHO's order. Rather than considering whether the student requires an FBA or a BIP, the district will be ordered to conduct an FBA of the student and to develop a BIP in full conformity with State regulations within 30 days of the date of this decision—unless it has already done so—to identify and address the student's behavior needs and as consistent with the IHO's further directives.

C. Special Transportation Services

In this case, neither party disputes the student's need for special transportation services. The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the LRE (34 CFR 300.107; 300.305). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]).

As noted above, transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Tatro, 468 U.S. at 891, 894; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs.,

117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question "is whether the transportation arrangements [the district] made for [the student] were appropriate to his needs" (Application of a Child with a Disability, Appeal No. 03-054).

Upon review, the evidence in the hearing record indicates that although the CSEs recommended special transportation services for the student in his IEPs, the CSEs did not identify what transportation accommodations or services the student required (see Dist. Exs. 1 at p. 11; 2 at p. 13; Parent Exs. BBB at p. 12; CCC at p. 18). Here, the evidence indicated that the student's physician requested that the student receive transportation services with "reduced travel time" not to exceed 30 minutes (Parent Ex. S). Due to particular medical conditions, the student's physician also indicated that the student required air conditioning and "non-stressful surroundings" (id.). Therefore, unless the CSE has already done so or the parties otherwise agree, the CSE shall consider the student's need for special transportation services and identify with particularity what accommodations or services the student requires in order to receive a FAPE.

VII. Conclusion

In summary, the evidence in the hearing record supports that IHO's findings and conclusions and further supports the IHO's decision denying the parent's request for compensatory academic educational services at the Fusion Academy.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 27, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER