The University of the State of New York

The State Education Department
State Review Officer
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No. 17-021

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:
Advocates for Children of New York, Inc., attorneys for petitioner, Daniel Hochbaum, Esq., and Rebecca C. Shore, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Gail Eckstein, 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 her request to extend her son's eligibility for special education for three years past the school year in which he turned 21 years of age as relief for respondent's (the district's) failure to provide the student with an appropriate educational program for the 2013-14, 2014-15, and 2015-16 school years. The appeal must be dismissed.[1]

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. The student was initially referred for special education in 2002 due to attending difficulties and hyperactivity but was not found eligible until after a second referral during the fourth grade in 2008 (Dist. Ex. 12 at p. 1). The student was found eligible for special education as a student with a learning disability and a CSE recommended that the student be placed in a special class and receive related services (Dist. Exs. 11 at p. 1; 12 at p. 1). The student attended a 12:1 special class through eighth grade (Parent Ex. Z at p. 2).

The student entered ninth grade in 2013 and, pursuant to an IEP dated September 17, 2013, attended a general education classroom with the support of integrated co-teaching (ICT) services and one 40-minute session of group counseling per week (Dist. Ex. 12 at p. 1; Parent Ex. H at pp. 1, 5, 8). The student struggled academically and behaviorally during the 2013-14 school year (Parent Exs. I, J).

The student repeated ninth grade the following school year (Parent Ex. Z at p. 2). According to the information reported on the student's November 5, 2014 IEP, the student was only attending school on a minimal basis and was failing his classes (Dist. Ex. 4 at pp. 1, 3; Parent Ex. K). The November 2014 CSE continued the recommendation for ICT services and counseling for the student (Dist. Ex. 4 at p. 4). The student missed approximately 75 days of school during the 2014-15 school year and finished the school year with a final "simple average" of 57.22 (Dist. Ex. 24 at p. 1; Parent Ex. I).

The student attended ninth grade for a third time during the 2015-16 school year (see Dist. Ex. 16 at p. 1). By letter dated December 10, 2015 the parent requested a reevaluation of the student to include psychoeducational, social/emotional, functional performance, transition and health evaluations, as well as a functional behavioral assessment (FBA) (Dist. Ex. 7). The parent was reportedly seeking a more restrictive educational setting for the student (Dist. Ex. 11).

According to a January 2016 psychoeducational evaluation, conducted in response to the parent's request, at that point, the student had "earned 9 credits out of 35.05 credits taken," had not passed any Regents examination, was failing all his classes due to poor attendance, and had been suspended from school numerous times for verbally and physically aggressive behaviors (Dist. Ex. 12 at p. 5; see Dist. Exs. 24; 25; 27; Parent Exs. K; L).

The district conducted an FBA and developed a behavioral intervention plan (BIP) for the student in February 2016 (Dist. Ex. 16). A CSE convened on February 26, 2016 and based on the results of the district's psychoeducational evaluation changed the student's eligibility classification to intellectual disability (Dist. Ex. 18 at p. 10; Parent Ex. Z at p. 2).[2] The present levels of performance of the resultant IEP indicated that the student roamed the hallways at school, rather than attending classes, and that when he did attend classes he was disruptive (Dist. Ex. 18 at pp.

[2] While the student's eligibility for special education and related services is not in dispute, the parent alleged that intellectual disability was not the most appropriate disability category for the student (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

2-3).[3] The IEP further indicated that the student demonstrated academic delays in all areas (id. at p. 2). The February 2016 CSE recommended that the student attend a 12:1+1 special class placement in a specialized school and receive counseling services (id. at pp. 7, 9).

In an undated letter sent after the student met with an evaluator from the nonpublic school on April 25, 2016, Fusion Academy accepted the student for attendance (Parent Ex. C).[4]

A. Due Process Complaint Notice

By due process complaint notice dated May 13, 2016, the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2013-14, 2014-15, and 2015-16 school years (Parent Ex. A). The parent asserted that the district had "consistently violated" the student's rights and "neglected its duty to provide him with a FAPE" (id. at p. 2).

The parent alleged that, for the 2013-14 school year, the September 2013 CSE changed the student's recommended placement from a special class to a general education class with ICT services, rendering it less supportive, without any basis for doing so (Parent Ex. A at pp. 4-5). Further, the parent alleged that the September 2013 IEP lacked information regarding the student's then-present levels of performance in academics and lacked adequate annual goals (id.). The parent also alleged that the IEP failed to include support for the student's social/emotional or behavioral needs or appropriate post-secondary transition services (id. at pp. 5-6).

With respect to the 2014-15 school year, the parent alleged that the district failed to timely conduct a triennial evaluation (Parent Ex. A at pp. 6-7). Further, the parent alleged that the November 2014 IEP failed to identify or address the student's academic needs, despite the student repeating the ninth grade, and that the IEP contained insufficient annual goals (id. at p. 7). The parent also alleged that the IEP again failed to include support for the student's social/emotional or behavioral needs or appropriate transition services (id. at pp. 8-9).

Regarding the 2015-16 school year, the parent alleged that the district failed to timely evaluate the student, failed to evaluate the student in all areas of suspected disability, and conducted an inappropriate FBA, all of which resulted in an inappropriate IEP and BIP (Parent Ex. A at p. 9). The parent further alleged that, due to reliance on unreliable testing results from the district's January 2016 psychoeducational evaluation of the student, the February 2016 CSE inappropriately changed the student eligibility classification from learning disability to intellectual disability (id. at p. 10). The parent asserted that the district predetermined the student's program and created a BIP without parental participation (id. at pp. 10-11). Next, the parent asserted that the February 2016 CSE recommended an insufficiently supportive 12:1+1 special class for the student (id.). The parent further asserted that the February 2016 IEP contained inappropriate annual goals and failed to provide sufficient social/emotional or behavioral support (id. at pp. 11-12). The parent alleged that the BIP was inappropriate and failed to comply with State law and regulations (id. at p. 13). The parent also alleged that the February 2016 IEP did not include an

[3] The February 2016 BIP targeted the student's tendency to walk into classes that he was not scheduled to attend (Dist. Ex. 16 at p. 1). Walking in the hallway was considered a "setting event" for this behavior (id.).

[4] The Commissioner of Education has not approved Fusion Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

appropriate transition plan (id. at pp. 12-13). Finally, the parent asserted that the particular public school site to which the district assigned the student to attend could not meet the student's needs or implement the IEP and that the district failed to provide the parent with copies of the student's educational records when requested (id. at pp. 14-15).

As a remedy, the parent requested production of the student's educational records and a battery of evaluations and assessments of the student, including an FBA (Parent Ex. A at p. 16). The parent further requested an order funding the development of a BIP for the student by the evaluator who conducts the FBA (id.). The parent requested 800 hours of compensatory education services for the student in reading, writing, and math (id.). In addition, the parent requested that the district be required to fund three years of the student's tuition at Fusion Academy, as well as three years of a vocational program for the student, including transportation to both and reimbursement of the cost of meals at Fusion Academy (id. at pp. 16-17). The parent sought five hours of legal training for district staff (id.). Further, the parent requested that the district be required to schedule a manifestation determination review regarding a March 2016 suspension of the student (id. at p. 17). Finally, the parent requested that the district be ordered to provide compensatory education to the student until either the student receives his diploma or until three years past the end of the school year in which the student turns 21 (id.).

B. Impartial Hearing and Facts Post-Dating the Due Process Complaint Notice

The parties proceeded to an impartial hearing, which commenced on July 13, 2016 and concluded on November 30, 2016, after five days of proceedings (see Tr. pp. 1-437). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years (see Tr. pp. 4-5, 94). The IHO issued three interim orders dated July 20 (corrected July 26), September 2, and December 12, 2016, ordering, among other things, that a neuropsychological evaluation, a psychiatric evaluation, a vocational assessment, and an FBA be performed and BIP developed at district expense at an enhanced rate, and that a CSE be convened to consider the results (Sept. 2, 2016 Interim IHO Decision at p. 4). The IHO also ordered the student be immediately enrolled at Fusion Academy for the 2016-17 school year continuing for the pendency of the hearing at district expense "as an Interim Service Plan" and that, in addition, the district provide for the student's transportation to and from the Fusion Academy and reimburse the parent for the costs of the student's meals that he would have received from the district if he was attending a district school (id. at p. 5).[5]

Consistent with the IHO's interim decision, the student began attending Fusion Academy for the 2016-17 school year (see Parent Exs. S at p. 1; CC at p. 1; EE at pp. 1-2). After the completion of some of the ordered evaluations, the district convened a CSE on November 23, 2016 and found the student eligible for special education as a student with a learning disability (IHO Ex. 1 at pp. 1, 12; see Parent Exs. Z; AA; BB). The CSE recommended the student attend a 12-month school year program in a 12:1+1 special class placement at a State-supported nonpublic school and receive two 30-minute sessions of counseling services per week, once individually and once in a group (IHO Ex. 1 at pp. 9-10, 12). According to the IEP, the parent expressed concern that the student had made progress at Fusion and that, "changing his environment" to a different

[5] The IHO also rejected the district's statute of limitations defense interposed during the impartial hearing as a defense to the parent's claims pertaining to the 2013-14 school year (Sept. 2, 2016 Interim IHO Decision at pp. 2-3; see Tr. pp. 94-95).

nonpublic school and increasing the ratio of student-to-adult support from 1:1 to 12:1+1 would result in the student "returning to his previous behavior, functioning level, and emotional outbursts" (id. at pp. 2, 13).

In a subsequent interim decision, the IHO noted that, while he previously ordered that the student's placement at the Fusion Academy be pursuant to an interim service plan, the parent actually sought the student's placement there as relief in the form of "prospective funding of a unilateral parental placement" (Dec. 12, 2016 Interim IHO Decision at p. 5). "[B]ased on the evidence presented [at the impartial hearing] on November 30, 2016," the IHO concluded that the student had been receiving benefit from his attendance at the Fusion Academy thus far and that the placement "was Rowley-appropriate" (id.). The IHO found that, because the student had repeated ninth grade twice in the district and accrued minimal credits, he now needed "an intensive 1:1 setting," which Fusion Academy provided (id.). Therefore, the IHO ordered the district to modify the student's IEP "to reflect this unilateral placement, effective September 6, 2016, as a non-public placement prospectively funded by the district" (id.). With respect to the parent's request for compensatory educational services in the form of 1:1 remediation, the IHO indicated that he was "not convinced" by testimony that Orton-Gillingham would be the best methodology for the student (id. at pp. 5-6). Accordingly, the IHO ordered the district to fund an assessment of the student by Lindamood Bell (id. at p. 6).

C. Impartial Hearing Officer Decision

In a decision dated January 24, 2017, the IHO indicated that the parties had agreed that the district deprived the student of a FAPE for the 2013-14, 2014-15, and 2015-16 school years and explained that he understood this to also reflect the district's concession that it denied the student a FAPE for a portion of the 2016-17 school year, since the challenged February 2016 IEP was intended to be implemented through February 2017 (Jan. 24, 2017 IHO Decision at pp. 5, 71). Notwithstanding the district's concession that it denied the student a FAPE, the district challenged the parent's requested remedy, which the IHO observed was "a notion that is, at best, problematic" (id. at pp. 68-71).[6]

Turning to relief, the IHO ordered that his interim decision placing the student at Fusion Academy for the 2016-17 school year and finding the program at the nonpublic school to be an appropriate unilateral placement be deemed final (Jan. 24, 2017 IHO Decision at pp. 8, 71). The IHO also ordered that the district be responsible for providing the student transportation to and from school daily (id. at pp. 74-75). However, the IHO noted that, based on his interim decision, requiring the district to provide for the student's placement at Fusion on the IEP, the student's "ongoing placement" pursuant to pendency had been established and, further, that he was "wary of substituting [his] judgment . . . for the CSE's judgment" by prospectively ordering the student's placement at Fusion Academy for school years beyond the 2016-17 school year (id. at p. 7).

As to compensatory education services, the IHO ordered the district to create a bank consisting of 1,000 hours of 1:1 basic skills tutoring and up to 100 hours of vocational "educational

[6] On at least one occasion, an SRO has expressed a similar sentiment—while perhaps on different, but in some instances, overlapping grounds—in a case involving the same school district (see Application of a Student with a Disability, Appeal No. 16-033).

consulting" services (Jan. 24, 2017 IHO Decision at pp. 8, 73).[7] For the tutoring, the IHO ordered that the services be delivered by a certified teacher utilizing research-based methodologies, such as those utilized by EBL Coaching or Lindamood Bell, and billing at an enhanced rate (id.). For the vocational services, the IHO specified that the provider should participate with the student's "family, his school, and the provider of his tutoring services to develop an integrated vocational education component" (id.). The IHO provided that both the tutoring and the vocational consulting services could be used by the student "without time limitation" (id.).[8]

Finally, the IHO declined to extend the student's eligibility for three years beyond the 2019-20 school year, explaining that it was "too soon to have the facts needed to enter such an Order" (Jan. 24, 2017 IHO Decision at pp. 9, 74). The IHO found that the "parties ha[d] jointly demonstrated" that the deprivation of FAPE had been "sustained and substantial" and that, therefore, the student was "entitled to compensatory relief extending potentially well beyond when he would otherwise age out of eligibility for special education in the school year during which he will turn 21 (the 2019-20 school year)" (id. at p. 7). However, the IHO concluded that, if the student did not graduate by the 2019-20 school year, any remedy for the deprivation beyond that summarized above was "too speculative to be, as yet, ripe to address" (id. at pp. 7-8, 9). The IHO dismissed the parent's request for extended eligibility "without prejudice," finding that the parent could litigate this claim "in the future, once the end of eligibility approaches and it becomes possible to assess whether the student will have fully caught up by then to where he would have been had FAPE been consistently provided" (id. at pp. 9, 74).

The IHO issued an "Amended Findings of Fact and Decision," dated January 27, 2017, which altered the award of compensatory services by providing that the availability of those services would terminate upon the student's completion of high school (Jan. 27, 2017 IHO Decision at p. 73; but see id. at p. 8). Further, in addition to ordering the district to provide the student transportation to school, the IHO also ordered the district to provide or reimburse the cost of the student's transportation to the ordered compensatory services (id. at p. 75).[9]

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in not granting the student extended eligibility for three years beyond the end of the school year in which the student turns 21 years old. Specifically, the parent alleges that the district's failure to provide the student a FAPE for the school years at issue constituted a gross deprivation, entitling the student to extended eligibility. The parent alleges that the student should be placed in the same position he would have been but for the district's actions resulting in a gross deprivation of FAPE for three years. The parent asserts that, because the student had seven years of eligibility remaining when he started high school,

[7] In acknowledgement of the district's argument that the student's lack of attendance while attending the district program might be predictive of the student availing himself of the compensatory services, the IHO clarified that the district would only be required to pay for services actually delivered (Jan. 24, 2017 IHO Decision at pp. 72-73).

[8] However, the IHO also indicated that, the vocational consultant hours would be available for the student's use until the student earned his high school diploma (Jan. 24, 2017 IHO Decision at p. 8).

[9] In what may have been an inadvertent omission, the amended decision also lacks four of the numbered directives included in the ordering clause in the original decision (compare Jan. 24, 2017 IHO Decision at pp. 74-75, with Jan. 27, 2017 IHO Decision at p. 75).

placing the student in the same position he would have been in but for the FAPE denial would require that the student "have 7 years in which to receive special education services and complete the 44 credits he needs to graduate." The parent argues that the IHO erred in postponing the decision on extended eligibility to a subsequent hearing and asserts that the hearing record includes sufficient information to support such relief as the student is not likely to graduate before turning 21 and will need extended eligibility in order to earn the credits required for graduation.

In an answer, the district responds to the parent's allegations with admissions and denials and generally argues to uphold the IHO's decision in its entirety. Addressing the IHO's issuance of an amended decision, the district asserts that the January 27, 2017 decision "technically" changed the substance of the January 24, 2017 decision and, therefore, "arguably" exceeded the IHO's authority.[10] However, the district asserts that it does not object to the timing of the parent's request for review. Finally, the district asserts that the IHO's decision not to award extended eligibility should be upheld because any determination regarding whether the student requires extended eligibility in order to graduate is speculative at this point.

In a reply, the parent contends that the IHO's January 24, 2017 decision was issued in error and that the request for review was timely served on March 8, 2017, counting the time to serve the request for review from the IHO's January 27, 2017 amended decision.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[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. Florida 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]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained

[10] In accord with State regulation providing that an SRO may request additional evidence upon a determination that such evidence may be necessary in order to render a decision (8 NYCRRR 279.10[b]), on March 31, 2017, the undersigned requested that the district provide further information regarding the circumstances surrounding the IHO's issuance of the amended decision and set forth its position regarding the IHO's authority to issue the amended decision, including what effect, if any, the IHO's issuance of the amended decision had on the parent's time to serve the request for review, to which the parent was entitled to respond in a reply.

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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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 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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [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"]; 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 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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]).

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

A. Amended Decision—IHO's Retention of Jurisdiction

Prior to addressing the merits, it is necessary to first address the IHO's authority to issue an amended decision and the impact that the issuance of the amended decision has on this appeal.

An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No, 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In this instance, the IHO issued a final written decision on January 24, 2017, which ended his jurisdiction over the matter. The IHO erred when he rendered an amended decision on January 27, 2017, which substantively altered the relief awarded (compare Jan. 27, 2017 IHO Decision at pp. 73, 75, with Jan. 24, 2017 IHO Decision). After the parent's receipt of the IHO's January 24, 2017 decision, the parent's counsel requested that the IHO amend his decision to add an order requiring the district to provide for the student's transportation to and from the awarded compensatory services (Answer Ex. A-1 at p. 1). In response, the IHO informed the parties that the January 24, 2017 decision was issued in error prior to his having the opportunity to review it (id.). Other than the IHO's subsequent e-mail, there was no indication that the January 24, 2017 decision was not a final and enforceable decision; the January 24, 2017 decision bore the electronic signature of the IHO and was transmitted to the parties (Jan. 24, 2017 IHO Decision at p. 75; Answer Ex. A-1 at p. 2).

Additionally, according to the last extension of the 45-day timeline contained in the hearing record, the IHO extended the deadline for 30 days from December 25, 2017 to January 26, 2017 (Tr. pp. 434-35).[11] This would mean that the IHO's issuance of the amended decision on January

[11] Although it is unclear from the hearing record, it is presumed that the IHO found January 26, 2017 to be the appropriate deadline by calculating 30 days from December 27, 2016, taking into account that December 25, 2017 fell on a Sunday and December 26, 2017 was a legal holiday (see Tr. pp. 434-35).

27, 2017 was outside of the timeline to render a decision. While a state may adopt a procedure allowing for a clarification or a motion for reconsideration, there is no such State law or regulation in this jurisdiction and, even if New York had such a process in place, the IHO would still be required to issue the final decision within the 45-day timeline or a properly extended timeline (see Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR 232, at p. 46 [OSEP 2013] [indicating that a state could allow motions for reconsideration before issuance of a final decision]; see also T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 930-31 [C.D. Ill. 2012] [discussing Illinois's statute that permits an IHO to retain jurisdiction to provide clarification of a written decision, so long as the request for such clarification by a party is provided in writing within five days of receipt of that decision]).

While some confusion on the part of the parties is understandably attributed to the IHO's e-mail indicating the January 24, 2017 decision was issued prematurely, the IHO's representation is not a sufficient basis for disregarding a final decision issued to the parties. Additionally, while neither party objects to the IHO's issuance of an amended decision, the parties have also not cited any authority which would allow the IHO's retention of jurisdiction after issuance of the January 24, 2017 decision. Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions.[12] Accordingly, regardless of the IHO's intentions, the IHO's jurisdiction over this matter ended with the issuance of the January 24, 2017 decision and the IHO's subsequent January 27, 2017 decision is a nullity (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024). This determination leaves the IHO's January 24, 2017 decision undisturbed and fully in effect. With that said, it appears that, to some extent, the district has agreed to implement aspects of the IHO's January 27, 2017 amended decision, which were not set forth in the original decision, including the provision of the student's transportation to and from the student's compensatory services. Nothing in this decision should be deemed to discourage such agreement by the parties.

B. Timeliness of the Request for Review

Since the January 27, 2017 amended decision is a nullity, review of the timeliness of the parent's appeal is reviewed by examining the timelines from the IHO's January 24, 2017 decision. Upon review of the timeline of the IHO's January 24, 2017 decision and the proceedings on appeal, the parent's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service of the petition in

[12] Additionally, if allowed, it would result in an IHO essentially unilaterally granting a party an extension of time to appeal an IHO decision, as alluded to below.

a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service of the petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service of the petition upon the district]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline specified for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (8 NYCRR 279.13). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012] ["attorney error or computer difficulties do not comprise good cause"]).

In this case, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated January 24, 2017 (Jan. 24, 2017 IHO Decision at p. 75). The parent was, therefore, required to personally serve the request for review upon the district no later than March 6, 2017 (8 NYCRR 279.4[a]). However, the petition was first served upon the district on March 8, 2017 (see Parent Aff. of Service). Additionally, the parent failed to assert good cause in her request for review for the failure to timely initiate the appeal. As discussed above, while it is somewhat understandable that the amended decision created confusion amongst the parties, the parent's attorney's mistaken belief that time to appeal ran from the date of the amended decision is not good cause. A review of pertinent SRO decisions, as well as statutory and regulatory authority, cited above, would have informed the parent's counsel that IHO's do not have the authority to amend decisions (T.W., 891 F. Supp. 2d at 440-41 [informing counsel for the parents that "an examination of pertinent SRO decisions would have informed her that delays due to scheduling difficulties or lack of availability on the part of parties or counsel are not typically found to be 'good cause' for untimely petitions"]). Additionally, as summarized above, the parent's appeal of the IHO's decision is very narrow, focused only on that portion of the IHO's decision which declined to extend the student's eligibility to receive a FAPE under the IDEA beyond the student's 21st birthday. The IHO's original and amended decision are consistent on this point (compare Jan. 24, 2017 IHO Decision at pp. 9, 74, with Jan. 27, 2017 IHO Decision at pp. 9, 74-75). Accordingly, the parent was on notice of this aspect of the IHO's decision with which she disagreed as of the issuance of the IHO's original decision. Based on the foregoing, there is no basis on which to excuse the untimely personal service of the request for review on the district (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-cv-0006, at *39-*41

[S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [Feb. 28, 2006]).[13]

C. Alternative Findings—Extended Eligibility

Notwithstanding that the parent's request for review is dismissed for untimeliness, I address, in the alternative, the merits of the parent's appeal. As summarized above, the parent's appeal is very narrow and the district has not cross-appealed any of the IHO's determinations. Accordingly, with the exception of the question of extended eligibility, all of the IHO's findings, determinations, and orders, as set forth in his January 24, 2017 decision have become final and binding on both parties and will not be further discussed (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]). The parent argues that the IHO erred in declining to extend the student's eligibility for special education for three years past the school year in which the student turns 21 years of age. The parent contends that the student can only be made whole by providing the student with an additional year of eligibility for each school year in which he was denied a FAPE.

Initially, the legal basis for the parent's request must be examined. The parent frames the request for extended eligibility as one for compensatory education, citing the gross violation standard applicable to an award of compensatory education for a student no longer eligible for special education.[14] However, the parent does not request equitable compensatory education relief in the form of more educational programs or services to be delivered to the student either before or after the student becomes ineligible for special education by reason of his age. Rather, she requests relief in the form of an extension of the district's statutory obligations.[15]

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 v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2 [2d Cir. 2008] [emphasis added]; see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011] [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],

[13] Further, notwithstanding that the district did not request dismissal of the parent's request for review on the basis of untimeliness, State regulation does not provide a mechanism for parties to agree to a petitioner's late service of a request for review. Additionally, neither party has pointed to any authority which would support a finding that the parent's time to appeal should have run from the date of the IHO's amended decision, issued in excess of his jurisdiction, or that the IHO's issuance of the amended decision, on its own, would be sufficient to amount to a showing of good cause.

[14] The district does not directly challenge the parent's assertion that it committed a gross violation of the IDEA.

[15] This is rather different than the relief sought in the parent's due process complaint notice, which requested that the district provide compensatory education until either the student graduated or until three years after the school year in which the student turned 21 (Parent Ex. A at p. 17).

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 ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[16] 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). The Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has 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, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994], citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]).

Upon reviewing the relevant authority, a distinction emerges 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], affd, 612 F.3d 712 [3d Cir. 2010]; Burr, 863 F.2d at 1078 [same], cert granted, judgment vacated sub nom. Sobol v. Burr, 492 U.S. 902 [1989], and on reconsideration sub nom. Burr, 888 F.2d 258; 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]). Courts have interpreted this distinction differently, either concluding that equitable relief may include the continued requirement for a district to follow the procedures of the IDEA and develop IEPs for a student (see Ferren C., 595 F. Supp. 2d at 581 [ordering the district to reevaluate the student and develop her IEPs for three years beyond the expiration of her eligibility for special education]; M.W. v. New York City Department of Education, 2015 WL 5025368, at *7 [S.D.N.Y. Aug. 25, 2015] [ordering the district to provide credit-bearing instruction to a 21-year-old student while her appeal was pending]), or questioning the notion that compensatory education may include extended eligibility (see Dracut Sch. Comm. V. Bur. of Special Educ. Appeals, 737 F. Supp. 2d 35, 55 [D. Mass. 2010] [finding that, because an IHO had ordered a district to award a diploma to a high schooler with Asperger syndrome, he could not order the district to extend the student's IDEA eligibility for another two years]). While the above authorities discuss, to some extent, the appropriateness of an award of extended eligibility, none grapple with the question of how such an award could ultimately result in many years of extended IDEA eligibility beyond the original award—as a consequence of the exercise of process rights, which would also presumably be extended as a byproduct of the extended statutory entitlements—and the potential for an extension

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

of eligibility well beyond the period of time when programs or services under the IDEA may be appropriate or beneficial to such a student who has reached adulthood.

However, in the present case, even assuming that I possess the authority to order the district to provide the student with a FAPE for school years beyond the year that the student's eligibility for special education under the IDEA expires, the hearing record does not support such relief in the present case. First, the student has three years remaining of IDEA eligibility (see 20 U.S.C. § 1412[a][1][A]). As such, this matter is distinguishable from the authority cited by the parent, in which the student had already reached the age of 21 (M.W., 2015 WL 5025368, at *3; see Application of a Student with a Disability, Appeal No. 09-044). In other words, while the IHO may have erred in citing the legal doctrine of ripeness to support his observation that the request for relief in the form of extended eligibility was premature (a doctrine that would be applicable to claims, not relief), his point is well taken. Given the totality of the relief crafted by the IHO and the student's motivation, the student is presently well equipped to achieve the progress guaranteed by the IDEA—that is, the progress which is appropriate in light of the circumstances of his disability (see Endrew F., 137 S. Ct. at 998-1001)—within the time remaining before he turns twenty-one.

Specifically, despite the student's deprivation of FAPE over multiple school years, the hearing record contains evidence demonstrating the student's ability to graduate a high school program during or before the school year in which turns 21 years of age (see Tr. pp. 193, 283, 372; Parent Ex. BB at p. 8). There is no doubt that much of this optimism arises from the student's success in the program at Fusion Academy. For example, the parent testified that, in comparison to the student's experience at the public high school, the student has been a "different child" since attending Fusion Academy (Tr. p. 294; see Tr. pp. 265, 298, 300-01, 304-05).[17] Likewise, the student testified that, at Fusion Academy, he liked his subjects, did well because he liked them, felt pride about earning good grades, and felt motivated to achieve goals related to graduating and learning a trade (Tr. pp. 422, 427; see Tr. pp. 422-26). The parent asserts that there is no guarantee that the district will offer the student an appropriate program but, if the district fails to offer the student a FAPE in the future, the parent may again resort to the due process procedures and, as the IHO noted, could likely secure the student's attendance at Fusion at district expense during the pendency of such proceedings.

Finally, although the IHO declined to extend the student's eligibility, the IHO awarded relief that was equitable, aligned with the conceded denials of FAPE, and supported by the evidence in the hearing record, including an award for the cost of the student's attendance at Fusion for the 2016-17 school year, tutoring services, and vocational consulting services. Moreover, the IHO awarded relief that will be available to the student beyond the school year in which the student turns 21 years of age. Pursuant to the IHO's January 24, 2017 decision, the IHO ordered that up to 1,000 hours of compensatory education be provided to the student and made specific note that "there is no deadline by which" the services must be used (see Jan. 24, 2017 IHO Decision at p. 73). As discussed above, the IHO's January 27, 2017 decision which purported to set an expiration

[17] The student's Fusion Academy progress reports, dated October 1, 2016 and November 1, 2016, reflected the student was passing all of his subjects (i.e., English 9, Foundations of Personal Fitness, Spanish 1, Ancient Civilizations (2), Geometry, and Biology) with grades ranging from "B" to "A+" (Tr. pp. 298-300; Parent Ex. DD).

date for the student's use of such services is a nullity (Jan. 27, 2017 IHO Decision at p. 73).[18] Considering that the student still has the opportunity to graduate high school prior to the end of the student's eligibility for special education, that the student has over three years of eligibility remaining, that the student is attending Fusion pursuant to the IHO's decision and receiving benefit therefrom, and that the student was awarded 1,000 hours of compensatory education, the benefits of which have yet to be seen, the IHO's decision not to award an extension of the student's eligibility was reasonable.

VII. Conclusion

Having found that the parent failed to timely initiate the appeal and, alternatively, that the evidence in the hearing record supports the IHO's decision declining to extend the student's eligibility for special education services, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 22, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[18] Further, the amended decision, itself, included contrary determinations on the point, both indicating that the services would and would not expire (Jan. 27, 2017 IHO Decision at pp. 8, 73).