The University of the State of New York

The State Education Department
State Review Officer
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No. 19-004

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 Ardsley Union Free School District

Appearances:
Jaspan Schlesinger LLP, attorneys for respondent, by Carol A. Melnick, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the cost of her son's attendance at Step Forward for the 2015-16 school year and to be awarded 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

The student had attended the district's schools since elementary school and was first evaluated in 2001 due to concerns related to his speech and language skills (Dist. Ex. 28 at p. 1). The student subsequently received diagnoses of autism, an auditory processing disorder, and an attention deficit hyperactivity disorder (ADHD) (id.).

For ninth and tenth grade (the 2011-12 and 2012-13 school years), the student was eligible to receive special education as a student with autism and attended the district's high school in an "emotional support program"; where he received integrated co-teaching (ICT) services in some academic subjects, daily resource room services, related services of counseling and speech-

language therapy, and shared aide services in academic classes (Parent Exs. C at pp. 3, 9-10; D at pp. 5, 11; Dist. Ex. 3 at p. 1).[1]

A CSE convened on June 19, 2013 to conduct the student's annual review and develop an IEP for the 2013-14 school year (eleventh grade) (Dist. Ex. 5 at p. 2). The June 2013 CSE recommended that the student receive daily resource room services, two sessions per week of small group speech-language therapy, two sessions per month of small group counseling, and two sessions per month of individual counseling (id. at p. 10).

On October 28, 2013, the CSE reconvened to amend the student's IEP to reflect that the student was attending the district's high school for half of the school day, and a Board of Cooperative Educational Services (BOCES) office skills program for half of the day (Dist. Ex. 8 at p. 1). The meeting information summary attached to the IEP indicated that the student "continues to be on a Regents track and should have enough credits to graduate with his class"; however, the parent requested that the student also pursue a Career Development and Occupational Studies (CDOS) commencement credential (id.). In addition, the October 2013 CSE recommended that the student receive daily resource room services, two sessions per week of group speech-language therapy, and one session per week of individual counseling (id. at p. 9).

A CSE convened on May 2, 2014 to conduct the student's annual review and develop an IEP for the 2014-15 school year (twelfth grade) (Dist. Ex. 15).[2] According to the meeting information summary attached to the May 2014 IEP, at the parent's request "the student was placed in BOCES Occupational Education to explore a program that would lead to a CDOS certificate" (id. at p. 2). The meeting summary also noted that the student was working with the district's transition coordinator and ACCES-VR, to further discuss the "[w]ork [r]eadiness [p]rogram" and his "[i]ndividual [p]lan of [e]mployment" (id.).[3] The CSE recommended that the student receive daily resource room services, ICT services in English and social studies classes, two sessions per week of group speech-language therapy, and one session per week of individual counseling (id. at pp. 11-12).

On June 25, 2014, the CSE reconvened at the parent's request to discuss her concerns regarding the vocational component of the student's programing (Dist. Ex. 18 at p. 1). The meeting information summary attached to the IEP indicated that at the time of the meeting, the parent had not yet decided if the student would attend high school for a fifth year, or graduate in June 2015 (id.). As a result of the meeting the IEP indicated that the student would "complete the

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

[2] The pages of district exhibit 15, which the IHO entered into the hearing record as the May 2, 2014 IEP, appear to have been mislabeled as district exhibit 16 (Tr. pp. 15, 31; compare Dist. Ex. 15, with Dist. Ex. 16).

[3] The acronym ACCES-VR refers to the New York State Education Department's Office of Adult Career and Continuing Education Services-Vocational Rehabilitation.

requirements for a CDOS credential," in addition to the requirements for a Regents diploma (id. at pp. 2, 9).

The CSE reconvened on September 11, 2014 at the parent's request to review the student's transition plan for the 2014-15 school year (Dist. Ex. 25 at p. 3). The meeting information summary attached to the September 2014 IEP indicated that the student would be able to graduate with a Regents diploma and a CDOS credential in August 2015 if the student completed one credit in art, a half credit in health, and passed the Regents examination in US history (id.).[4] With the high school principal's approval, the parent opted for the student to complete the remaining 1.5 credits needed for a diploma at "a local college" at her own expense (id.). Meeting minutes further reflected that "[d]ue to schedule conflicts and in order to meet graduation and vocational education requirements," the CSE recommended that the student receive resource room services, group speech-language therapy, individual counseling, ICT services in science, general education instruction in social studies, and physical education and, in the afternoon, the student went to BOCES and received instruction in an integrated English class and the Veterinary Tech program (id. at pp. 3, 13, 16).

On June 2, 2015, the CSE convened to develop an IEP for the student's fifth year (2015-16 school year) at the district's high school (Dist. Ex. 44). The meeting information summary attached to the IEP indicated that the student had recently completed "a health credit" at a local community college, and that "[b]y the conclusion of the school year, it is anticipated that he will have completed all credits and coursework necessary to meet the requirements of a Regents diploma with the exception of one art credit" (id. at p. 2).[5] The June 2015 CSE continued to recommend that the student daily receive resource room services, group speech-language therapy and individual counseling (id. at pp. 8, 10). The CSE also recommended that the student continue with the "second half" of the BOCES Veterinary Tech program, which involved an externship component, and "anticipated that the student will have completed the requirements for a [CDOS] [c]redential at the conclusion of this school year" (id. at pp. 2, 8).

In an email to the CSE chairperson dated June 23, 2015, the parent confirmed that she had received permission from the high school principal for the student to "fulfill missing credits by taking classes outside of the high school during the regular school year," and that the student's schedule would no longer be "compromised" by a mid-day class at the high school (Dist. Ex. 45 at p. 1; see Tr. p. 500; Dist. Ex. 44 at p. 1).

On August 21, 2015, in an email to the CSE chairperson, the parent referred to a prior correspondence from her which indicated that if the district had "no other offer" besides the high school-based program previously recommended, she would enroll the student in Step Forward and seek reimbursement from the school district (Dist. Ex. 56 at p. 1). In response, the CSE chairperson informed the parent that the district's recommended program for the 2015-16 school year would provide the student with a FAPE, and that it did not agree to the student's placement at, nor would

[4] At the time of the September 2014 CSE meeting, it was anticipated that the student would take the US history Regents exam in January 2015 (Dist. Ex. 25 at p. 3).

[5] According to the student's high school transcript, the student successfully passed the Regents examination in US history in January 2015 (Dist. Ex. 72).

it fund transportation to Step Forward (id.). The CSE chairperson also requested that the parent provide the district with documentation as to how the student would receive the one credit in art/music needed to meet his graduation requirements (id.). The parent indicated that "per her agreement" with the high school principal, the student could "fulfill half of his required high school credit" at a community college and that he was enrolled in "Chorus I next semester" (id.).

In fall 2015, the student was enrolled in the Step Forward program and took mathematics, biology, health, and voice classes at a community college, and chorus at a different community college (Dist. Ex. 61 at p. 3).

In a letter dated November 6, 2015, the parent provided the district with an August 2015 independent neuropsychological screening report, which the CSE convened to discuss on December 15, 2015 (Dist. Exs. 59; 60; 61 at p. 2). The meeting information summary attached to the December 2015 IEP indicated that the student had completed the health credit, the chorus course, and that the student planned to take the "final half credit of art required for graduation" at a school for visual arts during the spring 2016 semester (Dist. Ex. 61 at p. 3). The summary further indicated that the student had otherwise "completed all of his testing and coursework requirements for a Regents diploma and CDOS [c]ommencement [c]redential," noting that it was "reasonable that the student complete the outstanding half credit in art during the spring semester," and that the student "will then graduate this June [2016]" (id.). The district requested that the parent submit documentation regarding the completed chorus course to the high school guidance counselor (id.).

In an email to the parent dated May 13, 2016, the CSE chairperson requested that the parent provide the "transcript indicating completion of the final half art credit that [the student] has taken this semester to meet his graduation requirement" (Dist. Ex. 68 at p. 1). The CSE chairperson also advised the parent that an "Exit meeting" would be scheduled for the first week of June 2016 (id.).

On June 13, 2016, district staff including the CSE chairperson, a special education teacher, a school psychologist, a guidance counselor, and a speech-language pathologist conducted an exit meeting with the parent (Dist. Ex. 71 at pp. 1-4). In an email dated September 1, 2016, the then-current high school principal informed the parent that his decision to "certify that [the student] had met the requirements for graduation w[as] based on the fact that [the prior high school principal] had granted [the parent's] request for [the student] to finish his high school requirements at [a community college] during the 2015-16 school year" (Dist. Ex. 76 at p. 1). The principal indicated that the district had contacted the community college, which confirmed that the student "had indeed completed those requirements," specifically, the health and art/music credits (id. at pp. 1-2). Therefore, according to the principal, the student had "completed the requirements for a Regents diploma with CDOS credential," the diploma would be mailed to the student's home and the student was invited to participate in the graduation ceremony in June 2017 (id. at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated June 26, 2017, the parent, though her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15, 2015-16 and 2016-17 school years (see Due Process Compl. Notice).[6, 7]

With respect to the 2014-15 school year,[8] the parent argued that the district failed to assess the student in all areas of disability (Due Process Compl. Notice at p. 11). The parent further argued that the district failed to assess the student's daily living skills (id.). Next, the parent argued that the district significantly impeded her ability to participate in the development of the student's IEP because the district predetermined its "services and placement" (id. at p. 7). The parent further argued that she was unable to ask questions regarding the student's CDOS and ACCES-VR programs because the CSE meeting lacked the participation of ACCESS-VR and BOCES representatives (id. at p. 8). Next, the parent argued that the CSE failed to convene at the parent's request or prior to significant changes in the student's placement (id. at p. 9). In addition, the parent argued that the CSE failed to discuss supports and services for the student's externship during the CSE meeting (id. at p. 8). Next, the parent argued that the CSE failed to review and report on the student's present levels of performance pertaining to all areas of the CDOS learning standards (id. at p. 9). In addition, the parent argued that the district failed to provide appropriate prior written notices to the student (id.). Next, the parent argued that the annual goals were not appropriate and that the district failed to have an appropriate IEP in place at the start of the school year (id. at pp. 9-10). The parent also argued that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (id. at p. 9). Also, the parent argued that the district failed to evaluate the student for an auditory processing disorder (id. at p. 11).

Turning to the 2015-16 school year, the parent alleged that the district failed to assess the student in all areas of suspected disability (Due Process Compl. Notice at p. 12). The parent further alleged that her participation was significantly impeded because the district predetermined its

[6] The parent originally filed a due process complaint notice with the district dated June 19, 2017, which was entered into the hearing record as parent exhibit A. The pages of parent exhibit A are confusingly labeled as "V-1," "V-2," etc. (see Parent Ex. A at pp. 1-16). The parties and the IHO appeared to treat the amended due process complaint notice, dated June 26, 2017, as the operative pleading in this case from June 2017 (herein referenced as "Due Process Compl. Notice,") but the June 26th complaint was not entered into the hearing record; as further described below, the amended due process complaint was obtained by the Office of State Review and those pages had been labeled as "A-1,"A-2," etc. (see Due Process Comp. Notice pp. 1-16).

[7] The parent subsequently filed due process complaint notices dated May 22, June 21, and June 22, 2018. Although referenced in the hearing record, the May 22, 2018 due process complaint notice was withdrawn (Tr. pp. 739-41). Due to a series of typographical errors, informal orders, and information missing from the initial submission of the hearing record, the procedural history of this case was difficult to decipher. Consequently, on January 31, 2019, the Office of State Review, at my direction, required the district to file copies of, among other things, all due process complaint notices filed with respect to the student as well as orders regarding consolidation matters, which were submitted on February 8, 2019.

[8] The parent also asserted a number of claims related to the 2013-14 school year in her due process complaint notice (Due Process Compl. Notice at pp. 4-7) but did not seek specific relief for those claims and such claims were not referred to in the parties' closing briefs or addressed by the IHO is his decision.

"services and placement" by basing the student's IEP on "customs or policies" instead of parental input and the student's needs (id. at p. 11). Next, the parent alleged that the CSE failed to review and report on the student's present levels of performance pertaining to the CDOS learning standards (id. at p. 13). The parent also alleged that the district failed to provide appropriate prior written notices for the student (id.). Next, the parent alleged that the district failed to conduct an FBA or develop a BIP for the student (id.). Additionally, the parent alleged that the annual goals were not appropriate (id.).

With regard to the 2016-17 school year, the parent claimed that her parental participation was impeded because the district conducted an "Exit Meeting" for the student, rather than convening a CSE meeting to develop an IEP for the 2016-17 school year (Due Process Compl. Notice at pp. 14-15). The parent further argued that although the student did not meet the credit requirements for achieving a diploma, the district inappropriately issued the student a diploma which terminated the student's right to a FAPE without due process (id. at p. 15).

With respect to the unilateral placement, the parent asserted that Step Forward is an appropriate unilateral placement and equitable considerations weighed in her favor because she cooperated with the district and provided the district with timely notice of the student's placement at Step Forward (Due Process Compl. Notice. at p. 15). As relief, the parent requested an annulment of the student's diploma and CDOS commencement credential (id.). The parent also requested reimbursement for neurofeedback training, tuition for the student's attendance at Step Forward for the 2015-16 school year, transportation costs, counseling, and out-of-pocket expenses (id. at pp 15-16). Additionally, the parent requested evaluations of the student in the areas of auditory processing, social skills, and behavior (id. at p. 16). Lastly, the parent requested compensatory educational services and attorney's fees (id.).

B. Interim Impartial Hearing Officer Decision – Consolidation Order

On August 3, 2018, pursuant to a July 12, 2018 request by the parties, the IHO issued an order consolidating the due process complaint notice dated June 26, 2017 (referred to as "the first DPC"),[9] with a subsequent due process complaint notice dated June 21, 2018 (referred to as "the second DPC")[10] (IHO Interim Decision at p. 1). In pertinent part, the IHO found that the "parent's

[9] Although the order states that "the first DPC" was filed on June 21, 2017, as previously noted in footnote 6 to this decision, the parent originally filed a due process complaint notice with the district dated June 19, 2017 which she amended on June 26, 2017. Accordingly, for purposes of clarity, I construe "the first DPC" to refer to the June 26, 2017 due process complaint notice underlying this appeal. In addition, although the IHO described "the first DPC" as containing claims related to the 2015-16, 2016-17 and 2017-18 school years, both the June 19, 2017 due process complaint notice and the June 26, 2017 amended due process complaint notice assert claims related solely to the 2014-15, 2015-16 and 2016-17 school years.

[10] The IHO refers to "the second DPC," dated June 21, 2018, by its purported filing date of July 21, 2018, and describes the claims contained therein as related to the "[d]istrict's alleged failure to provide FAPE from 2011 on." However, the June 21, 2018 due process complaint asserts claims for the 2009-10 school year through the 2015-16 school year. Moreover, as noted above, there were two due process complaints dated June 21 and June 22, 2018, both filed by counsel for the parent which addressed identical issues. The hearing record did not clarify which one was the operative complaint, but it is of little importance.

first and second DPCs" involved common questions of law and fact and the hearings related to both would require some of the same witnesses and documents. He further found that consolidation would not cause any negative effect on the student's educational interests or well-being and also served the interest of judicial efficiency (id. at p. 3). Subsequent to the July 12, 2018 request for consolidation by the parties but prior to the IHO's issuance of the interim consolidation order, the district moved to dismiss "the second DPC" as insufficient. The parent responded by a memorandum of law in opposition to the district's motion to dismiss dated July 23, 2018. The IHO dismissed "the second DPC" in an August 3, 2018 email which accompanied the August 3, 2018 consolidation order (IHO Exhibit 4 at p. 1). As grounds for dismissal, the IHO found that "the parent 'either knew or should have known,' about the alleged facts at the time of the CSE meeting in 2011 and when the parent obtain[ed] the student's records in 2015." The IHO further stated that his "decision on the second DPC and the [statute of limitations] will be formally addressed in the final decision" (id.).[11]

C. Impartial Hearing Officer Decision

The IHO convened the impartial hearing on September 20, 2017, which concluded on July 11, 2018 after seven days of proceedings (Tr. pp. 1-904). By decision dated December 2, 2018, the IHO found that the parent's claims related to the 2014-15 school year were time-barred by the IDEA's statute of limitations (IHO Decision at p. 29). Moreover, the IHO found that the parent did not set forth any facts in her closing brief to support her contentions that the district misrepresented facts or failed to provide prior written notices that warranted an exception to the statute of limitations (id. at p. 30). To the extent that the parent asserted that the district misrepresented the CDOS requirements or the requirements for the student's externship, the IHO found that the hearing record indicated that the district provided the parent with adequate information regarding both the requirement for the CDOS credential and the externship (id.). In addition, the IHO found that the district provided the parent with appropriate prior written notices and that the parent was provided with procedural safeguard notices which included the parent rights to due process (id.). Accordingly, the IHO dismissed all claims related to the 2014-15 school year because he did not "find any evidence to support the parent's claims that the [d]istrict misled the parent and/or concealed any facts from the parent in order to prevent the parent from filing for due process" on those claims (id. at 31). Instead, the IHO determined that the parent was aware of her rights to file for due process for claims related to the 2014-15 school year but failed to do so in a timely manner(id.).

With respect to the 2015-16 school year, the IHO found that based on the information available to the June and December 2015 CSEs, the IEPs developed for the student were reasonably calculated to enable the student to make progress and that the district offered the student a FAPE (IHO Decision at p. 33). The IHO further found that the IEPs were appropriate to meet the student's needs because they focused on transition skills, resource room, counseling and speech-language services (id.). The IHO also found no evidence that the CSE predetermined the student's IEP (id. at p. 34). With respect to the parent's contention that her participation was

[11] Although the IHO represented that he intended to address the dismissal of "the second DPC" and statute of limitations issues in the final decision, the IHO Decision does not include any discussion of "the second DPC" and only addresses statute of limitations issues as they relate to "the first DPC."

impeded because the district's decision to credit the student's work hours at BOCES occurred outside of a CSE meeting, the IHO found no authority to support the parent's argument that her participation was impeded because the student's attendance at BOCES exposed The student to a career option, which was the purpose of the externship (id. at pp. 34-35). The IHO found no merit to the parent's claim that the district failed to conduct an FBA or develop a BIP for the student because the hearing record indicated that the student did not exhibit behaviors to the extent they interfered with his ability to access his education (id. at p. 36). Additionally, the IHO noted that the student had passed all of his required Regents exams and completed almost all of his academic credits required for graduation (id. at p. 33). The IHO determined that the annual goals in the IEPs were appropriate (id.). The IHO further found that the student did not require goals for doing laundry or navigating public transportation and/or driving because the student was of average intelligence and could have learned the aforementioned skills outside of the school setting (id. at pp. 33-34). The IHO also found that the "Coordinated Set of Transition Services" referenced in the IEPs were appropriate to meet the student's needs (id. at p. 33). The IHO found that the annual goals were relevant to the student's placement at BOCES; however, to the extent the student did not have a sufficient amount of work-based learning hours during the school year, the IHO found this did not rise to a denial of a FAPE (id.). The IHO also found that the student did not require an auditory processing evaluation or goals in that area (id. at pp. 36-37).

Turning to the 2016-17 school year, the IHO found that there was nothing in the hearing record to support the parent's contention that the student's credits from the community college were insufficient to meet the student's graduation requirement (IHO Decision at p. 34). The IHO also found that the CDOS credential was properly issued to the student (id. at p. 35).

Given that the IHO found that a FAPE was offered to the student for the subject school years, he did not address the issues of the appropriateness of Step Forward or equitable considerations (IHO Decision at p. 36). Additionally, because the IHO did not find a denial of a FAPE for any of the school years at issue, the IHO denied an award of compensatory educational services (id.).

IV. Appeal for State-Level Review

On appeal, the parent appears pro se and argues that the IHO erred in finding that the district offered the student a FAPE and denying the parent's request for tuition reimbursement for Step Forward and compensatory educational services.[12] The parent argues that the IHO denied the

[12] At my direction, the Office of State Review rejected the parent's initial request for review dated January 11, 2019 because it did not comply with practice regulations. The Office of State Review informed the parent that she could prepare an amended request for review which must be verified and served upon the district no later than January 29, 2019. The parent prepared an amended request for review dated January 29, 2019 and timely served it upon the district on January 29, 2019. Subsequently, the parent then prepared another additional request for review dated January 31, 2019, which she served upon the district on February 1, 2019. I note that the January 31, 2019 request for review that was served on February 1, 2019 had no substantive changes from the January 29, 2019 request for review and only minor changes to citations and grammar. The district was informed by letter dated February 4, 2019 that I deemed the subsequent service and filing as a request by the parent to serve and file a second amended request for review. Although the district has objected in its answer to this filing by the parent as untimely, in the absence of prejudice to the district, I will accept the parent's second amended request for

parent due process and prejudiced the student's case by consolidating the due process complaint notices referred to in the consolidation order as "the first DPC" (the amended due process complaint notice underlying this appeal, dated June 26, 2017) and "the second DPC" (dated 2018) and dismissing "the second DPC."[13] The parent further alleges that the IHO erred by failing to rule on the parent's 2013-14 school year claims on statute of limitations grounds. Next, the parent argues that the IHO erred in concluding that the parent did not provide evidence of the district's misrepresentation or its failure to provide prior written notices sufficient to demonstrate that the student's claims prior to the 2015-16 school year fell within the exception to the statute of limitations. The parent also alleges that the IHO erred in finding that the parent participated in the CSE process. The parent further argues that the IHO erred in finding that the student did not need an FBA because the student did not exhibit behaviors that interfered with access to his education. Next, the parent alleges that the IHO erred in finding that the student was properly awarded his CDOS credential. The parent also alleges that the IHO erred in finding that there was nothing in the hearing record to support the parent's contention that the student was inappropriately awarded a diploma credit.

As relief, the parent requests that the SRO reverse the IHO's dismissal of "the second DPC," dated June 21, 2018, and consider it as an amendment to the "the first DPC" dated June 26, 2017, which "relates back" to the filing of "the first DPC." The parent also requests that all claims for the 2009-10 through 2014-15 school years contained in "the second DPC" be deemed to be within the statute of limitations and adjudicated at a hearing. Next, the parent requests that the SRO find that the student was denied a FAPE for the 2013-14 through the 2016-17 school years. The parent further requests that the SRO find that the district's violations during the 2014-15 though the 2016-17 school years constituted a gross denial of a FAPE, and that the services provided by the parent for the student during the 2015-16 and 2016-17 school years were appropriate. Lastly, the parent requests that the SRO award her reimbursement of tuition and other fees for Step Forward, counseling, neurofeedback, and transportation for the 2015-16 and 2016-17 school years, along with "whatever compensatory services the SRO deems appropriate at this time."

In an answer, the district responds to the parent's allegations with denials, and generally argues that the IHO's decision should be upheld in its entirety. The district contends that the IHO was correct in finding that any claims prior to the 2015-16 school year should be barred by the statute of limitations. The district further contends that the IHO correctly determined that the district offered the student a FAPE for the 2015-16 school year and that compensatory educational

review, dated January 31, 2019, as the operative one for purposes of this appeal.

[13] The parent's notice of intention to seek review, dated December 20, 2018, refers to the case on appeal as "consolidated" and lists the IHO case numbers appealed from as 504325, 504737, and 514560. The hearing record, including the consolidation order, reflect that IHO case number 504325 refers to the case initiated by a due process complaint notice dated June 19, 2017, which was subsequently amended on June 26, 2017 (the amended due process complaint notice dated June 26, 2017 is referred to as "the first DPC" in the consolidation order and is also the due process complaint notice underlying this appeal). IHO case number 514560 refers to "the second DPC," dated June 21, 2018, which was dismissed by the IHO on August 3, 2018. Since the only place that IHO case number 504737 appears is on page 1 of the IHO Decision, where it erroneously refers to the June 26, 2017 amended due process complaint notice (the correct case number for that due process complaint notice appears in the decision's caption as 504325), I construe the reference to that case number as a typographical error and is apparently not an impartial hearing related to this student.

services were not warranted. Next, the district maintains that Step Forward was not appropriate to meet the student's needs, equitable considerations do not favor the parent and contends that the IHO correctly determined that the appropriateness of the unilateral placement or equitable considerations need not be considered. Lastly, the district contends that the January 30, 2019 and January 31, 2019 requests for review should be dismissed for non-compliance because they were untimely.

In a reply, the parent responds to the assertions made in the district's answer. The parent's reply largely reiterates the claims set forth in the request for review and, therefore, is beyond the scope of a reply as permitted by State regulation. Accordingly, the reply will be not considered in this appeal (see 8 NYCRR 279.6[a]).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[14]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist.

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

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. In the due process complaint notice, he parent asserted claims for the 2015-16 and 2016-17 school years challenging aspects of the student's present levels of performance and the district's alleged failure to evaluate the student in all areas of disability or to properly use certain evaluations during the CSE process which are no longer pursued in her request for review. In addition, the IHO did not address any of the parent's claims related to the 2013-14 school year. To the extent the parent does not raise arguments on appeal regarding any claims related to the sufficiency of the student's evaluations or present levels of performance or claims related to the 2013-14 school year, which were alleged in the due process complaint notice and were not addressed by the IHO,[15] those claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).[16]

2. Consolidation of Due Process Complaint Notices

On appeal, the parent argues that the IHO denied her due process and prejudiced the student's case by consolidating and dismissing the parent's second due process complaint notice dated July 21, 2018.

State regulations concerning the conduct of impartial hearings provide that when a subsequent due process complaint notice is filed while a due process complaint is pending before

[15] To the extent the parent seeks to assert any claims related to the 2013-14 school year on appeal, those claims are raised in the context of her challenge to the IHO's dismissal of "the second DPC," which contained claims going back to the 2009-10 school year and encompassed the 2013-14 school year, and not in the context of the due process complaint notice underlying the current appeal.

[16] The parent raised a number of claims and factual allegations related to the student's CDOS credential in the due process complaint notice. Although the IHO did not address every single factual nuance or strand of the parent's CDOS claim, all of the parent's various CDOS allegations are so intertwined that I construe the IHO to have addressed – and rejected – the totality of her CDOS claim in his decision.

an IHO involving the same parties and student with a disability, the IHO with the pending due process complaint notice "shall be appointed" to the subsequent due process complaint notice involving the same parties and student with a disability, unless that IHO is unavailable (see 8 NYCRR 200.5[j][3][ii][a]). The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately before the same IHO (8 NYCRR 200.5[j][3][ii][a][2]). When considering whether to consolidate multiple due process complaint notices, the impartial hearing officer is required to consider relevant factors including: (1) the potential negative effects on the child's educational interests or well-being; (2) any adverse financial or other detrimental consequences; and (3) whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the impartial hearing officer from timely rendering a decision (see 8 NYCRR 200.5[j][3][ii][a][4][i-iii]). In the instant case, the IHO issued an interim decision dated August 3, 3018 which consolidated the "June 21, 2017" and "July 21, 2018" due process complaint notices because they both involved "common questions of law and fact" and they would require some of the same witnesses and documents and there was no potential negative effect on the student's educational interests or well-being that would result from the consolidation (IHO Ex. IV at pp. 2-3).

First, I find that the IHO did not abuse his discretion by consolidating the two due process complaint notices. A review of the hearing record reveals that the two due process complaint notices both arise from essentially the same set of facts and involve similar underlying issues. Thus, the IHO's discretionary determination to consolidate the two due process complaint notices into one proceeding was not erroneous. I will address the IHO's dismissal of the June 2018 due process compliant notice below.

B. Statute of Limitations

1. Time-Barred Claims from the June 2017 Due Process Complaint Notice

Turning next to the parent's assertion that the IHO erred in finding that the parent's claims for the 2014-15 school year were time-barred by the IDEA's two year statute of limitations and that the exceptions to the limitations period did not apply, federal and state law and regulations require that a party must request a due process hearing within two years of the date the party "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).

In this case, the parent's claims associated with the 2014-15 school year accrued in close proximity to the events surrounding the May 2014 CSE meeting that the parent attended. Among the parent's particular allegations were that the May 2014 CSE was improperly composed because it lacked certain public agency representatives; the CSE failed to assess the student's daily living skills and auditory processing disorder; the CSE engaged in predetermination, failed to conduct an FBA or create a BIP, and failed to review or discuss certain topics including the student's externship and the IEP present levels of performance; and the CSE created inadequate IEP annual goals, failed to provide the parent with prior written notices, and failed to have an IEP in place for the student at the beginning of the 2014-15 school year. As the 2014-15 claims accrued

approximately three years prior to the parent's filing of her due process complaint notices in June, 2017, the IHO correctly determined that the her claims from the 2014-15 school year were beyond the IDEA's two year statute of limitations.

Thus, unless one of the exceptions to the limitations period applies, the parent's 2014-15 school year claims are time-barred. The exceptions to the two-year limitations period for requesting an impartial hearing apply in circumstances in which a parent has been 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

Here the parent argues that the district "misrepresented" its compliance with the CDOS criteria and improperly relied on exceptions to the criteria to issue the student a CDOS credential. The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]; [see also Application of a Student with a Disability, Appeal No. 13-215).

In this case, the parent's arguments that the district improperly applied the criteria for granting the student a CDOS credential and failed to provide prior written notices—while clearly indicating her view that the district's actions were impermissible—fails to meet the specific misrepresentation exception, which requires that the district specifically misrepresent that it had resolved the problem forming the basis of the complaint, such that the parent was prevented from requesting an impartial hearing (C.H. v. Northwest Indep. Sch. Dist., 2011 WL 4537784, at *5 [E.D. Tex. Sept. 30, 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2011 WL 3273203, at *11 [S.D. Ind. July 29, 2011]). The evidence offered by the parent shows that she believed as early as October and November 2014 that the district was incorrectly applying the applicable regulations, policies and/or procedures regarding the CDOS credential (see, e.g., Parent Ex. V at pp. 115-24, 146-49), but the evidence does not show that the parent was thereafter prevented from

timely seeking relief through due process based on any specific misrepresentation made by the district. If anything, the district continued along the same course of conduct to which the parent had expressed concern or objection and eventually issued the CDOS credential against her wishes. Consequently, the parent's arguments are insufficient to overcome the IHO's conclusion that there was no specific misrepresentation that provided an exception to the limitations period (C.H., 2011 WL 4537784, at *6), such that the district intentionally misrepresented that it had resolved the problem on which the due process complaint notice was based (Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar.24, 2009], aff'd 2011 WL 1289145 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]).

2. Time-Barred Claims from the June 2018 Due Process Complaint Notice

With regard to the parent's challenges to the dismissal of her June 2018 due process complaint notice, the record shows that in an email to the parties dated August 3, 2018, the IHO dismissed "the second" due process complaint notice which included claims from the 2009-10 school year through the 2015-16 school years (IHO Ex. IV at p. 1; see June 21, 2018 Due Process Compl. Notice). As noted above, the IHO found that the parent's claims in the June 2018 due process complaint notice were time-barred as the parent knew or should have known about the alleged facts at the time of the CSE meeting in 2011 and when the parent obtained the student's records in 2015, and that he would further address this dismissal in his final order (IHO Ex. IV at p. 1).

First, the parent is correct insofar as the IHO failed to follow through and further address the parent's June 2018 due process complaint in his final order, thus his determination dismissing the parent's claims was made in an informal email with no reference to the hearing record or to applicable legal standards. Unlike his final determination with respect to the 2014-15 school year discussed above, the August 3, 2018 interim decision contains no analysis of whether an exception to the limitations period applies. However, while the IHO paid little attention to the drafting of this statute of limitations determination, I have conducted an independent review and find that the parent's claims must nevertheless be dismissed as time-barred. The June 2018 due process complaint notice focuses on the effects of two alleged violations by the district. First, the parent alleged that that the district failed to conduct a "Level 1 career assessment" citing 8 NYCRR 200.4(b)(6)(viii) beginning when the student was approximately 12 years old (the 2009-10 school year) up through the point in time when the parent alleges she discovered the scope of the assessment requirements during the impartial hearing in this case and that the district failed to provide the parent with prior written notices.[17] Second, the parent alleged that the district failed

[17] State regulations provide that "students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). The regulations do not refer to "Level 1" assessments specifically. To establish her claims, the parent relies on guidance "contributed by the Southern Westchester BOCES/ Hudson Valley Transition Coordination Site" (http://www.p12.nysed.gov/specialed/transition/level1careerassess.htm); however, the Office of Special Education indicated that the guidance needed to be updated and replaced (http://www.p12.nysed.gov/specialed/transition/impt.htm).

to provide prior written notices from 2011 through the 2014-15 school year with respect to a refusal to conduct assessments such as the "Level 1 career assessment" and the Armed Services Vocational Aptitude Battery, as well as the referral of the student to ACCESS-VR.[18]

The parent's "Level 1" assessment claims in her June 2018 due process complaint notice involve events that date back as far as when the student was 12 years old, or approximately nine years preceding the June 2018 complaint, and any lack of prior written notice claims related to events up through June 2015 are dated at least three years prior to the parent's June 2018 complaint. These are well beyond the IDEA's two-year statute of limitations.[19] While parent's claims in the June 2018 due process complaint notice allege omissions on the part of the district such as the lack of assessment or failure to provide prior written notices, similar to the analysis above with respect to the June 2017 due process complaint notice, the alleged omissions are not "specific misrepresentations" that the district had resolved the problem on which the June 2018 due process complaint notice was based such that the parent was prevented from timely asserting her claims. In view of the foregoing I decline to reverse the IHO's determination.

C. Regents Diploma

1. Career Development and Occupational Studies Credential

Similar to the way she did before the CSE, the parent raises many facts on appeal to support her argument that the district inappropriately awarded the CDOS credential to the student.

The CDOS credential was developed by the New York State Board of Regents at the same time that the student in this case was progressing through high school. A description of CDOS at its inception and its later inclusion in other Board of Regents initiatives is useful for purposes of context. Beginning in the 2013-14 school year, the Board of Regents established the CDOS as a new exiting credential as a more meaningful substitute for the prior credential known as the IEP diploma ("New York State Career Development and Occupational Studies Commencement Credential," Office of Special Educ. Mem. [June 2013], available at http://www.p12.nysed.gov/specialed/publications/CDOScredential-613.pdf; see Notice of Adoption, New York State Career Development and Occupational Studies Commencement Credential, N.Y. Reg. July 3, 2013, at p. 10). When it was first adopted, the CDOS credential was awarded to students with disabilities as a supplement to a regular high school diploma or, for a student with a disability who was unable to earn a regular diploma, as the student's exiting credential (see "Proposed Amendment of Sections 100.5 and 100.6 of the Regulations of the Commissioner of Education Relating to the Career Development Occupational Studies Pathway

[18] The parent attempts to connect these alleged violations to her subsequent claims about the CDOS credential and the 2015-16 school year, but the CDOS claims were already set forth in her June 2017 due process compliant notice and were addressed by the IHO (see IHO Decision at pp. 32, 34-35).

[19] The parent also alleged both "Level 1" assessment and prior written notice claims in her June 2017 amended due process complaint notice for the 2015-16 school year as well as previous school years (Due Process Compl. Notice pp. 6-9, 13-14, 16). To the extent the June 2018 issues would not be barred by the statute of limitations, federal and state regulations preclude the parent from filing duplicative claims, stating that [n]othing in §§ 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed (34 CFR 300.513[c]; see 8 NYCRR 200.5[j][3][ii][6]).

to Graduation," NYSED Mem. Mar. 2016, available at http://www.regents.nysed.gov/common/regents/files/316p12a1.pdf (CDOS Pathway Memo); "Approval of Proposed Amendment to Sections 100.5, 100.6 and 200.5 Relating to a New York State Career Development and Occupational Studies Commencement Credential (NYS CDOS Commencement Credential" NYSED Mem. June 2013 available at) http://www.regents.nysed.gov/common/regents/files/613p12a3[1].pdf).

Prior to the 2014-15 school year, State regulations required students to pass five Regents exams in high school in order to receive a Regents diploma – one each in English, science, math, as well as the U.S history and the global studies and geography exams. During the 2014-15 school year, the Board of Regents began expanding graduation opportunities in New York State though a "multiple pathways" approach (see http://www.nysed.gov/curriculum-instruction/multiple-pathways; CDOS Pathway Memo; http://www.nysed.gov/common/nysed/ files/programs/curriculum-instruction/diplomarequirementsfinal011019.pdf; http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/diploma-and-credentials-summary-requirements.pdf). Initially, the regulations created graduation pathways in the Humanities, STEM, Biliteracy, CTE, and the Arts (http://www.regents.nysed.gov/common/regents/files/meetings/Jan%202015/115p12a2.pdf; N.Y. Reg. Jan. 28, 2015, at p. 10). Thus, a "4+1" option was created that permitted students to take four Regents exams and technical, arts, or other assessment for the fifth examination required for graduation. The 4+1 option was made applicable beginning with students who first entered ninth grade in or after September 2011 and thereafter or who are otherwise eligible to receive a high school diploma in June 2015 and thereafter and have passed four required Regents exams (or Department-approved alternative assessments) in English, mathematics, science and social studies http://www.regents.nysed.gov/common/regents/files/meetings/Jan%202015/115p12a2.pdf; N.Y. Reg. Jan. 28, 2015 at p. 10).[20] In March 2016, the Board thereafter added the CDOS "4+1" as one of the multiple pathways which established, beginning June 2016 and thereafter, that a student (regardless of whether the student is eligible under IDEA) may graduate with a high school diploma if the student meets the graduation course and credit requirements; passes four required Regents Exams or Department-approved alternative assessments (one in each of the following subjects: English, mathematics, science, and social studies); and meets the requirements to earn the New York State (NYS) CDOS Commencement Credential (see "Career Development Occupational Studies Graduation Pathway Option" Office of Special Educ. Mem. [June 2016] , available at http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/cdos-field-memo-june-2016.pdf; http://www.regents.nysed.gov/common/regents/files/316p12a1.pdf; N.Y. Reg. June 29 2016, at pp.8-10). Thus, as of June 2016 students may earn a high school diploma though either through the traditional approach including five state assessments or through a 4+1 pathway option such as the CDOS.

In this case the parent's arguments focus heavily on the degree to which the district complied with the criteria for issuing a CDOS commencement credential, however, but for the issue of the student's credit in music which is discussed further below, the evidence in the hearing record does not show that the student was pursing in the 4+1 CDOS pathway in order to earn a

[20] Further technical amendments were made in March 2015 (http://www.regents.nysed.gov/common/regents/files/meetings/Mar%202015/315p12a1.pdf).

diploma. Instead, the student appeared at all times to pursue a diploma in the traditional five assessment approach manner of five also seeking a CDOS in addition. State guidance, however, makes clear that once a student has earned a diploma the student may not continue to seek a CDOS credential thereafter.

> May a student who has graduated with a high school diploma return to school to work toward the CDOS Commencement Credential?
>
> No. Receipt of a high school diploma ends a student's entitlement to free public education.

"New York State (NYS) Career Development and Occupational Studies (CDOS) Commencement Credential Questions and Answers," Office of Special Educ. Mem. [Sept. 2018] available at http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/cdos-pathwayq-9-18.ose_.pdf). Therefore, the parent's challenges to the manner in which the district awarded a the CDOS credential would not in itself extend the student's right a FAPE in this case because a review of student's transcript indicates that the student completed 29.5 credits including the required four English credits, four social studies credits, three math credits, three science credits, one language other than English credit, and two physical education credits (compare Dist. Ex. 72, with 8 NYCRR 100.5 [b][7][iv]). In addition, the student's high school transcript shows that he had passed seven Regents exams (integrated algebra, earth science, geometry, global history, living environment, English language arts (ELA), and US history), which included those required for a Regents diploma (compare Dist. Ex. 72, with 8 NYCRR 100.5 [b][7][iv]). Consequently, even if the district failed to follow the CDOS criteria in some way, for the reasons described below with regard to earning a diploma and the need for compensatory education, it would not form a basis to provide equitable relief under the circumstances of this case. According to State regulations, a student first entering grade nine in September 2001 and thereafter shall meet the commencement-level New York State learning standards by successfully completing 22 units of credit and five New York State assessments (8 NYCRR 100.5 [b][7][iv]).

2. Music

Tuning next to the parent's argument that the IHO erroneously found that the hearing record did not support her contention that the student was inappropriately awarded music credit, at outset I note that the IDEA, Article 89 of the Education Law, and the attendant federal and state regulations to those statutes are silent on the issue of whether to award credit for general education study, especially where, as here, the student did not require or received special education supports in the area of music. It has generally been the province of the Commissioner of Education to hear regarding the award of course credit and the related issuance or revocation of a diploma as a result (see, e.g., Appeal of K.D., 52 Ed Dept Rep, Decision No. 16460), and an impartial hearing is not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR. 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding

the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority, again subject to the review of the Commissioner (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]). In this case, as noted above, the CSE and the district's special education personnel were not involved in determining whether to grant the credit for music or issue a diploma; however, out of an abundance of caution, because graduation constitutes a change in placement under IDEA (34 CFR 300.102 [a][3][ii]), I will review the available evidence to determine if any of the district's actions were inconsistent with the student's special education needs or the requirements of the IDEA.

The evidence shows that as of September 2014, per an agreement with the then-current high school principal, the student would complete the outstanding one credit of art or music and the outstanding half credit of health at the community college, and graduate with a diploma in August 2015 (Tr. pp. 119-20; Dist. Ex. 25 at p. 3). The student did not graduate from the district at the end of the 2014-15 school year, rather, in June 2015 the CSE discussed that during the 2015-16 school year the student would complete the one outstanding art/music credit required for graduation outside of the district (Dist. Ex. 44 at p. 2; see Tr. pp. 151-52, 159).

In a June 16, 2015 email, the parent requested that the then-current high school principal grant permission for the student to fulfill his art/music credit at a community college (Parent Ex. V at pp. 229-30; see Tr. p. 333). The email also stated that similar to a health class that the student had attended outside of the high school, the parent was "willing to pay the tuition" (Parent Ex. V at p. 229; see Tr. p. 334). The principal and the guidance counselor responded in emails to the parent confirming that the student would be allowed to fulfill the art/music requirement outside of the high school, specified that the course must meet State requirements regarding mandated "contact time," and approved the requested "Chorus 1" course for two credits (Parent Ex. V at pp. 231, 237, 241; see Tr. pp. 334-36). In an email dated June 23, 2015, the parent informed the CSE chairperson that the high school principal had granted permission for the student to "fulfill missing credits by taking classes outside of the high school" (Dist. Ex. 45; see Tr. p. 162).

In addition to attending community college, the student, consistent with the IDEA, also to receive programming from the district during the 2015-16 school year, and according to the meeting information summary attached to the December 2015 IEP, by then the student had completed all of his testing and coursework requirements for a Regents diploma, but still needed to complete a half credit of art or music during the spring 2016 semester in order to graduate in

June 2016 (Dist. Exs. 44; 61 at p. 3).[21] The student's transcript shows that he successfully obtained one music credit by taking chorus 1 and chorus 2 at the community college during the 2015-16 school year (Dist. Ex. 72).

The parent specifically asserts on appeal that the IHO erred by failing to find that the district "misappropriated" the student's community college credits, and used them to meet high school diploma requirements "in a manner with which [the parent] did not agree." In her request for review, the parent provides specific calculations which she alleges shows the student did not meet the time requirements for a music unit of study.

According to State regulations, a student may obtain the unit of credit in art and/or music by participating in an advanced out-of-school art or music activity. Credit for such participation shall be upon recommendation by the student's visual arts, music, dance or theatre teacher, shall be approved by the visual arts, music, dance or theatre teacher department chairperson, if there is one, and by the school principal (8 NYCRR 100.5 [d][2]).

The student earned the required one half credit in health during the 2014-2015 school year, and two half credits for chorus 1 and chorus 2 during the 2015-2016 school year at the community college (compare Dist. Ex. 72, with 8 NYCRR 100.5 [b][7][iv]). The high school principal testified that allowing a student to complete credits outside of the high school to fulfill Regents credit requirements is permitted "at the discretion of the principal" (Tr. p. 500). He further testified that the community college the student attended to gain his music credit is a school the district would accept credits from because the district had "a relationship with them. We have had other students attend. We are confident we understand what's in their course catalog and what the level of rigor would be" (Tr. p. 502; see Dist. Ex. 72). The high school principal confirmed that during the 2015-16 school year the student earned a half credit in chorus and a half credit in chorus 2 (Tr. pp. 512-13). When asked about the "conversion formula" between the college credits and high school credits, the high school principal responded that in this case it was "credit for credit," and that the music credit earned at the community college satisfied the high school credit requirement (Tr. p. 513).

Here, the evidence shows that that both the prior and current high school principals engaged in discretionary determinations—including prior knowledge of the community college courses—to approve the music credit the student earned there (Tr. pp. 500, 502, 512-13; Parent Ex. V at p. 231, 237, 241).[22] Accordingly, there is no reason to disturb the IHO's conclusion that hearing

[21] The CSE chairperson testified that she had requested that the parent submit documentation regarding the completion of the 1.5 credits that the principal had allowed the student to take at the community college (Tr. pp. 178-80; see Dist. Ex. 61 at p. 3). Emails dated May 13, 2016 and June 13, 2016 indicated that the district again requested that the parent provide it with the necessary documentation to demonstrate completion of the student's final half credit (Dist. Exs. 68; 70). The parent testified that she withheld the information from the district regarding the half credit of music because she wanted to schedule a CSE meeting (Tr. pp. 695, 702).

[22] I note that in August 2015, the parent also believed that the student's enrollment in chorus 1 would "fulfill one of [the student's] required Art/Music classes to meet his diploma requirements" (Dist. Ex. 57).

record did not support the parent's contention that the credits the student earned at the community college were insufficient to meet his graduation requirements.

Given the principal's discretionary determination regarding the community college music credit for purposes of his graduation requirements, the student had earned enough credits to graduate and was awarded a Regents diploma in June 2016 (Dist. Ex. 76 at p. 1). There is no evidence that the student's special education programming was implicated in any way in relation to the circumstances under which he obtained the music credit.[23] In New York State, a student who is 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 (Educ. Law §§ 3202[1]; 4402[1][b][5]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Here, the student's eligibility for special education programs and related services as a student with a disability ended upon his graduation in June 2016 and, there was no gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time, thus, the student would not be entitled to compensatory education thereafter (French, 476 Fed. App'x at 471-72; see Somoza, 538 F.3d at 109 n.2 [an award of compensatory education "beyond the expiration of a child's eligibility . . . is appropriate only for gross violations of the IDEA"]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994]; 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]). In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory education (see, e.g., Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159). Accordingly I find that no relief would be available to the parent in this proceeding, even assuming, for the sake of argument, that the parent's allegations of inadequate assessment, lack of prior written notices, and improper application of the CDOS commencement credential criteria had been borne out by the evidence.

[23] This is unlike a case in which an IEP team is asked to knowingly set different diploma standards for a student with a disability or exempt a student from graduation standards because the student is otherwise incapable of meeting state graduation standards, actions which the United State Department of Education has indicated would likely deny a student a FAPE and possibly result in discrimination (see Letter to White, 63 IDELR 230 [OSERS 2014]).

VII. Conclusion

In summary, my review of the evidence in the hearing record reveals no error in the IHO's determination that the student received a FAPE from the district for the 2015-16 school year and achieved his Regents diploma in June 2016, thereby rendering him ineligible for further special education services. Accordingly, the IHO correctly denied the parent's request for post-eligibility compensatory educational services or reimbursement for educational services that she obtained privately for the student.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 13, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER