The University of the State of New York

The State Education Department
State Review Officer
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No. 19-038

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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for a compensatory educational services' fund, compensatory educational services, and independent educational evaluations (IEEs). Respondent (the district) cross-appeals from the IHO's decision to award the student extended eligibility for the district's failure to offer the student an appropriate educational program and services for the 2015-16, 2016-17, 2017-18, and 2018-19 school years. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record in this case contains scant evidence of the student's educational history prior to the 2014-15 school year when he last attended a State-approved nonpublic school (out-of-

State) for ninth grade (see Tr. pp. 3-10, 82-83; Parent Ex. D; see also September 2018 Interim IHO Decision at p. 3; Parent Exs. A at p. 3; B at pp. 3, 7-10; see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II).[1] In October 2015 during the 2015-16 school year, the district reevaluated the student and convened a CSE meeting on October 16, 2015 to review the student's IEP (see Parent Exs. B at pp. 1-2, 11; C at p. 1).[2] Finding that the student remained eligible to receive special education as a student with an emotional disturbance, the October 2015 CSE recommended a 12-month school year program in an 8:1+1 special class placement at a State-approved nonpublic school together with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group, and one 30-minute session per week of individual speech-language therapy services (see Parent Ex. B at pp. 1, 7-8, 10). The October 2015 IEP also included strategies to address the student's management needs, annual goals, testing accommodations, and a coordinated set of transition activities with postsecondary goals (id. at pp. 3-7, 9).[3]

For the 2016-17 school year, the evidence in the hearing record reveals that the parent "rejected" a district public school "placement that was offered after [an] IEP meeting in November

[1] The hearing record in this matter contains very little documentary or testimonial evidence (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II). Accordingly, portions of the factual background are derived from factual allegations in the parent's due process complaint notice dated August 24, 2018 (see Parent Ex. A) and representations made by the parent's attorney or the district's representative during the impartial hearing (see Tr. pp. 3-10, 82-83). According to the parent's due process complaint notice, the student attended a charter school prior to the 2014-15 school year, where he had been "held over multiple times" in sixth grade and thereafter "skipped" seventh and eighth grades before attending ninth grade in the State-approved nonpublic school during the 2014-15 school year (Parent Ex. A at p. 3). The parent asserted in the due process complaint notice that, near the conclusion of the 2014-15 school year, the State-approved nonpublic school "advised the [district] that it was not an appropriate placement for [the student] and he was not offered a seat to return" (id.). In addition, the parent asserted that, although the student had been "suspended due to inappropriate behaviors," the district failed to conduct or "offer" a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), "positive behavioral supports or any other services to address the issues" at the State-approved nonpublic school during the 2014-15 school year (id.).

[2] The October 2015 IEP reported the results of the district's reevaluation of the student, which included the administration of the Stanford-Binet Intelligence Scales—Fifth Edition (SB-5), as well as the administration of the Wechsler Individual Achievement Test—Third Edition (WIAT-III), to the student (see Parent Ex. B at pp. 1-2).

[3] According to the parent's due process complaint notice, the student did not receive any special education program or related services during the 2015-16 school year because the district did not "locate or offer an IEP or placement at a private program" (Parent Ex. A at p. 3). The parent also alleged that the student "received a handful of interviews, but he was blocked from most schools due to his classification" of emotional disturbance and, furthermore, that the student "did not belong in a program filled with students who ha[d] severe behavioral issues" (id. at pp. 3-4). Next, the parent alleged in the due process complaint notice that, in June 2016, the student was "offered an interview at a program for children with cognitive and emotional disturbances" (id. at p. 4). According to the due process complaint notice, the parent visited the program and "observed many students engaging in maladaptive and inappropriate behaviors, even toward [the student]" (id.). As further set forth in the due process complaint notice, the student allegedly did not receive "any instructional services" following his "discharge" from the State-approved nonpublic school (id.).

2016" (Parent Ex. C at p. 13).[4] The evidence also reflects that a CSE reconvened on May 10, 2017, per the parent's request, to "determine an appropriate placement" (id.). At the May 2017 CSE meeting, the parent expressed her opinion that a State-approved nonpublic school was the "most appropriate to support [the student's] academic and social emotional needs," and she requested that the CSE change the student's eligibility category from emotional disturbance to autism (id.). To support this request, the parent presented the CSE with a "one-page letter written by a neurologist who diagnosed [the student] with Asperger's syndrome"; however, the May 2017 CSE advised the parent that, at that time, the CSE needed "new testing . . . to substantiate this change of placement because the neurologist's letter [was] lacking information" (id.).[5] In response, the parent noted that she was "in the process of doing paperwork to schedule a private neuropsychological evaluation" but "agreed to leave the recommendations the same until new testing [was] completed" (id.).[6] The school psychologist attending the May 2017 CSE meeting

[4] Although the evidence in the hearing record does not include a copy of the student's IEP for the 2016-17 school year (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II), the parent's due process complaint notice included an allegation that a CSE convened in "October 2016" and created an IEP, which documented a recommendation for an 8:1+1 special class placement in a public school and for the same related services as set forth in the student's October 2015 IEP (Parent Ex. A at p. 4; see Parent Ex. C at p. 13; compare Parent Ex. A at p. 4, with Parent Ex. B at p. 8). The parent further asserted in the due process complaint notice that the district thereafter "offered a wholly inappropriate program" at a particular district public school site, which the parent characterized as a "school for severely emotionally disturbed and cognitively impaired students" (Parent Ex. A at p. 4). After visiting that particular school site, the parent and the student found it to be "wholly inappropriate" and so advised the district (id.). The parent's due process complaint notice also included an allegation reflecting that the district did not thereafter offer any other program or placement for the student and he allegedly remained "out of school" (id.).

[5] The hearing record does not include a copy of the May 2017 neurologist's letter (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II). As reported in an IEP, the letter revealed that the student visited the neurologist's "office for 'sensory integration disorder from the autistic spectrum, more specifically Asperger's syndrome'" (Parent Ex. C at pp. 4, 13). According to the notation in the IEP, the neurologist's letter further indicated that the student's "'social interaction [was] severely impaired and thus his ability to function in a large class setting [was] limited'" (id. at p. 4). The neurologist's letter continued, noting that that the student was "'easily distractible, [and that such] condition affect[ed] his ability to learn in a large environment'" (id.). The May 2017 letter noted that the student "'would highly benefit from placement in a small and structured school environment with highly functioning adolescents like himself,'" and he would also "'benefit from extended time for testing and testing in a place with low noise level'" (id.).

[6] It is unclear whether the parent privately obtained the neuropsychological evaluation of the student mentioned at the CSE meeting, as the hearing record does not include a copy of any such evaluation of the student (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II). The hearing record does include, however, a document reporting testing results from the administration of the Wechsler Abbreviated Scale of Intelligence—Second Edition (WASI-II), the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV), "Achievement Testing" including the WIAT-III and the Test of Word Reading Efficiency, Second Edition (TOWRE-2), the Clinical Evaluation of Language Fundamentals—Fifth Edition (CELF-5), and the Comprehensive Test of Phonological Processing—Second Edition (CTOPP-2) to the student, which the parent identified on her exhibit list (and similarly by the IHO at the impartial hearing) as being dated "July 2018" (Parent Ex. G; see IHO Decision at p. 8; Tr. pp. 18, 21). However, the parent's exhibit does not reflect a date of July 2018; instead, the exhibit only reflects a "Date of original . . . assessment: 07/25/2017; 07/31/2017" (Parent Ex. G at p. 1). Nonetheless, the parent's exhibit does not appear to represent the results of the neuropsychological evaluation of the student she was in the process of obtaining in or around May 2017, as the document describes the testing results as "a

then "offered a psychoeducational evaluation appointment for May 22nd"; however, the parent "missed that appointment and it was later rescheduled for June 9th" and the evaluation was completed on "June 14th" (id.).

Next, on June 28, 2017, a CSE convened to review the June 2017 psychoeducational evaluation and to develop an IEP for the 2017-18 school year (see Parent Ex. C at pp. 1, 12-13).[7] Finding that the student was eligible for special education and related services as a student with a learning disability, the June 2017 CSE recommended a 12-month school year program in a 12:1+1 special class placement located within a State-approved nonpublic school with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group, and one 30-minute session per week of individual speech-language therapy services (id. at pp. 1, 8-9, 12-13).[8] The June 2017 IEP also included strategies to address the student's management needs, annual goals, testing accommodations, and a coordinated set of transition activities with measurable postsecondary goals (id. at pp. 4-8, 10-11).

As "Parent Concerns" reported in the June 2017 IEP, the CSE noted that the parent "disagreed" with its recommendation to change the student's eligibility category from emotional disturbance to learning disability (Parent Ex. C at p. 13). The student—who also attended the June 2017 CSE meeting—voiced his "agreement," noting specifically that "[l]earning [d]isability better describe[d] his learning profile and needs" (id.). In addition, the student "verbalized that the recommendations made at th[at] IEP meeting w[ould] provide him with enough support to help him achieve his goals" (id.). The parent continued to press the CSE to change the student's eligibility category to autism based upon the "neurologist's letter" (id.). The CSE explained, however, that the results of the GARS-3 assessment revealed that a "diagnosis of autism [was]

summary of results obtained as part of [a] comprehensive . . . mental health evaluation during a cognitive and academic profile update" (id. at p. 1 [all caps removed]).

[7] The hearing record does not include a copy of the June 2017 psychoeducational evaluation of the student (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II). Based upon a comparison of the IEPs in the hearing record, it appears that, at a minimum, prior to the June 2017 CSE meeting, the district readministered the WIAT-III to the student and administered the Behavior Assessment System for Children—Third Edition (BASC-3) to the student; additionally, the parent completed the Gilliam Autism Rating Scale—Third Edition (GARS-3) prior to the meeting (compare Parent Ex. C at pp. 1-4, 13, with Parent Ex. B at pp. 1-3). The June 2017 IEP noted that the GARS-3 "was administered due to concerns regarding [the student's] current functioning" (Parent Ex. C at p. 3). The June 2017 IEP described the GARS-3 as "a norm-referenced screening instrument that is designed to identify individuals 3 through 22 years of age who have severe behavioral problems that may be indicative of autism" (id.). Based upon the parent's responses on the GARS-3, the autism index score of 65 "fell at the 1st percentile and indicated that a diagnosis of Autism [was] 'Unlikely'" (id. at pp. 3-4, 13). According to the June 2017 IEP, the parent "disagreed with the result of the GARS-3" (id. at p. 13).

[8] Although the student's eligibility for special education programs and related services is not in dispute, the parent contends that the student should be eligible for such services as a student with autism (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see also Parent Ex. A at p. 11) and not as a student with a learning disability (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

'Unlikely,'" and the parent stated that she "disagreed with the result of the GARS-3" (id.). At that point, the parent stated that the student's eligibility category "should remain as [e]motional [d]isturbance" (id.). Committee members appeared to disagree with the parent and further "explained that based on the available data and the psychoeducational evaluation, [the student's] significant discrepancy between his verbal and nonverbal skills, significantly slow processing speed, [and] poor writing and mathematics abilities, [were] impeding his full potential to learn" (id.). As a result, the CSE found that a "change of classification" to learning disabled was warranted (id.). While the parent disagreed with this change, "she agreed with the [State-approved nonpublic school]-Day placement recommendation" and was "willing to visit the school once it ha[d] been secured" by the Central Based Support Team (CBST) (id.).[9]

The evidence in the hearing record revealed that the student participated in a "Research Evaluation" in May 2018 (Parent Ex. F at p. 1). As part of the evaluation, the following assessments were completed by the parent: the Autism Diagnostic Interview—Revised (ADI-R) and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) (id. at pp. 1-3).[10] According to the evaluation report, the ADI-R "focused on social development and play, communication, repetitive behaviors, and early behavioral history" (id. at p. 1). The Vineland-II measured an "individual's ability to carry out age[-]appropriate tasks independently" (id.). "Module 4" of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) was administered to the student, which was "designed for adolescents and adults who use fluent verbal speech" (id. at pp. 1, 3-5). Based upon these assessments, the evaluator concluded that the student's scores "met cut-offs for an instrument [sic] classification of autism spectrum disorder" (id. at p. 5). The evaluation report further noted, however, that the student was "assessed as part of a research project examining brain development in adults and children" and, since the testing results were "provided as part of the study protocol," they "should not be considered equivalent to a full clinical evaluation" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated August 24, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17,

[9] In the due process complaint notice, the parent acknowledged that the CSE deferred the student's case to the CBST to locate the 12:1+1 special class placement and program recommended in the June 2017 IEP (see Parent Ex. A at p. 4). The parent also noted, however, that the student was allegedly "rejected by most schools that would afford him an opportunity to earn a regular diploma and be prepared for college in a setting that d[id] not segregate him with children with significant behavioral issues" (id. at p. 5). According to the due process complaint notice, the parent visited "two schools that might have considered [the student], but neither were appropriate or could address his needs at th[at] point" because the "schools ha[d] too many children with significant behaviors," the student's IEP was "wholly inappropriate" and "not designed" to enable the student to make progress "in any [S]tate-approved school, and the "IEP offer[ed] no remediation and/or strategies for a child with [a learning disability], particularly one who the [district] never previously identified as [having a learning disability]" (id.).

[10] The evaluation report referred to the Vineland-2 as the "VABS-II" (Parent Ex. F at p. 1).

2017-18, and 2018-19 school years (see Parent Ex. A at pp. 1-2).[11] Generally, the parent alleged that the student was not attending school and required "emergency interim, credit-bearing instruction and remediation" (id. at p. 2). The parent also alleged that—for all school years in question and relevant to the issues on appeal—the district failed to: "timely, thoroughly, and appropriately" evaluate the student's "special education needs" and his "underlying disabilities" (including but not limited to an occupational therapy [OT] evaluation, an assistive technology evaluation, a speech-language evaluation, a transition assessment, and a neuropsychological evaluation); "develop and implement substantively and procedurally valid IEPs"; offer the student "timely and appropriate" placements; "employ appropriate IEP-development and placement procedures"; and "locate or offer an IEP or placement at a private program" (id. at pp. 2-3, 5-6). In addition, the parent asserted that the district violated her "procedural rights under the IDEA, resulting in [her] exclusion from the special education process," and "applied illegal policies and practices in relation to promotional criteria, assessment eligibility and service delivery" (id. at pp. 2, 6). Relatedly, the parent alleged that, because the district based its "program and placement decision[s]" on a student's "classification," the district's "misdiagnos[is] and misidentifi[cation]" of the student lead to "inappropriate placements" (id. at pp. 2, 5-6). Additionally, the parent alleged that, while the district improperly "designated" the student as "'emotionally disturbed,'" the district failed to "develop and implement academic supports, positive behavioral supports and social skills supports" (id.). Moreover, the parent asserted that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) to discern and address the student's social/emotional or behavior needs (id. at pp. 2-3, 5-6). The parent similarly alleged that the district failed to address the student's social skills needs, his inability to "navigate social situations" or "function independently without support," and failed to provide social skills training or applied behavior analysis (ABA) with ABA supervision (id. at pp. 5, 7). The parent also asserted that she "disagree[d] with the most recent reevaluation of [the student]" (id. at p. 8).

Next, the parent asserted that the district failed to provide her with "interpreters at meetings"—or for the purposes of "school communications and school visits"—in her native language (Parent Ex. A at pp. 2, 8). The parent also asserted that the district failed to provide her with "evaluations, IEPs, Prior Written Notices and other educational records" translated into her native language (id.).

With regard to the school years at issue, the parent alleged that the district committed the following "[p]rocedural [v]iolations" that precluded her from the "[p]rocess," deprived the student of educational benefits, and denied the student a FAPE: predetermination of the student's program

[11] In fall 2018, the student turned 21 years of age (see Parent Ex. A at pp. 1, 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]), or until the conclusion of the 10-month school year in which he or she turns age 21—here, the 2018-19 school year (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]; see also Parent Ex. A at pp. 1, 5). Despite remaining eligible to receive services under the IDEA during the 2018-19 school year, the hearing record is devoid of any evidence regarding whether a CSE convened to conduct an annual review or developed an IEP for the 2018-19 school year (see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II).

and placement recommendations; improperly composed CSEs; inappropriate annual goals that were "vague, boilerplate, not measurable and not individually tailored" to the student's needs; the failure to include annual goals that addressed all of the student's needs; creating IEPs that failed to "accurately describe and address all of [the student's] disabilities and diagnoses," including his "strengths, weaknesses" and how his disability affected his ability to make progress in the "cognitive, developmental, academic and functional areas"; the failure to provide the parent with a meaningful opportunity to develop the student's IEP or annual goals; and the failure to include "individuals with expertise concerning and knowledge of developing educational programs for students with [this student's] needs" (Parent Ex. A at pp. 7-8).

With regard to the school years at issue, the parent alleged that the student's IEPs failed to include the following "[s]ubstantively [a]ppropriate" services: transition services and transition planning for the student; "1:1 tutoring, remediation and executive functioning support"; "1:1 multi-sensory instruction, behavioral and social support, tutoring, accessible texts, books on tape, a scribe, OT, adequate [speech-language therapy], assistive technology and training, vocational education, life skills training, employment readiness and several other services legally required for FAPE"; "behavioral support and social skills training"; services to address how the student's "receptive and expressive language, auditory processing, vision, learning disabilities and behavioral difficulties" affected his ability to make progress in the general education curriculum; services to "address or remediate the delays resulting" from the student's autism spectrum disorder; and services required pursuant to State regulations related to students with autism (Parent Ex. A at pp. 6-7). In addition, the parent contended that the district failed to offer "services in an appropriate ratio," failed to include "peer-reviewed research based methods," failed to develop IEPs consistent with the principles of the least restrictive environment (LRE), and failed to include the student in "nonacademic, extracurricular opportunities" available to "other students his age in regular high schools" (id. at p. 7).

As relief, the parent requested that an IHO find that the district failed to offer the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years and to order "extended eligibility for special education, general education and to remain eligible for a regular high school diploma equal to the years that [the student] ha[d] been denied a FAPE" (Parent Ex. A at p. 10). In addition, the parent requested that the district issue a "credit accounting immediately outlining the remaining credits and exit exams necessary for [the student] to earn a local diploma" (id.). The parent also sought a pendency order "consistent with the last agreed upon program" provided to the student at a nonpublic school (id.). Next, the parent requested that an IHO order an "interim home-based program" if a nonpublic school could not be located, which provided "full-time, 1:1 credit-bearing home instruction (or, at a library), related services and transportation" (id. at p. 11). Next, the parent requested that the district fund "immediate independent evaluations" in the following areas: an FBA by a "Ph.D.-level Board Certified Behavior Analyst" (BCBA), a speech-language evaluation, an auditory processing evaluation, and an assistive technology evaluation (id.).

In addition to the foregoing, the parent requested an award of compensatory educational services to place the student in the "position he would [have] be[en] in had he not been subject to the deprivations described herein" (Parent Ex. A at p. 11). Specifically, the parent requested

> intensive 1:1 tutoring using multi-sensory techniques, ABA and ABA supervision, social skills training, the full range of 1:1 instruction in remediation, using all available [assistive technology], supports and services, accessible text and materials, and strategies that c[ould] enable [the student] to learn and retain the information, vocational training, behavioral and social support, job coaching, make-up speech[-]language therapy, [assistive technology] and [assistive technology] training, counseling, coaching, social work services, transportation expenses and any other special education, related services and support and accommodations necessary to make up for the denial of FAPE

(id.). The parent indicated that the district must fund and deliver such services through "private providers . . . wherever appropriate" (id.).

Next, the parent indicated that the district "must immediately offer an IEP and a FAPE" to the student that included a "1:1 credit bearing instruction, program with an [sic] appropriate teachers and trained staff designed to improve his basic academic skills and, if feasible and desired, assist him in obtaining a legitimate credential that he c[ould] use for employment and other post-secondary activities" (Parent Ex. A at p. 11). The parent further indicated that the program:

> should also include intensive ABA, social skills training, 1:1 tutoring using multi-sensory techniques, [assistive technology], supports and services, accessible text and strategies that c[ould] enable [the student] to learn and retain the information, vocational training, behavioral and social support, job coaching, make-up speech[-]language therapy, [assistive technology] and [assistive technology] training, counseling, coaching, social work services, [and] transportation expenses

(id.).

In addition, the parent indicated that if she could "locate a program," the district must fund a "private program as [the district] d[id] not have an appropriate program or placement" (Parent Ex. A at p. 11). The parent also requested an order directing the district to translate "any and all documents" related to the student's education during the school years at issue, as well as provide the parent with "translation and interpretation services" (id.). The parent further requested that the district should change the student's "classification from emotionally disturbed to [a]utism," to reimburse the parent for any expenses associated with provision of services during the school years in question or during pendency, and to assign a "transition linkage coordinator" to assist the student (id. at pp. 11-12).

B. Impartial Hearing

On September 7, 2018, the parties proceeded to an impartial hearing, which resulted in the IHO's issuance of an undated (September 2018) interim "Order on Pendency" (see Tr. pp. 1, 3; see generally September 2018 Interim IHO Decision).[12] In the September 2018 pendency decision, the IHO described the pendency (stay put) placement and services to be provided to the student; to wit:

> a full-time credit-bearing high school special education program in a non-public school, with transportation to and from school daily, related services of 1:1 Counseling 1 time weekly for a duration of 30 minutes; Group Counseling 1 time weekly for a duration of 30 minutes; and 1:1 Speech Therapy 1 time weekly for a duration of 30 minutes. Testing accommodations include: extended (double time); separate small room with "a full-time credit minimal distractions and no more than 7 other test-takers; instructions read aloud; revised/repeated instructions; and use of a calculator for all tests involving calculation.

(September 2018 Interim IHO Decision at pp. 3-4). The IHO further ordered the district to "provide the family with a credit and requirements audit of all work completed and credited to date no later than end of business on September 14, 2018" (id. at p. 4).

The impartial hearing convened on two additional dates for further proceedings related to the student's pendency services—October 2, 2018 and January 10, 2019—which resulted in the IHO issuing two more interim orders on pendency (an undated [October 2018] "Order on Pendency" and a "Third Pendency Order" dated January 10, 2019) (see Tr. pp. 17, 19-20, 47, 54; see generally Oct. 2018 Interim IHO Decision; Jan. 2019 Interim IHO Decision).

At the October 2, 2018 impartial hearing date, the parent entered documents into the hearing record as evidence and presented the testimony of a witness for the purpose of establishing that Fusion Academy (Fusion) was "substantially comparable" to the pendency placement and services ordered by the IHO in the September 2018 pendency decision (see Tr. pp. 17-18, 22-42; Oct. 2018 Interim IHO Decision at pp. 2-3; see also September 2018 Interim IHO Decision at pp. 3-4).[13]

[12] The IHO indicated that, since the district was not offering to "provide a pendency placement," the parent had a "right to seek a nonpublic school placement that [she] deem[ed] substantially similar to the program" described in the IEPs that formed the basis for the student's pendency placement and services in this case (Tr. p. 9). The IHO explained that, should the parent locate a nonpublic school placement consistent with this directive, the parent would have the opportunity to "come back to the table to describe what it [was] that ma[de] it substantially similar in their view" (id.).

[13] The evidence in the hearing record reflects that the student was expected to begin attending Fusion on or about October 8, 2018 (see Parent Ex. H at p. 1). The hearing record includes copies of three unsigned Fusion

At the impartial hearing held on January 10, 2019, the IHO learned that, notwithstanding the directive for the district to complete and provide the "family with a credit and requirements audit of all work completed and credited to date no later than end of business on September 14, 2018," the district failed to comply with that order (Tr. pp. 47, 49-51, 53; September 2018 Interim IHO Decision at p. 4). In the face of the district's noncompliance, the IHO stated on the hearing record that he was "now defaulting the [d]istrict out" and clarified that the district "failed to meet its burden" and the district "no longer ha[d] a Prong I case in this matter" (Tr. p. 54). The IHO also stated that he was "granting the family a six-month compensatory extension of this student's eligibility by virtue of the [d]istrict's inaction" and he would "issue yet another order, an interim order, directing the [d]istrict to provide the credit audit" (Tr. p. 54; see generally Jan. 2019 Interim IHO Decision).

Thereafter, at an impartial hearing date on February 5, 2019, the district failed to appear without explanation (see Tr. pp. 65-68). Notwithstanding the district's failure to appear, a district employee subpoenaed by the parent as a witness provided the IHO with the credit audit the IHO ordered to be completed beginning in September 2018 (see Tr. pp. 68-70). During an off-the-record discussion with this witness, the IHO learned that the student had not earned "any credits" and that the district did not possess a copy of the student's transcript from the nonpublic school he had attended during the 2014-15 school year (Tr. pp. 68-69). Noting the need to schedule yet another impartial hearing date, the IHO advised the parent's attorney that she would "have an opportunity at that time to make whatever record [she] want[ed] about pretty much anything [she] want[ed]" (Tr. p. 71). The IHO explained that he only wanted the parent's attorney to wait until the next impartial hearing date so as to provide the district with "an opportunity to respond" (Tr. pp. 71-72). The IHO further explained that if the district failed to appear at the next date, then "they've slept on their rights" (Tr. p. 72).

Thereafter, the parent's attorney asked the IHO if she would be "able to make an application for an interim order for the student to start at, . . . , Lindamood-Bell or some other tutoring services," and the IHO advised that she could "do it in writing" but "not without [the district] present" (Tr. p. 72). The IHO further noted that he was inclined to hear the parties at the next impartial hearing date and then "issue either an interim order or a final remedy" (Tr. pp. 72-73). The parent's attorney asked the IHO not to issue a "final remedy without [her] having witnesses" in order to have an "opportunity to pursue the claims" in the due process complaint notice (Tr. p. 73). The IHO stated that he could "simply take [the parent's] complaint as true" and at that point, the parent's attorney continued to press the IHO, noting that the parent had "asked for some independent evaluations that [they] d[idn't] have" (Tr. pp. 73-74). While acknowledging this, the IHO stated that he did not want to have "this conversation today" but rather, he wanted to have the conversation at the next impartial hearing date (Tr. pp. 74-75). The IHO also opined that he did not understand what was "wrong with just giving [the parent] what the complaint ask[ed] for," and the parent's attorney indicated that she did not "know if the student ha[d] an auditory processing

enrollment contracts—all dated September 25, 2018—which appear to reflect that the student was expected to attend Fusion for three different academic semesters with three different estimated start dates as a 10th grade student during the 2018-19 school year (see Parent Exs. H at pp. 1, 3; I at pp. 1, 3; J at pp. 1, 3).

disorder" or what type of assistive technology he had and, thus, evaluations were needed (Tr. p. 75). The parent's attorney also stated that, if the IHO was "default[ing]" the district, she wanted to ask for "independent evaluations" (Tr. pp. 75-76). The IHO responded "[y]ou got them" and added that the parent's attorney should "reiterate th[at] request" at the next impartial hearing date (Tr. p. 76). The IHO also added that he did not see the need to call witnesses if the "allegations" in the due process complaint notice were deemed true, and the parent's attorney then clarified that the "additional evaluations" were needed in order for her to "facilitate an appropriate remedy for the student" (Tr. pp. 76-77). The parent's attorney then noted that she was requesting the "evaluations to be ordered on an interim order basis . . . to inform the record," and later added "for the purposes of making an appropriate compensatory education award" (Tr. pp. 77-78, 81).

The IHO, in response, noted however that he and the parent's attorney appeared to have a "different understanding of what it mean[t] . . . to default" (Tr. p. 81). According to the IHO, it meant that the "complaint [was taken] at face value," and he would "craft a remedy based on the information that was available to everybody at the time in question, including the development of further evaluations that may make it plausible to award a further remedy" (Tr. pp. 81-82). The IHO also noted that the parties would "move forward in a fashion that allow[ed] [the parent's attorney], once [she] had that material in hand, to pursue any claims that arise from it" (Tr. p. 82). Finally, the IHO stated his "intention to extend the student's eligibility long enough for him to graduate from high school" and, thus, the parent would have a "long time in which to file additional complaints for additional remedies" (id.).

On February 11, 2019, the parties returned to the impartial hearing (see Tr. pp. 92-93). The IHO briefly recited the events surrounding the credit audit from the previous impartial hearing date, and the parent's attorney indicated that, on the prior date, she had "mentioned" wanting to "make a potential motion for interim relief to add tutoring to the student's program in the meantime" (Tr. pp. 93-94). The IHO indicated that he was "going to issue a final order in this case very shortly," and the parent's attorney could return for a "longer conversation" concerning her "reasons" for filing a motion for interim relief after reviewing the "credit audit" document submitted into evidence (Tr. pp. 94-96). The IHO indicated he would then determine whether he would grant the parent's request for interim relief or issue a final order, which he was inclined to do (see Tr. p. 96). The IHO then granted the parties' joint request to extend the compliance date (see Tr. pp. 94, 96).[14]

C. Impartial Hearing Officer Decision

In a decision dated April 3, 2019, the IHO described the proceedings, including a detailed account of the ongoing pendency placement and services issues and the district's noncompliance in producing the student's "credit audit" (IHO Decision at pp. 2-4). Based upon the submission of evidence documenting the student's credit audit conducted by a district employee, the IHO found that the student had, to date, earned a "total of 11 out of 44 high school credits" and had "zero

[14] In a document dated March 11, 2019, the parent submitted a numbered list of requests for relief to the IHO (see generally IHO Ex. II).

required examinations completed out of the list of those required for a Regents diploma" (id. at p. 4). Noting the parent's objections to "concluding this matter on the record available at that time," the IHO—having "preserved" the objections—reached the following findings: the statute of limitations was not "dispositive of the scope" of the parent's due process complaint notice, as the district's "consistent affirmative misdiagnosis" of the student deprived the parent of the opportunity to "participate meaningfully in the evaluation and placement process"; the district failed to "evaluate or place" the student, failed to offer the student a FAPE, and failed to provide "any education at all" for an "extended and sustained period and in a pervasive manner"; the district failed to adequately identify the student's disabilities and the "'underlying reason for his lack of progress, social, and behavioral issues'"; and the district failed to adequately "evaluate or classify" the student throughout his "high school years" (id. at pp. 4-5). The IHO also indicated that, generally, a student with a disability who was "eligible for a Regents diploma, . . . should have approximately seven years of special education eligibility and transition planning and services to complete high school" (id. at p. 5). As a consequence of the foregoing, the IHO found that the district failed to "appropriately place" the student (id.).

As relief for these violations, the IHO ordered an extension of the student's "age eligibility for special education and transition services, until June 30, 2025" (IHO Decision at p. 5). In addition, the IHO ordered the district to immediately conduct IEEs at district expense (including a neuropsychological evaluation, a "comprehensive" speech-language evaluation, a transition assessment, an FBA by a "Ph.D.-level" BCBA, an auditory processing evaluation, and an assistive technology evaluation) (id. at pp. 5-6). The IHO clarified that, while the district was obligated to "pay for and contract with the providers," the parent could "propose providers" for the district's consideration but the evaluations were "to be district-conducted independent evaluations," and the parent "retained the right to seek IEEs if [she] believe[d] the district assessments to be inaccurate or incomplete" (id. at p. 6). Next, the IHO ordered the student "to continue receiving the full-time credit bearing program and related services, including lunch and transportation"—which the IHO identified as the student's "pendency services, in Fusion Academy or a comparable school, at district expense as an interim service plan [and] until such time as the evaluations [were] complete[d] and an appropriate placement ha[d] been defined and implemented" (id.). In addition, the IHO indicated that if "no such school program [was] available during some portion of this period, then the district was ordered to "provide five hours per day of credit-bearing Home Instruction to the student consistent with the outstanding needs on his transcript at that time" (id.). To the extent that the parent paid for any portion of the "pendency or interim service plan program and placement," the IHO ordered the district to reimburse the parent for such expenses (id.). The IHO also ordered the district to reimburse the parent for the costs of an iPad she purchased for the student during the 2018-19 school year upon receipt of proof of payment (id.). Next, the IHO ordered the district to issue an "official transcript accurate to the end of the fall 2018 semester's credits" within 30 days and "again no less frequently than every 180 days thereafter" (id.). Additionally, the IHO ordered the district to provide the parent with "translations of all reports ordered" herein into the parent's native language and to provide the parent with the services of an interpreter in her native language for "all CSE meetings and other review arising from those evaluations" (id.).

As a final point, the IHO—pointing to the uncertainty of "what the future" would bring—noted that it "would be over-reaching to make or pursue any claims beyond those that support[ed] the incontrovertible conclusion that the district ha[d] failed for many years to provide this student with a FAPE, and the conclusion that evaluations [were] urgently needed before any steps towards classification, placement, and compensation for past harm" (IHO Decision at pp. 6-7). The IHO dismissed, "without prejudice any claims for litigation in the context of a properly informed and framed Complaint predicated on adequate clinical information" (id. at p. 7). In summary, the IHO concluded that the relief outlined in his decision constituted the "full supportable remedy for the harms" set forth in the due process complaint notice and "not challenged by the district," including the "immediate comprehensive clinical evaluations; six years of compensatory extended age eligibility to compensate temporally for the denial of FAPE up to December 31, 2018; and continuation of the pendency program as an interim services plan until such time as the evaluations [were] complete[d] and FAPE and a substantive compensatory award [were] crafted" (id.). The IHO also ordered the district to provide "any person participating in any review of this student's placement" during the 2018-19 school year with a copy of his decision (id.).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent offers additional documentary evidence for consideration on appeal. With regard to the IHO's decision, the parent argues that the IHO erred in dismissing her request for compensatory educational services. The parent further argues that the IHO erred by failing to order interim evaluations to inform and fully develop the hearing record with respect to an award of compensatory educational services. Relatedly, the parent contends that the IHO erred in sua sponte awarding IEEs as relief "by and for the district," and should have, instead, awarded IEEs to the parent to obtain evaluations of the student. In addition, the parent asserts that the IHO denied her access to due process by precluding the parent from presenting evidence from Fusion, Lindamood Bell and EBL Coaching. Next, the parent asserts that the IHO erred in failing to award a compensatory educational services' fund "calculated by monetizing categories of educational services to which [the student] was entitled" during the school years at issue. The parent also asserts that the IHO erred in failing to award a minimum of 10 hours per week of "'translation and interpretation services by an agency'" for the purpose of providing the parent with "'in-person and/or phone services.'" Finally, the parent contends that: the IHO improperly shifted the burden of proof in violation of State statutes; the IHO erred in failing to award compensatory educational services for the district's failure to implement pendency from August 24, 2018 to October 8, 2018; the IHO was pressured to meet timelines and was therefore precluded from extending the timeline for the impartial hearing to accommodate the completion of evaluations to fully develop the hearing record; and the IHO erred in failing to conclude that the district committed a "gross denial of FAPE" such that relief beyond the age of 21 was warranted.[15]

[15] In addition to asserting that the district committed procedural and substantive violations of the IDEA, its implementing regulations, and corresponding State laws and regulations, the parent also alleged in the due process complaint notice that the district committed systemic violations (i.e., adopting, applying, and implementing

As relief, the parent seeks to reverse the IHO's decision with "respect to the aspects of relief" not already granted by the IHO and as set forth in the additional documentary evidence, as well as the "adverse rulings" in the decision. Alternatively, the parent seeks an award of the relief described within paragraph "10" in the request for review, an award of IEEs to the parent and funded by the district, and the "additional relief and compensatory education fund" described within paragraph "10" of the request for review. At a minimum, and "with respect to compensatory education," the parent requests that an SRO "should fund IEEs, reverse and remand back to the IHO for a consideration of compensatory education" for the school years at issue.

In an answer, the district responds to the parent's allegations and seeks to remand the matter back to the IHO for further administrative proceedings to further develop the hearing record before deciding an appropriate remedy for the parent's claims. In a footnote, the district objects to the consideration of the parent's additional documentary evidence submitted with the request for review. As and for a cross-appeal, the district argues the IHO erred in awarding the student six years of extended age-eligibility until June 30, 2025 for the district's failure to offer the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years, as no such legal basis exists upon which to predicate such relief. Next, the district cross-appeals the IHO's "pendency orders" for failing to limit the student's pendency placement and services to the conclusion of the 2018-19 school year.[16] In a footnote, the district alleges that the IHO's "Third Interim Order" did not

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blanket policies), and violated the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (section 504), and Section 1983 of the United States Code (section 1983) (see generally Parent Ex. A at pp. 8-10). On appeal, the parent contends that the IHO failed to address the section 504 claims raised; however, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, or ADA claims or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 or the ADA (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, the ADA, or systemic violations or policy claims, and to the extent such claims are asserted in this proceeding on appeal, such claims will not be further addressed.

[16] To the extent that the district does not cross-appeal or otherwise challenge the IHO's conclusion that the district failed to offer the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years; the IHO's decision to award the parent reimbursement for the costs of the iPad purchased during the 2018-19 school year; the IHO's order directing the district to regularly issue official transcripts of the student's academic credits; and

constitute a pendency order as it did "not address the substance" of the pendency placement or services "in any way." The district, as relief, seeks to vacate the IHO's decision in its entirety, other than the "ordered evaluations," and to dismiss the parent's appeal with prejudice.

The parent, in an answer to the district's cross-appeal and reply to the district's answer, responds to the allegations.[17] Initially, the parent argues that the district never raised any objections to the pendency placement or services at Fusion—or otherwise—as ordered by the IHO, and specifically failed to raise any objections pertaining to the "limitation to pendency" at the impartial hearing. The parent further argues that the district waived any objections to the relief awarded, including the extended eligibility, pendency, funding for Fusion, and all other relief awarded, and the district cannot, now, raise such objections or defenses for the first time on appeal. Next, the parent contends that the district is required, under State law and its own programming, to provide the student with IDEA services up until the student's 22nd birthday. The parent also argues that, contrary to the district's contentions, the hearing record supports the relief awarded by the IHO. The parent specifically notes that the district failed to cross-appeal that portion of the IHO's decision ordering the district to continue to fund the student's attendance at Fusion, or to fund the student's attendance at Fusion—or a comparable school—as an interim services plan until evaluations are completed and an appropriate placement located. With respect to the IHO's award of extended age-eligibility, the parent argues that such relief is a viable form of compensatory educational services. As a final point, the parent alleges that the district's answer and cross-appeal do not comply with practice regulations governing the Office of State Review.

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

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the IHO's order directing the district to provide translation and interpretation services as set forth in the decision, the IHO's determinations on these issues have become final and binding on both parties and these issues will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[17] In the answer to the cross-appeal and reply, the parent references "SRO Ex. E"; however, no such exhibit was submitted with the parent's papers.

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]).[18]

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. Additional Evidence

The parent attaches four documents to the request for review as additional evidence for consideration on appeal (see generally Req. for Rev. Exs. A-D). In a footnote, the district objects to the consideration of all four documents, alleging without explanation that the additional evidence is not necessary to render a decision and noting, further, that the IHO already entered two of the proffered documents into the hearing record as evidence (see Answer & Cr. App. at p. 5 n.2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, it is—as the district asserts—unnecessary to determine whether to accept two of the proffered documents as additional evidence because the IHO entered both documents into the hearing record as evidence (compare Req. for Rev. Exs. A; C, with IHO Exs. I-II). Regarding the two remaining documents—exhibits B and D—I will exercise my discretion to now admit such documents as evidence necessary to render a decision in this matter. Here, exhibit B reflects email exchanges between the parties and the IHO prior to the record close date and relates to the parent's appeal of the IHO's decision

[18] 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).

denying the request for an interim order for evaluations (see generally Req. for Rev. Ex. B). Exhibit D—a transcript of the student's grades at Fusion during the 2018-19 school year—was not available at the time of the impartial hearing and is necessary to the discussion of the relief awarded in this matter (see generally Req. for Rev. Ex. D).

2. Pendency

Before turning to the crux of the dispute between the parties (the relief warranted to remedy the district's denial of a FAPE), a brief discussion of the parties' dispute about the student's pendency (stay-put) placement is warranted in the event the litigation of this matter continues beyond the current administrative proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112, 125-27 [3d Cir. 2014] [finding that a district's obligation to maintain and fund a student's pendency placement remained in effect "through the final resolution of the dispute"]). Here, there is no dispute that Fusion constituted the student's pendency placement as determined by the IHO in his second pendency decision (Oct. 2018 Interim IHO Decision). The parties disagree, however, as to whether the district is obligated to continue to fund the student's attendance at Fusion pursuant to pendency after the end of the school year in which the student turns 21 (the 2018-19 school year).

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980];

see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

The district has taken the position that the student is not entitled to continue at Fusion for the 2019-20 school year pursuant to pendency because the student's statutory eligibility for special education expires at the end of the 2018-19 school year as a consequence of the student's 21st birthday. 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 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]).

Generally, the stay-put provision does not apply beyond expiration of the student's eligibility for special education due to age (see Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654 [7th Cir., 1996]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 385-90 [N.D.N.Y. 2001]). However, courts have found that a student should remain in a stay-put placement in instances where one of the purposes of the pending proceedings is to challenge the factor which terminated the student's eligibility, i.e., to challenge the age limit on special education (see A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] [finding that stay put applied for a student with a disability who challenged state-imposed age limits on IDEA eligibility, even though the student exceeded that age limit while the proceedings were pending]) or to challenge whether the disabled student met the requirements for graduation (see R.Y. v. Hawaii, 2010 WL 558552, at *6-*7 [D. Haw. Feb. 17, 2010] [noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2010 WL 557058, at *2-*4 [S.D. Ind. Feb. 10, 2010]; Cronin v. E. Ramapo Cent. Sch. Dist., 689 F. Supp. 197, [S.D.N.Y. 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]).

Here, the statutory expiration of the student's eligibility is not challenged in the present matter; rather, the extension of the statutory entitlements is sought as a remedy.[19] The potentiality

[19] In her answer to the district's cross-appeal, the parent has raised an issue regarding the expiration of the student's eligibility before his 22nd birthday. Even assuming the parent raised this as a claim to be addressed in the impartial hearing (see generally Parent Ex. A) and that I had jurisdiction to reach the issue, I would find the parent's argument to be without merit. The Second Circuit has noted that the IDEA applies to children "between the ages of 3 and 21, inclusive (interpreted to mean up to age 22) only if that is consistent with State law and that New York law provides for IDEA eligibility to children through the end of the year in which they turn 21 (St. Johnsbury Acad. v. D.H., 240 F.3d 163, 168-69 [2d Cir. 2001]; see 20 U.S.C. § 1412[a][1][A], [B][i]; see also Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]). The parent cites E.R.K. v. Hawaii Department of Education for the proposition that, because State law contemplates adult education, the default age

of a remedy—as opposed to a challenge to a statute or regulation pertaining to the termination of a student's eligibility on its face or as applied—would not serve to invoke one of the exceptions discussed above. Further, as discussed below, extension of the student's eligibility for special education as a compensatory education remedy would not operate to extend the IDEA's stay-put protections (Cosgrove, 175 F. Supp. 2d at 387; see also Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 573-75 [E.D. Pa. 2009], affd, 612 F.3d 712 [3d Cir. 2010]).[20] Accordingly, pendency does not operate to secure the student's continued attendance at Fusion at district expense after the conclusion of the 2018-19 school year.[21]

B. Relief

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d

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cap of the IDEA (22) must be deemed to apply, rather than the age 21 cap found in the provisions of State law cited above (728 F.3d 982, 986-92 [9th Cir. 2013]). However, E.R.K., which is non-binding persuasive authority, is distinguishable because the state law examined in that case provided for free public "secondary education" to adult students, whereas the provision of New York Education Law cited by the parent does not specify that its intended purpose is to allow adult students to complete high school requirements (compare E.R.K., 728 F.3d at 988-92, with Educ. Law § 4604). To the extent a district chooses to implement adult continuing education in a format that allows adults to complete high school requirements, it would not appear that such a district-specific, discretionary program would serve to invalidate the State's statutory cap on age eligibility.

[20] In his "Third Pendency Order," the IHO ordered the district to fund "one semester of additional eligibility for special education after the year in which the student turns 21, as a form of compensatory remedy to address the effects of the district's failure" to produce the audit of the student's credits toward achieving graduation (Jan. 2019 Interim IHO Decision). The district takes issue with the characterization of this interim decision as a "Pendency Order" since it did not "address the substance of the Student's pendency program or placement in any way" (Answer & Cr. App. at p. 3 n.2). For the reasons set forth herein, whether the order for extended eligibility contained within the "Third Pendency Order" was characterized as being a pendency determination or a determination based on the IHO's equitable authority to order relief, it may not be interpreted as extending the district's statutory obligations to maintain the student's pendency placement beyond the school year in which the student turned 21.

[21] Parents in this circumstance are not left without options. Although courts tend to apply the automatic injunction provided for under the IDEA, they have from time to time also found it necessary to apply the traditional injunctive relief standards to create or modify a student's pendency placement when circumstances warrant such relief (see, e.g., Cosgrove, 175 F Supp 2d at 391).

69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom., Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove, 175 F. Supp. 2d at 387).[22]

The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

1. Extended Age-Eligibility

In its cross-appeal, the district asserts that IHO erred in extending the student's age eligibility for special education because there exists no legal basis for such relief.

The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza, 538 F.3d at 109 n.2 [emphasis added]; see French, 476 Fed. App'x at 471 [noting that "[a] disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). State law does not require school districts to provide students with a free public education past the age of 21 (Educ. Law § 3202[1]), yet compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction

[22] Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).

under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).

In a prior decision, I reviewed some relevant authority on this type of remedy and observed that there was a distinction between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C., 595 F. Supp. 2d at 576 [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief]; Burr, 863 F.2d at 1078 [same]; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]).[23]

As I alluded to in the previous decision, this type of relief, if interpreted broadly to include an extension of the procedural due process entitlements set forth in the IDEA, including pendency, could result in many more years of eligibility than intended (see Application of a Student with a Disability, Appeal No. 17-021).[24] However, there is a difference between basing relief "on considerations enunciated under a legislated obligation and actually invoking the statutory provision" (Cosgrove, 175 F Supp 2d at 389). Thus, compensatory education is not a full extension of the IDEA itself and does not, for example, continue a student's stay-put rights (id. at 390).[25] This logic would appear to apply further to preclude the parent's access to the due process protections of the IDEA to challenge IEPs developed by a CSE during the extension of eligibility. Otherwise, the extension of eligibility could result in potentially perpetual challenges to IEPs developed during the period of extension and additional awards of compensatory education. In other words, the extension of the student's eligibility must be viewed as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review, and the parent has now assumed the risk that unforeseen future events could render the

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

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

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

relief undesirable. As such, the parent cannot return to the due process hearing system to allege new faults by the district during the period of the student's extended eligibility.[26, 27]

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

In this case, as the district did not set forth any reason to disturb the IHO's award of extended eligibility, beyond arguing that the nature of the relief was legally impermissible, the award of six years of extended eligibility is generally upheld with some modifications for the purpose of clarifying the breadth and scope of the remedy. With regard to the length of the extension identified by the IHO, the six years of extended eligibility appears more than sufficient to remedy the four years of a FAPE denial in this case assuming the truth of all of the allegations in the parent's due process complaint notice (see generally Parent Ex. A). However, 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, 142 F.3d at 130), 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]), an award that extended beyond the student's graduation in this case would be inappropriate, as at that point the student would have met both disqualifying factors that end IDEA eligibility. Accordingly, the award of extended eligibility is modified to provide that the district should afford the student with a program and services, in a manner generally consistent with the IDEA as elaborated upon herein, for six years beyond the expiration of his age eligibility under State law or until the student graduates from high school, whichever is sooner.

Further, consistent with the discussion herein, during the period of the student's extension of eligibility, the district shall be required to evaluate the student at least once every three years but no more than once per year in the manner contemplated by federal and State regulations (see

[26] Further consideration of the implications of the lack of due process protections during the period of extended eligibility in this particular case is set forth below.

[27] Overall, the continuation of the types of programs and services available under the IDEA to a student over the age of 21 may become fraught with challenges related to the student's age, not the least of which is that the student will have exceeded the age of compulsory school-age attendance under State law (see N.Y. Educ. Law § 3205[1][a] [requiring students aged 6 through 16 to attend "full time instruction"]; see also N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]).

34 CFR 300.303[a][2]; [b][1]-[2]; 8 NYCRR 200.4[b][4]) and the CSE shall be required to convene and engage in educational planning for the student at least annually (see 34 CFR 300.324[b][1][i]; 8 NYCRR 200.4[f]).[28]

2. Compensatory Education—Tuition and Services

Here, the parent asserts that the IHO should have ordered a compensatory fund representing the monetization of four years' worth of services, with each year consisting of 5.5 hours of general education instruction per week (times 10 months), 25 hours of special education instruction per week (times 46 weeks), and 15 hours per week of after-school services. Additionally, the parent specifically contends that the IHO erred in dismissing her request for compensatory educational services because the claim for relief cannot be refiled without tolling the statute of limitations, the parent was improperly precluded from presenting evidence on such claim for relief at the impartial hearing, and the uncertainty of the future was not a proper basis upon which to dismiss the parent's requested relief.

As noted above, the IHO's determination that the student's eligibility should be extended constitutes a form of compensatory education. The contours of the extended eligibility overlap with the parent's outstanding requests for relief and, as such, modification of the IHO's award is warranted to take into account the tuition and services requested by the parent; however, the parent is not entitled to the compensatory fund requested.

Initially, a word on the IHO's finding that an award of compensatory education was premature and dismissed "without prejudice" is necessary. The IHO's reticence in calculating a compensatory education award consisting of additional services without a full understanding of how the student would fare in a program resulting from the extended eligibility ordered in the IHO's final decision is understandable, and it would have been appropriate for the IHO to take into account any prospective program that he ordered the district to implement as part of the extended eligibility when calculating a compensatory education award (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at *8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]). However, rather than supporting the IHO's determination to refrain from making a decision about compensatory education, such a consideration could have weighed in the IHO's decision about what compensatory education award was appropriate, if any. Moreover, the IHO's deferral of the parent's request for compensatory education on the ground that evaluations were "urgently needed" was inappropriate since, as noted below, the IHO was empowered to order IEEs as part of the hearing process if he felt them necessary to inform the hearing record (see 8 NYCRR 200.5[j][3[viii]; see also 8 NYCRR 200.5[g][2]). And the IHO's assumption that the parent could pursue due process during the years of eligibility extension despite the expiration of the student's

[28] As discussed below, the district will be required to fund IEEs in this matter, so that when the CSE next convenes, it should have the benefit of such evaluations.

statutory eligibility is not supported by authority discussed above (see Cosgrove, 175 F Supp 2d at 389).[29]

While in prior cases the same IHO has similarly dismissed requests for compensatory education without prejudice for lack of ripeness (see Application of a Student with a Disability, Appeal No. 18-135),[30] here the IHO ordered the extended eligibility and articulated to some degree what that might include (i.e., continued attendance at Fusion as an "interim services plan," an "appropriate placement" recommended by a CSE, or, if no such program was available, credit-bearing home instruction for five hours per day). Extended eligibility, while possessing its own characteristics distinguishable from a traditional award of compensatory services is, in effect, compensatory education (see Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717-20 [3d Cir. 2010]). As such, it is to be taken into account when determining whether the totality of the award placed the student in the place he should have been but for the denial of a FAPE (see Reid, 401 F.3d at 524).

To be sure, the evidence in the hearing record is scant in this matter and consideration of compensatory education generally requires a fact-specific inquiry (see Reid, 401 F.3d at 524). As a solution to the lack of evidence, the district and the parent (as an alternative) have both suggested that this matter could be remanded to the IHO in order to develop the hearing record (see 8 NYCRR 279.10[c]). However, it appears that the parent's suggestion for such a result in her request for review predated the district's articulation of its position that it would not fund the student's stay-put placement at Fusion during the pendency of these proceedings after the end of the 2018-19 school year, as discussed above. While the district may be on solid legal footing in taking this stance, it makes further delay of this matter by remand potentially prejudicial to the student. Further, the district's position that the IHO had an insufficient hearing record and its request for a remand of this matter is particularly disingenuous given that it barely participated in the impartial hearing, offered no evidence, and took no position regarding the parent's requests for relief until this appeal and, even then, set forth a very narrow objection. The district is required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate

[29] Additionally, as alleged by the parent, the effect of the IHO's dismissal of the parent's compensatory education claims, if upheld, could have had an impact on her ability to refile her claims in the future due to the two year statute of limitations. The IHO found that the statute of limitations did not bar the parent's claims as raised in the August 24, 2018 due process complaint notice because of "the district's consistent misdiagnosis" of the student (IHO Decision at p. 5). As the district did not assert in its cross-appeal that the IHO erred in this determination, it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, to the extent the parents knew or should have known about her claims as of the date that the "misdiagnosis" became apparent, a future due process complaint notice, filed beyond two years from such date, may run afoul of the IDEA's two-year statute of limitations.

[30] Generally, claims are ripe once a cause of action accrues, and under the IDEA a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza, 538 F.3d at 114-15 & n.8). While the analysis of compensatory education may, at times, feel like speculative assessments of future educational needs, it has been held that, since the injury has been done, the issue is ripe for review (see Lester H. v. Gilhool, 916 F.2d 865, 868 [3d Cir. 1990]).

compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Doe, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. The district did not alternatively assert any arguments or provide evidentiary support on the issue of what, if any, compensatory education remedy would be appropriate if it were found to have denied the student a FAPE, despite having a full and fair opportunity to be heard at the impartial hearing. That the IHO found the district in default on the issue of its provision of a FAPE to the student, due to the district's failure to comply with the IHO's reasonable directive, does not alter the district's burden in this regard. While the parent expressed to the IHO her desire to present evidence regarding compensatory education, it appears that the district remained silent when the IHO stated his intent to issue a decision without further evidence or testimony (see Tr. pp. 73, 75-77, 96-97; Req. for Rev. Ex. B at pp. 2-7).

Based on the IHO's now final and binding determination that the district defaulted in this matter, the parent requests all of the relief sought at the impartial hearing (see generally Parent Ex. A; IHO Ex. II). I do not intend to diminish the seriousness of the violations alleged in the due process complaint notice, which at this point are deemed to be true—including the district's failure to provide any educational placement or services to the student for at least three years—and support a finding that the district committed a gross violation of the IDEA (see E. Lyme, 790 F.3d at 456 n.15; French, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C., 916 F.2d at 75-76; Burr, 863 F.2d at 1078-79; Cosgrove, 175 F. Supp. 2d at 387). However, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]).[31] Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory

[31] Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, the default was entered, not due to the district's failure to submit a response, but rather due to the district's failure to respond to a reasonable directive of the IHO and an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).[32] With these considerations in mind, I turn to modifying the IHO's award to ensure that it is more properly aligned to remedy the district's failure to offer or provide the student with a FAPE for four years.

As discussed above, the IHO's order for extended eligibility is upheld, with the caveat that it will expire at such time as the student graduates or six years beyond the expiration of his age eligibility under State law, whichever is sooner This is a substantial award to remedy the district's denial of a FAPE to the student for four years. Moreover, while the evidence in the hearing record is sparse, it is sufficient to determine that the student could achieve graduation within the six years and that, therefore, further award of compensatory services to be delivered contemporaneously (i.e., as an award in addition to extended eligibility) is unnecessary. First, the student achieved 11 credits during the 2014-15 school year (IHO Ex. I at p. 2). While this leaves 33 credits outstanding as well passing scores on all applicable Regents examinations in order for the student to achieve a Regents diploma (see id. at pp. 2-3), it represents a start. Further, while attending Fusion during the 2018-19 school year, additional evidence provided by the parent reflects that the student was achieving passing grades in all of his classes (see Req. for Rev. Ex. D). Evidence in the hearing record about the student's needs, as documented on his IEPs and in the evaluation information offered by the parent, also supports a finding that extended eligibility without supplemental compensatory services will suffice to return the student to the place he should have been but for the district's gross denial of a FAPE (see Parent Exs. B at pp. 1-2; C at pp. 1-4; F-G).

Notwithstanding that no compensatory services are warranted to supplement the extended eligibility, the IHO's order shall be modified to take into account the other compensatory relief sought by the parent. Given the conclusions set forth above regarding the nature of the extended eligibility remedy, the parent will be without the benefit of due process in the event that she deems the IEPs developed by the CSEs to be inappropriate. Accordingly, the IHO's order of extended eligibility is hereby modified to provide for compensatory education in the form of tuition or services to be delivered in the alternative, which is a result that is not far from what it appears the IHO was aiming to achieve. That is, if the parent disagrees with a CSE's recommendations developed during the period of extended eligibility, while the parent may not pursue due process, she may elect instead that the student receive compensatory tuition and/or services.

[32] The sort of compensatory fund sought by the parent, representing monetization of requested compensatory education services, may be appropriate in certain instance (see, e.g., Streck v. Bd. of Educ. of E. Greenbush Cent. Sch. Dist., 408 Fed. App'x 411 [2d Cir. Nov. 30, 2010] [awarding a student an escrow account with funds for additional reading instruction]; but see Millay, 2011 WL 1122132, at *10-*12 [declining to award a trust fund in light of its order of extended eligibility and setting forth other concerns with the trust fund remedy]); however, it does begin to resemble monetary damages, particularly to extent the parent requests such services on top of the extension of eligibility. The IDEA does not provide for, nor have the courts allowed, monetary damages (see Baldessarre v. Monroe-Woodbury Cent. Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor, 313 F.3d at 786 n.14; Polera, 288 F.3d at 483-86; R.B., 99 F. Supp. 2d at 418).

This approach differs from that ordered by the IHO in that the IHO characterized funding of tuition and related expenses at Fusion "as an interim service plan until such time as . . . an appropriate placement has been defined and implemented" and provided that the district would be responsible to deliver home instruction to the student if no such school or program was available (IHO Decision at p. 6). The concern I have with the IHO's order that it is unclear as to who is responsible for making the determination that the placement so "defined" is "appropriate" (see id.). Instead, given the gross denial of a FAPE perpetrated by the district, as well as its failure to state its position regarding what relief might be appropriate, the IHO's order is modified such that it is left to the parent's discretion to determine appropriateness. Otherwise, were it left to the CSE to make this determination (with no due process option for the parent to challenge such determination), the award would resemble an improper delegation to the CSE to determine the remedy (see Sch. Comm. of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 [1985] [noting that, while the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district]; see also Reid, 401 F.3d at 526-27; Student X, 2008 WL 4890440, at *24). On the other hand, the district has not challenged the IHO's determinations that, under particular circumstances, the district would be required to fund the costs of tuition or to provide home instruction. Accordingly, I decline to greatly modify the general content of these alterative awards to include much less than contemplated by the IHO and only adjust the awards with respect to the terms pursuant to which they may be available to the parent, to omit the option for funding for a school comparable to Fusion, and to add related services to accompany the home instruction.

Thus, in the event that the parent disagrees with the content of an IEP developed by a CSE during the period of the student's extended eligibility, alternative compensatory education may take the form of (a) the costs of the student's attendance at Fusion along with related services and lunch and transportation consistent with the IHO's second interim order;[33] or (b) five hours per day of credit-bearing home instruction to the student consistent with the outstanding needs on the student's transcript (see IHO Decision at p. 6), as well as the related services to which the student was entitled under the IHO's second interim order (see Oct. 2018 Interim IHO Decision at p. 2). The parent should provide the district notice of her disagreement and election as soon as possible

[33] Compensatory education in the form of tuition at a nonpublic school is generally disfavored, particularly whereas here the evidence in the hearing record is not fully developed regarding the appropriateness of Fusion and the IHO's order contemplates the possibility of an as yet unknown "comparable school" for the student (see IHO Decision at p. 6; see also Application of a Student with a Disability, Appeal No. 19-018 [discussing at length the potential pitfalls that may arise as a result of an award of prospective placement of a student at a nonpublic school]). Since the district has not directly challenged the appropriateness of Fusion and there is some testimony and evidence about the general nature of the program at Fusion and student's grades achieved thus far (see Tr. pp. 26-30; Req. for Rev. Ex. D)., I will include tuition at Fusion as one of the alternative forms of compensatory education. However, to the extent that the IHO's award would require the district to fund the student's tuition at a "comparable school," this aspect of the IHO's award will not be adopted herein. While the parties are free to agree to implement the alternative compensatory education as tuition at a nonpublic school other than Fusion, to require the same as part of the order in this case is not practical without a definition of which party would be responsible for determining the school was "comparable" and a mechanism by which either party could challenge the other party's position that such school was comparable.

after she becomes aware of her disagreement but in no event later than 10 days prior to the first day of the applicable 12-month school year.

3. Implementation of the Pendency Placement

The parent asserts that the district should be obligated for an award of compensatory education to remedy the lapse in services from the date of the due process complaint notice through the date the student began attending Fusion. As the student attended no school program and received no services for this period of time, the parent requests "a full return of 1:1 hours for that month, plus related services" (Parent Mem. of Law at p. 20).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [awarding full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [awarding services that the district failed to implement under pendency as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

There is no evidence in the hearing record that the student attended any placement or received any services from the date of the due process complaint notice (August 24, 2018) through October 8, 2018 when the student began attending Fusion pursuant to the IHO's second interim order (see Oct. 2018 Interim IHO Decision at pp. 2-3; Parent Exs. A; H). In its answer, the district has not taken a position regarding the parent's request for compensatory relief for this period of time other than generally denying the parent's allegations. Given the remedy discussed above, which is essence permits a home-based program to substitute for the student's attendance at Fusion (or an appropriate placement recommended by a CSE), the compensatory award shall be gleaned from this basis. That is, the IHO's decision provided for a program of 5 hours per day of home instruction to be delivered in the event an appropriate placement (or Fusion) was not available to the student (see IHO Decision at p. 6). As alluded to above, the district has not directly challenged this notion of equivalence. Accordingly, for the period beginning August 24, 2018 and ending with the student's attendance at Fusion, which totals 31 school days, the district is ordered to provide compensatory education totaling the 155 hours of home instruction, three hours of 1:1 counseling and three hours of group counseling, and three hours of 1:1 speech-language therapy (based on one 30-minute session per week each).

4. Independent Educational Evaluations

On this point, the parent's arguments on appeal focus primarily on the IHO's failure to order IEEs during the impartial hearing to inform and develop the hearing record in order to craft a compensatory educational services award, the IHO's sua sponte decision to award IEEs to the district, and the IHO's failure to award IEEs to the parent for the district's alleged longstanding

failure to evaluate the student in all areas of disability and the parent's related disagreement with the district's most recent evaluation of the student. In response, the district agrees with the parent's concern that the IHO should have ordered IEEs during the impartial hearing and thus, that the IHO failed to develop the hearing record upon which to award relief. The district also agrees with the parent's request (in the alternative) to remand the matter to the IHO. The district disagrees with the parent, however, with respect to whether the IHO erred in failing to award IEEs to the parent. Upon review of the IHO's decision and as explained briefly below, the evidence in the hearing record supports a finding that the IHO erred in awarding IEEs to the district instead of the parent, and the IHO's decision must be modified accordingly.

Here, even assuming for the sake of argument that the IHO should have ordered IEEs to be performed during the impartial hearing at public expense pursuant to State regulation (see 8 NYCRR 200.5[j][3[viii]; see also 8 NYCRR 200.5[g][2]), the IHO's error at this juncture is moot and the parent does not articulate any basis upon which to conclude that vacating or overturning this portion of the IHO's final decision would automatically result in awarding the same IEEs to the parent.[34] With respect to the parent's argument that the IHO improperly and sua sponte awarded IEEs to the district as relief, such argument is misplaced. While the parent correctly argues that an IHO may not generally raise an issue or claim sua sponte, and that certain defenses—when not raised are deemed waived—such is not the case with an IHO's decision to award relief that a party may not have requested. Notably, courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Thus, the parent's arguments are not persuasive and must be dismissed.

Turning next to the parent's argument that she was entitled to an award of IEEs because she disagreed with the district's most recent evaluation of the student, the parent finds more traction, especially when the IHO failed to rely upon any legal standard whatsoever in formulating this relief. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent

[34] State regulation generally defines an IEE as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]).

disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

In this case, the hearing record reveals that the parent specifically expressed her disagreement with the results of the GARS-3 assessment of the student at the June 2017 CSE meeting, which found that a diagnosis of autism was "'[u]nlikely'" for the student and which appears to have conflicted with the diagnosis of "Asperger's syndrome" set forth in the May 2017 neurologist's letter the parent shared with the May 2017 CSE (Parent Ex. C at pp. 1, 3-4, 12-13). The hearing record contains no evidence that the parent requested an IEE at district expense until she alleged, without specificity in the August 2018 due process complaint notice, that she "disagree[d] with the most recent reevaluation" of the student and requested independent evaluations funded by the district (Parent Ex. A at pp. 1, 8, 11; see generally Tr. pp. 1-99; Parent Exs. A-J; IHO Exs. I-II). However, the hearing record is devoid of any evidence that, after receipt of the parent's due process complaint notice, the district either, without unnecessary delay, ensured that the IEEs were provided at public expense or that the district initiated an impartial hearing to establish that its evaluations were appropriate (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). Now, even though the district objects to the parent's request to obtain the IEEs rather than allowing the district to obtain the IEEs, the district asserts no legal argument in support of its contention (see generally Answer & Cr. App.). Because it is not an SRO's role to research and construct a party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [noting that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [concluding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [explaining that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]), I will not now do so for the district.[35] Given the foregoing, the parent is entitled to obtain

[35] The same rationale applies to the parent's request for relief in the form of 10 hours per week of "'translation and interpretation services by an agency who can deliver in-person and/or phone services,'" meaning that the parent has not set forth any argument to overturn the IHO's decision to not award this as relief, other than the alleging the district failure to "establish that it provided language access for the parent over the course of the years" (Req.

the following IEEs at district expense: a neuropsychological evaluation, a comprehensive speech-language evaluation, a transition assessment, an FBA conducted by a Ph.D.-level BCBA, an auditory processing evaluation, and an assistive technology assessment. Consistent with State regulation, the district shall—if requested—provide the parent with a list of independent evaluators from which the parent can obtain IEEs for the student at district expense (8 NYCRR 200.5[g][1][i]). If, however, the parent wishes to obtain evaluation(s) from evaluator(s) whose fee(s) do(es) not fall within the district's cost criteria, the district must provide the parent with an opportunity to demonstrate that unique circumstances justify IEE(s) that do(es) not fall within the district's cost criteria (see 8 NYCRR 200.5[g][1][ii]).

VII. Conclusion

Based on the above, the IHO's determination that the district failed to offer the student a FAPE for the 2015-16, 2016-17, 2017-18, and 2018-19 school years is final and binding. The IHO's compensatory education relief is modified for the reasons set forth above and the parent's appeal is sustained to the extent indicated.

I have considered the remaining contentions, including the parent's and/or district's arguments that the IHO failed to develop the record, improperly shifted the burden of proof, and conducted the hearing in a manner in conflict with due process as a result of the pressure to meet deadlines, and find it is unnecessary to further address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 3, 2019, is hereby modified to provide that the student shall receive the benefits of extended eligibility for special education, subject to the limits discussed in the body of this decision, until such date as the student achieves high school graduation or six years after the school year in which the student turns 21 (through the 2024-25 school year), whichever is sooner; and

IT IS FURTHER ORDERED that the IHO's decision dated April 3, 2019, is hereby modified by vacating those portions which required the district to fund the student's tuition at Fusion or a comparable school as an interim services plan and provide credit-bearing instruction if no appropriate placement is identified and implemented; and

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for Rev. at p. 8). However, the IHO awarded relief directed at this alleged violation; to wit, that the district must provide translations of all the IEEs and provide interpretation at all CSE meetings and "other reviews arising from those evaluations" (IHO Decision at p. 6). As the district did not cross-appeal this finding, it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The parent has not articulated in her appeal why this relief is inadequate. Accordingly, the parent's generalized assertion of error on appeal is insufficient (see Garrett, 425 F.3d at 841), and the undersigned SRO will not construct the parent's argument (see Gross, 619 F.3d at 704).

IT IS FURTHER ORDERED that, in the event that the parent disagrees with the program and placement recommended by a CSE during the period of the student's extended eligibility, at the parent's election and upon notice to the district as described in the body of this decision, the student shall be entitled to compensatory education in the form of (1) the costs of the student's tuition at Fusion, along with related services, lunch, and transportation, or (2) compensatory services consisting of five hours per day of credit-bearing home instruction, along with related services and transportation; and

IT IS FURTHER ORDERED that the district shall provide the student with compensatory education services, consisting of 155 hours of home instruction, three hours of 1:1 counseling and three hours of group counseling, and three hours of 1:1 speech-language therapy, to be provided during the period of the student's extended eligibility as a result of the district's failure to implement pendency services from August 24, 2018 through October 8, 2018; and

IT IS FURTHER ORDERED that the IHO's decision dated April 3, 2019, is hereby modified by vacating that portion of the decision ordering the district to obtain IEEs at district expense; and,

IT IS FURTHER ORDERED that the district shall fund IEEs obtained by the parent, including a neuropsychological evaluation, a comprehensive speech-language evaluation, a transition assessment, an FBA conducted by a Ph.D.-level BCBA, an auditory processing evaluation, and an assistive technology assessment, consistent with the body of this decision; and

IT IS FURTHER ORDERED that, if it has not already done so, the district shall convene a CSE upon receipt of the IEEs or within 20 days of the date of this decision, whichever is sooner, to develop an IEP for the student for the 2019-20 school year in accordance with the student's present levels of performance and special education needs.

Dated: **Albany, New York**
July 1, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER